In the Matter of:

RICK JACKSON, **ARB CASE NO. 09-113**

COMPLAINANT, **ALJ CASE NO. 2009-STA-022**

v. **DATE: February 28, 2012**

MAJOR TRANSPORT, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Rick Jackson, *pro se*, Janesville, Wisconsin

For the Respondent:
Steven C. Zach, Esq., *Boardman Suhr, Curry and Field, LLP*, Madison, Wisconsin

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

ORDER DENYING RECONSIDERATION

Rick Jackson filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, Major Transport, Inc., violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and re-codified, when it refused to hire him on April 8, 2008. 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2011).

A Department of Labor Administrative Law Judge (ALJ) dismissed Jackson's complaint after a hearing because he found that Jackson failed to establish a prima facie case and in the alternative, that if he did establish a prima facie case, he did not establish that Major Transport's legitimate non-discriminatory reason for not hiring him was pretext for discrimination. On May 31, 2011, the Administrative Review Board (ARB or Board) issued a Final Decision and Order (F. D. & O.) affirming the ALJ's decision because we concluded that substantial evidence supported the ALJ's findings of fact.

On July 7, 2011, Jackson filed a Motion for Reconsideration of the F. D. & O., requesting reconsideration of our ruling. On February 21, 2012, Jackson re-filed the motion and also filed a Motion for Expedited/Emergency Decision. Jackson argues that a recent Seventh Circuit decision compels a favorable outcome in his case. Major Transport did not file a response to Jackson's 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 decision was issued. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 11 (ARB May 30, 2007). Having reviewed Jackson's motion for reconsideration, we deny reconsideration.

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 Board 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).

Jackson argues that the Seventh Circuit ruled in *Loudermilk v. Best Pallet Co., LLC*, 636 F.3d 312 (7th Cir. 2011), that (1) the court must look at the evidence most favorable to the complainant, (2) the three different reasons the Respondents gave supports an inference of pretext, and (3) timing can support an inference of causation.

We deny Jackson's motion because he has not demonstrated that any of the provisions of the Board's four-part test apply. The case he cites does not reflect a change in the law – each of

the propositions Jackson asserts were in existence at the time we decided his case.[1] Jackson did not prevail in his case because he did not prove that he engaged in protected activity. Nothing in the Seventh Circuit case is relevant to that finding and it stands – Jackson did not prove by a preponderance of the evidence that he engaged in protected activity. Therefore his claim fails and it was properly dismissed.

Accordingly, Jackson's Motion for Reconsideration is **DENIED**.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

[1] On a motion for summary decision, we look at the evidence in the light most favorable to the non-moving party. *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104; ALJ Nos. 2008-STA-012, -041, slip op. at 6 (ARB Sept. 23, 2010). This rule is not applicable here because the case went to a hearing. At this stage, Jackson had to prove each of the elements of his case by a preponderance of the evidence. 49 U.S.C.A. § 31105(b)(1); 49 U.S.C.A. § 42121 (b)(2)(B)(iii) (Thomson/West 2007). *See Dysert v. Sec'y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997). Shifting explanations for adverse action can support a finding of pretext. *Riess v. Nucor Corporation-Vulcraft-Texas, Inc.*, ARB No. 08-137, 2008-STA-011, slip op. at 6 (ARB Nov. 30, 2010). Temporal proximity between the protected activity and adverse action can establish retaliatory intent. *Riess*, ARB No. 08-137, slip op. at 5.