



In the Matter of:

KEITH KLOPFENSTEIN,
COMPLAINANT,

v.

**PCC FLOW TECHNOLOGIES
HOLDINGS, INC.**

and

ALLEN PARROTT,
RESPONDENTS.

**ARB CASE NO. 07-021
07-022**

ALJ CASE NO. 2004-SOX-011

DATE: January 13, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

**Marc E. Grossberg, Esq., Stephen F. Fink, Esq., *Thompson & Knight L.L.P.*,
Houston, Texas**

For the Respondents:

**Keith A. Ashmus, Esq., Kelly S. Lawrence, Esq., *Frantz Ward L.L.P.*,
Cleveland, Ohio**

ORDER DENYING RECONSIDERATION

Keith Klopfenstein filed a complaint alleging that “his former employer ... and its representative, Allen Parrott” discharged him in violation of the whistleblower protection provisions of the Sarbanes-Oxley Act (the Act or the SOX), 18 U.S.C.A. § 1514A (West Supp. 2008). Following an evidentiary hearing on April 5 and 6, 2004, the

Administrative Law Judge (ALJ) issued a decision holding that the named respondents were not proper parties to the action, and that Klopfenstein was fired for legitimate, non-discriminatory reasons and not because of any alleged whistleblower activity. Upon review, the Administrative Review Board (ARB) held that PCC Flow Technologies Holdings, Inc. (Holdings) and Allen Parrott could be liable under the SOX if they established that they were agents of Precision Castparts Corp. (PCC), a publicly held company. *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 13-16 (ARB May 31, 2006). In remanding the case to the ALJ, the ARB also asked the ALJ to clarify his holding on causation, specifically whether Klopfenstein proved that his alleged protected activity was a contributing factor in his discharge, and, if he did, whether the respondents proved by clear and convincing evidence that they would have discharged him, notwithstanding Klopfenstein's claim of protected activity. *Id.* at 12, 19-20.

On remand from the ARB, the ALJ made additional detailed findings of fact. In his October 13, 2006 Recommended Decision and Order (R. D. & O.), the ALJ ruled that Holdings, but not Parrott was an agent of PCC under the SOX. *Id.* at 4-8. He held that Klopfenstein's supposed protected activity was not a contributing factor, and that clear and convincing evidence supported Holdings' position that it would have discharged him anyway. *Id.* at 9-13. Because Klopfenstein failed in other elements of his proof, the ALJ did not consider it necessary to decide whether Klopfenstein had, in fact, engaged in protected activity. *See id.* at 13. On the second appeal to the ARB, we affirmed the ALJ's holdings as supported by substantial evidence. *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Nos. 07-021, 07-022, ALJ No. 2004-SOX-011 (ARB Aug. 31, 2009).

There remains before us Klopfenstein's motion for reconsideration. Klopfenstein contests the procedural adequacy of the Board's decision, alleging that the Board failed to make findings of fact on some facts he contests or rulings of law on some issues. The respondents oppose the motion.

To achieve this Board's reconsideration, a movant must demonstrate:

- (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision.

Carpenter v. Bishop Well Servs. Corp., ARB No. 07-060, ALJ No. 2006-ERA-035 (ARB Dec. 31, 2009).

Klopfenstein's motion does not argue any of the first three grounds for reconsideration: differences in fact or law, new material facts, or a change in the law since the ARB's decision. He appears to rely solely on the fourth ground, failure to

consider and rule on material facts. He is in error. As the ARB concluded, substantial evidence in the record supported the ALJ's extensive findings of fact on the issues material to the resolution of this case. Because a failure of proof on any one element of Klopfenstein's claim means that his entire case must fail, it was not necessary for the ALJ to determine, for example, whether Klopfenstein engaged in protected activity. *Davis v. Rock Hard Aggregate, LLC*, ARB No. 07-041, ALJ No. 2007-STA-041 (ARB Mar. 27, 2009).

Klopfenstein's motion for reconsideration is therefore **DENIED**.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge