



IN THE MATTER OF:

KENNON MARA,

COMPLAINANT,

v.

SEMPRA ENERGY TRADING, LLC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Kennon Mara, *pro se*, Northport, New York

For the Respondent:

Kathleen M. McKenna, Esq., and Nathaniel M. Glaser, Esq., *Proskauer Rose, LLP*,
New York, New York

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Luis A. Corchado,
Administrative Appeals Judge; and Lisa Wilson Edwards, *Administrative Appeals Judge*

**ORDER DENYING RECONSIDERATION OF REQUEST
FOR INTERLOCUTORY REVIEW**

This case arises under the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C.A. § 1514A (Thomson/West 2011)(SOX), and its implementing regulations

found at 29 C.F.R. Part 1980 (2011). Complainant Kennon Mara filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging harassment by employees at Sempra Energy Trading LLC in violation of SOX.

On January 31, 2012, the Administrative Review Board (ARB) entered an order denying interlocutory review of specific questions certified for review by the Administrative Law Judge (ALJ) by order dated November 25, 2011, and additional questions Mara raised as collateral to the ALJ-certified issues.¹ On March 12, 2012, Mara moved for reconsideration of the ARB's order denying interlocutory review. We deny the motion.

The ARB is authorized to reconsider a decision upon the filing of a motion for reconsideration within a reasonable time of the date on which the ARB issued the decision. *Avlon v. American Express Co.*, ARB No. 09-089, ALJ No. 2009-SOX-051, slip op. at 5 (ARB Sept. 15, 2011). Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure. Rule 40 expressly requires that any petition for rehearing “state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended” Fed. R. App. P. 40(a)(2). In considering a motion for reconsideration, the ARB has applied a four-part test to determine whether the movant has demonstrated:

- (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.

Getman v. Southwest Secs., Inc., ARB No. 04-059, ALJ No. 2003-SOX-008, slip op. at 2 (ARB Mar. 7, 2006); see also *Avlon*, ARB No. 09-089, slip op. at 5.

We deny Mara's motion because her petition fails to demonstrate that any of the provisions of the ARB's four-part test apply. We note Mara's argument in support of her motion (at p. 5) that in quoting the district court's transcript of proceedings held on September 7, 2010, the ARB's January 31, 2012, order quoted the district court judge as stating that Mara “go back to the administrative agency and see whether they will allow you to pursue it [there].” ARB Order, slip op. at 4. The transcript reflects that the district court judge ended his statement with “will allow you to pursue it *here*.” District Court Transcript (Tr.) at 22 (emphasis added). This discrepancy in the ARB Order and the district court transcript does not change our reading of the

¹ A description of the proceedings leading to the ARB's January 31, 2012 order denying interlocutory review is set out at pages 2-5 of that order. See Order Denying Interlocutory Review, *Mara v. Sempra Energy Trading, LLC*, ARB Case No. 12-021, ALJ No. 2009-SOX-018 (Jan. 31, 2012) (ARB Order).

district court judge's statements in the transcript overall. The district court judge heard argument on the waiver issue and stated his decision on that issue in the transcript. See District Court Tr. at pp. 12-22. The district court judge determined that "there was a clear waiver by counsel of the right to proceed in federal court," and that Mara's opportunity to bring her SOX claim to federal court "remains open by way of petition for review to the Court of Appeals following final decision-making by the administrative agency." District Court Tr. at 17; see also *id.* at 21 (district court judge stating that "in my view as a matter of law you have waived your right."). Based on the district court proceeding, and without ruling on the merits of the district court's ruling, we concluded that resolution of the issues presented would not materially advance the ultimate termination of the litigation. ARB Order at 5-6. There is no basis for us to reconsider that determination.

Accordingly, Mara's motion for reconsideration is **DENIED**, and we **REMAND** this matter to the ALJ for further proceedings.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge