In the Matter of:

MARTIN KERCHNER, **ARB CASE NO. 08-066**

COMPLAINANT, **ALJ CASE NO. 2007-STA-041**

v. **DATE: March 8, 2011**

GROCERY HAULERS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Martin Kerchner, pro se, Avenel, New Jersey

For the Respondent:
Dion Y. Kohler, Esq., Brandon M. Cordell, Esq., *Jackson Lewis LLP*, Atlanta, Georgia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, and E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*

ORDER GRANTING RECONSIDERATION

Martin Kerchner filed a complaint with the United States Department of Labor Occupational Safety and Health Administration (OSHA) alleging that when his former employer, Grocery Haulers, Inc., (GHI), terminated his employment, it violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA or Act). 49 U.S.C.A. §

31105 (Thomson/West Supp. 2010); 29 C.F.R. Part 1978 (2010).[1] OSHA dismissed Kerchner's claim finding GHI did not violate the STAA. Kerchner filed objections, and the ALJ affirmed in part and remanded to OSHA in part. On appeal to the Administrative Review Board (ARB or Board), the ARB affirmed in part and reversed in part. Shortly thereafter, on July 20, 2010, GHI filed a motion for reconsideration of the ARB's final decision and order. For the reasons stated below, we grant the motion for reconsideration.

BACKGROUND AND PROCEDURAL HISTORY

GHI is a privately held trucking company that specializes in food distribution services throughout the greater New York, New Jersey, and the mid-Atlantic area. GHI employed Kerchner as a truck driver from December 2000 until his suspension and termination in August 2005.

On August 25, 2005, Kerchner filed a complaint with OSHA alleging that GHI terminated his employment because he complained about unsafe working conditions. During OSHA's investigation, Kerchner further claimed that he was blacklisted from employment with a different trucking company, Silver Line, when he applied for a job with that company in September 2005. SHA dismissed Kerchner's STAA complaint because he failed to demonstrate a case of retaliatory discharge against GHI and, construing his blacklisting claim as a claim against Silver Line, it found that his blacklisting claim was untimely.

Kerchner objected to OSHA's findings and timely requested a hearing before the Office of Administrative Law Judges. The presiding Administrative Law Judge (ALJ) determined that neither the suspension nor the discharge was causally related to any protected activity and thus did not constitute STAA violations. As to Kerchner's blacklisting claim, the ALJ concluded that OSHA misconstrued Kerchner's blacklisting claim as a claim against Silver Line instead of a claim against GHI and Local 863. The ALJ also concluded that Kerchner's blacklisting claim was timely and ordered that the blacklisting claim be remanded to OSHA for investigation. *See* Recommended Decision and Order, *Kerchner v. Grocery Haulers, Inc.*, ALJ No. 2007-STA-041 (ALJ Mar. 19, 2008) (R. D. & O.).

The ARB reviewed the ALJ's R. D. & O. under STAA's automatic review provision. *See* 29 C.F.R. § 1978.109(a). On June 30, 2010, the ARB affirmed the ALJ's R. D. & O. in part and reversed in part. As to the retaliatory discharge, the ARB reviewed the record and found that substantial evidence supported the ALJ's factual findings, and her legal reasoning and analysis were correct. *Kerchner v. Grocery Haulers, Inc.*, ARB No. 08-066, ALJ No. 2007-STA-041 (ARB June 30, 2010) (F. D. & O. *Kerchner I*). The ARB, therefore, affirmed the ALJ's holding that GHI did not terminate Kerchner for engaging in protected activity in violation of the STAA. F. D. & O. at 3.

[1] Congress amended the STAA in 2007 after Kerchner filed his complaint with OSHA. Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007).

The ARB also affirmed the ALJ's finding that GHI was the proper respondent to the blacklisting claim and that Kerchner's blacklisting claim was timely. F. D. & O. at 4-5. In light of her determination that GHI was the proper party respondent to the blacklisting claim and that Kerchner had timely filed it, the ALJ ordered that the blacklisting claim be remanded to OSHA for investigation. On this point, however, the ARB reversed the ALJ. We concluded that

> the ALJ erred in remanding the blacklisting claim to OSHA for investigation. While the STAA regulations do not expressly prevent an ALJ from remanding a claim to OSHA for reconsideration, in *Freeze v. Consolidated Freightways, Inc.*, ARB No. 04-128, ALJ No. 2002-STA-004 (ARB Aug. 31, 2005), the ARB pointed out that "neither STAA nor its implementing regulations vest ALJs with authority to compel OSHA to conduct investigations." *Freeze*, ARB No. 04-128, slip op. at 2 n.3. Accordingly, where, as here, a complainant has alleged ongoing retaliation after he has filed his initial claim that OSHA has either failed or refused to consider, the ALJ should afford the complainant the opportunity to have the ALJ hear his claim after, of course, the ALJ has given to the respondent proper notice and an adequate opportunity to conduct discovery and prepare its defense against the claim.

F. D. & O. at 4, *citing* 29 C.F.R. § 18.5(e) (2009). The ARB instead remanded the case to the ALJ to hear the blacklisting claim.

DISCUSSION

On July 20, 2010, GHI filed a motion for reconsideration informing the Board that OSHA had already considered and rejected Kerchner's blacklisting claim. Thereafter, Kerchner requested a hearing with the ALJ but later withdrew his complaint after failing to secure the services of an attorney. On November 30, 2009, the ARB had affirmed the dismissal. *Kerchner v. Grocery Haulers Inc.*, ARB No. 10-003, ALJ No. 2009-STA-052 (ARB Nov. 30, 2009) (*Kerchner II*).

In response to the motion for reconsideration, the ARB issued a show cause order asking Kerchner to show cause why the Board should not grant GHI's motion for reconsideration. Kerchner did not respond within the allotted time.

The ARB will reconsider a prior decision under limited circumstances. Those circumstances include: (i) material differences in fact or law from that presented to the Board of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the Board's decision, (iii) a change in the law after the Board's decision, and (iv) failure to consider material facts presented to the Board before its decision. *Williams v. United Airlines, Inc.*, ARB No. 08-063, ALJ No. 2008-AIR-003 (ARB June 23, 2010) (order

denying motion for reconsideration); *Knox v. U.S. Dep't of Interior*, ARB No. 03-040, ALJ No. 2001-CAA-003, slip op. at 3 (ARB Oct. 24, 2005) (same).

Because the ARB overlooked a material fact, i.e., that it had already dismissed the blacklisting claim in *Kerchner II*, the ARB erred in remanding the blacklisting claim to the ALJ. We find the Respondent's request for reconsideration warranted and hereby grant the motion to vacate our order remanding the blacklisting claim to the ALJ. In all other respects, we affirm the F. D. & O. in *Kerchner I*.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge