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Disabled Employees Versus Reluctant Employers: Who Wins When the Evidence Is Equal?

by Jay E. Grenig

**Director, Office of Workers' Compensation
Programs, United States Department of Labor**

v.

Greenwich Collieries

**Director, Office of Workers' Compensation Programs,
United States Department of Labor**

v.

Maher Terminals, Inc.
(Docket No. 93-744)

*Argument Date: April 25, 1994
From: The Third Circuit*

rule resolves all doubt in favor of the claimant when the evidence of the opposing parties is of equal weight, the A.L.J. found that Ondecko had established the existence of pneumoconiosis and awarded benefits.

Greenwich Collieries appealed to the Department of Labor's Benefits Review Board (the "Board") which affirmed. The Board concluded that the A.L.J. had "properly discussed and weighed all relevant medical evidence" on the pneumoconiosis issue and that, because she "found the positive and negative interpretations by [expert] physicians . . . to be equally probative," she had properly resolved the question in Ondecko's favor under the true doubt rule.

Greenwich Collieries then appealed to the United States Court of Appeals for the Third Circuit. Vacating the Board's decision, the court of appeals held that Ondecko was required to prove the existence of pneumoconiosis by a preponderance of the evidence. *Greenwich Collieries v. Director, Office of*

Workers' Compensation Programs, 990 F.2d 730 (3d Cir. 1993).

In reaching this decision, the Third Circuit construed Section 718 of the Department of Labor's regulations under the BLBA, 20 C.F.R. §718.40, which provides that "the burden of proving a fact . . . rests with the party making such allegations," as allocating to the claimant the burden of persuasion as to his or her disability. (The "burden of persuasion" refers to the degree of proof required to support a particular fact. Proof by a "preponderance of the evidence" is the lowest degree of proof in the law and is the degree of proof most often applied in administrative hearings.) The Third Circuit also relied on Section 7(c) of the Administrative Procedure Act (the "APA"), 5 U.S.C.

§ 556(d), which provides that the proponent of an order has the burden of proof and that an order may not be issued unless it is supported by "reliable, probative, and substantial evidence."

In the *Maher Terminals* case, Michael Santoro sustained a work-related back injury on July 23, 1985. Despite treatment, he experienced increasing pain and numbness. By August 15, he was unable to get out of bed and was hospitalized.

An examining physician at the hospital observed spinal cord swelling and irregularity; a neurosurgeon suspected a

ISSUE

Does the use of the "true doubt" rule in adjudicating claims for benefits under the Longshore and Harbor Workers' Compensation Act and the Black Lung Benefits Act contravene regulations of the Department of Labor and Section 7(c) of the Administrative Procedure Act?

FACTS

In *Greenwich Collieries*, Andrew Ondecko had worked as a coal miner for 31 years before applying for disability benefits under the Black Lung Benefits Act (the "BLBA"). 30 U.S.C. §§ 901-45. When his application was denied, Ondecko requested a hearing before an administrative law judge.

Examining conflicting expert testimony, the Administrative Law Judge (the "A.L.J.") concluded that the fact that at least one expert had repeatedly found evidence of pneumoconiosis was significant enough to raise true doubt on the issue of the existence of the disease, notwithstanding expert interpretations finding no evidence of the lung disease. Holding that the true doubt

Case at a Glance

In determining if injured workers are entitled to benefits under the Longshore and Harbor Workers' Compensation Act and the Black Lung Benefit Act, the Department of Labor applies a rule of evidence called the "true doubt" rule which provides that, when the claimant's evidence and the evidence of the party opposing the claimant is equal, doubt is resolved in the claimant's favor. Now the Supreme Court is asked to determine if the true doubt rule contravenes the Department's regulations and the Administrative Procedure Act.

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tumor in the spinal cord. Surgery disclosed that Santoro, indeed, had a tumor, identified as an astrocytoma, a rare form of nerve cancer. Santoro died in March 1986 from cardiac arrest caused by the cancerous tumor.

Santoro's widow filed a claim under the Longshore and Harbor Workers' Compensation Act (the "LHWCA"), 33 U.S.C. §§ 901-45, claiming that the July 1985 injury had rendered her husband totally disabled and had caused his death. The A.L.J. found the evidence of causation evenly balanced and invoked the true doubt rule, awarding benefits to Mrs. Santoro.

The Board affirmed, holding that the true doubt rule is well established under the LHWCA. The Board found no error in the A.L.J.'s analysis or his application of the true doubt rule and, accordingly, also affirmed the award of benefits.

On appeal to United States Court of Appeals for the Third Circuit, the same three-judge panel that had vacated the Board's decision in the *Greenwich Collieries* case also vacated the Board's decision in the *Maher Terminals* case, rejecting the true doubt rule. *Maher Terminals, Inc. v. Director, Office of Workers' Compensation Programs*, 992 F.2d 1277 (3d Cir. 1993).

The Third Circuit went on to hold that Section 7(c) of the APA, 5 U.S.C. § 556(d), specifies the level of proof that must be met by the party bearing the burden of persuasion on a particular issue and went on to hold that proof by a preponderance of the evidence is the required level of proof under the LHWCA. Finally, the court held that Section 7(c) affirmatively allocates the burden of persuasion to the party seeking benefits under the LHWCA, i.e., to the injured worker or claimant. Because the true doubt rule allows a claimant to prevail when the evidence is in equipoise, the court concluded that the rule's application violates Section 7(c) of the APA.

The Supreme Court granted petitions for certiorari filed by the Department of Labor in both of these cases to review the Third Circuit's holdings with respect to the true doubt rule.

BACKGROUND AND SIGNIFICANCE

The LHWCA provides a workers' compensation system for longshore workers and other persons engaged in maritime employment on navigable waters. Similarly, the BLBA provides a compensation system for miners, if (1) the miner is totally disabled; (2) the disability was caused, at least in part, by pneumoconiosis; and (3) the disability arose out of coal mine employment. When the BLBA was enacted in 1969, it incorporated many provisions of the LHWCA, including its procedures for processing and adjudicating claims.

The Department of Labor (the "DOL") has applied the true doubt rule for many years in resolving benefits claims under the LHWCA. Courts of appeals in the First, Fifth, Seventh, Ninth, and District of Columbia Circuits have upheld decisions utilizing the true doubt rule under the LHWCA. *See, e.g., Bath Iron Works Corp. v. White*, 584 F.2d 569 (1st Cir. 1978); *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88 (5th Cir. 1990); *Freeman United Coal Mining Co. v. OWCP*, 988 F.2d

706 (7th Cir. 1993), *petition for cert. pending*; *Parsons Corp. v. Director, OWCP*, 619 F.2d 38 (9th Cir. 1980); *Fidelity & Casualty Co. v. Burris*, 59 F.2d 1042 (D.C. Cir. 1932). Pointing out that the purpose of all workers' compensation laws is to provide injured employees with security, the court in *Burris* explained that evidentiary doubt should be resolved in favor of the injured employee or the employee's dependent family.

In *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987), the Supreme Court stated that another DOL regulation, 20 C.F.R. § 727.203, required a claimant to invoke a presumption of eligibility by establishing one of several predicate facts by a preponderance of the evidence. However, in discussing the employer's burden under the same regulation, the Court noted that the use of the true doubt rule ensures that the employer will win only when its evidence is stronger than the claimant's. The Court, however, did not consider directly the validity of either the true doubt rule or the DOL's regulations at issue in these cases.

Section 19(d) of the LHWCA, 33 U.S.C. § 919(d), requires that any hearing held under the LHWCA must be conducted in accordance with the APA. The first sentence of Section 7(c) of the APA, 5 U.S.C. § 556(d), provides that, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." In *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the Supreme Court commented that the first sentence of Section 7(c) determines only the burden of offering evidence, not the burden of persuasion.

Two years later, in considering the third sentence of Section 7(c), which provides that an order may not be issued unless supported by reliable, probative, and substantial evidence, the Court stated that the language of Section 7(c) implies a burden of persuasion and that the appropriate burden of persuasion is the preponderance-of-the-evidence standard. *Steadman v. SEC*, 450 U.S. 91 (1981). However, neither *Transportation Management* nor *Steadman* directly addressed the applicability of the true doubt rule.

The Supreme Court's decision in these two cases will have important consequences in future cases under the BLBA and the LHWCA. If it invalidates the true doubt rule, injured employees will have more difficulty in establishing their rights to benefits under the acts. On the other hand, if the Court upholds the true doubt rule, it will be more difficult for employers to defend against claims under these two acts.

ARGUMENTS

For the Director, Office of Workers' Compensation Programs, United States Department of Labor (Counsel of Record: Drew S. Days, III, Solicitor General, Department of Justice, Washington, DC 20530; (202) 514-2217):

1. The true doubt rule is a reasonable implementation of the Longshore and Harbor Workers' Compensation Act and the Black Lung Benefits Act.
2. Application of the true doubt rule is a long-standing and reasonable implementation of the Longshore and Harbor

Workers' Compensation Act and furthers the policies underlying the Act.

3. Application of the true doubt rule is an appropriate implementation of the Black Lung Benefits Act and rests, in part, on a reasonable interpretation of the Secretary of Labor's own regulations under that Act.
4. The true doubt rule does not contravene Section 7(c) of the Administrative Procedure Act.

For Greenwich Collieries (*Counsel of Record: John J. Bagnato; Spence, Custer, Saylor, Wolfe & Rose, U.S. National Bank Building, P.O. Box 280, Johnstown, PA 15907; (814) 536-0735*) and **for Maher Terminals, Inc.** (*Counsel of Record, Joseph T. Stearns; Kenny & Stearns, 26 Broadway, New York, NY 10004-1882; (212) 422-6111*):

1. The Administrative Procedure Act does not contemplate the allocation of burdens or standards of proof with an eye toward the identity of the party the proof favors.
2. The Administrative Procedure Act was designed to ensure a level playing field, maximize the independence of the

adjudicator, and guarantee the fairness of the basic rules insulating both from the ebb and flow of agency policies and politics.

AMICUS BRIEFS

In Support of Greenwich Collieries and Maher Terminals, Inc.

American Insurance Association (*Counsel of Record: William J. Kilberg; Gibson, Dunn & Crutcher, 1050 Connecticut Avenue, NW, Washington, DC 20036; (202) 955-8500*);

Joint brief of the National Association of Waterfront Employers and four others (*Counsel of Record; Charles T. Carroll, Jr., 2011 Eye Street, NW, Washington, DC 20006; (202) 296-3005*);

National Coal Association (*Counsel of Record; Harold P. Quinn, Jr., National Coal Association, 1130 17th Street, NW, Washington, DC 20036; (202) 463-2652*).