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Jeffrey Thomas Skinner

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Resolving the Doubt About the True Doubt Rule in *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*

Participants in legal disputes have been said to determine the justness of their cases' outcome by the apparent fairness of the process used to reach resolution.[1] For processes to be fair the procedural rules should be designed to serve the broad objectives of the substantive law to be applied. Coal miners, for example, have depended until recently on a procedural principle developed in accordance with policy goals. This principle shifts the burden of persuasion to an employer once a miner puts forth a prima facie workers' compensation case showing that he has contracted pneumoconiosis,[2] a degenerative and deadly lung disease often caused by long-term inhalation of coal dust.[3] No matter how fair or uniform this principle made the process of evaluating pneumoconiosis claims, however, the United States Supreme Court recently brought this burden-shifting approach to a screeching halt.

In *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*,[4] the Court faced the question of whether a case of equal evidence under the Black Lung Benefits Act (BLBA)[5] or

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1. RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 3 (1989).

2. *See, e.g.*, Provance v. United States Steel Corp., 1 BLACK LUNG REP. 1-483 (1978); *see also infra* notes 63-66 and accompanying text.

3. PETER S. BARTH, THE TRAGEDY OF BLACK LUNG 56-57 (1987). Pneumoconiosis often is referred to as "black lung disease," but the term "black lung" may refer to a variety of respiratory and pulmonary diseases. *Id.* at 66.

4. 114 S. Ct. 2251 (1994). The *Greenwich* decision actually resolved two separate cases on appeal from the Third Circuit Court of Appeals: Greenwich Collieries v. Director, Office of Workers' Compensation Programs, 990 F.2d 730 (3d Cir. 1993), and Maher Terminals, Inc. v. Director, Office of Workers' Compensation Programs, 992 F.2d 1277 (3d Cir. 1993). The first case involved a black lung disability claim under the Black Lung Benefits Act (BLBA), *see infra* note 5; the second involved a claim brought under the Longshore and Harbor Workers' Compensation Act (LHWCA), *see infra* note 6.

5. The BLBA was originally enacted as Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (codified as amended in scattered sections of several titles in the U.S.C.), to provide a workers' compensation benefits program for mine workers disabled by black lung disease. 30 U.S.C. § 901(a). Although state workers' compensation laws served a similar purpose, Congress found those acts inadequate. BARTH, *supra* note 3, at 280.

the Longshore and Harbor Workers' Compensation Act (LHWCA)[6] should be resolved in favor of the claimant by applying the so-called "true doubt rule."[7] In an opinion written by Justice O'Connor, the Court concluded that under the Administrative Procedure Act (APA),[8] adopted in part by both the BLBA and LHWCA,[9] such a

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6. 33 U.S.C. §§ 901-45, 947-50 (1988). The LHWCA was enacted in 1927 to compensate workers in maritime trades who were not covered by any state law provisions. Crowell v. Benson, 285 U.S. 22, 37-38 (1932). It was designed to provide benefits without regard to an employer's fault or an employee's contributory fault. *Id.* at 38.

7. *Greenwich*, 114 S. Ct. at 2254. Once the claimant had put forth enough evidence to establish a prima facie case that she had a disabling disease, that she was in fact disabled by it, and that the disease arose from her employment, the true doubt rule operated to shift the burden of persuasion to the employer. *Id.* at 2253; *infra* note 61 and accompanying text. Although it had been applied for years in principle under the LHWCA and the BLBA, the name "true doubt rule" did not appear until 1978, when the Benefits Review Board announced that it would apply a "true doubt rule" to cases under the BLBA. Provance v. United States Steel Corp., 1 BLACK LUNG REP. 1-483 (1978); *see also infra* note 65 and accompanying text. The courts developed the rule as a "judicial construct designed to effectuate Congress's intent that the Black Lung Benefits Act be liberally construed to ensure payment to deserving claimants." Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs, 988 F.2d 706, 709-10 (7th Cir. 1993). The rule holds that "when equally probative but contradictory evidence is [put forward by each side], the evidence must be resolved in favor of the claimant." *Id.* at 710. Courts derived the true doubt rule from a 1972 Senate Report that stated: "In the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors." S. REP. NO. 743, 92d Cong., 2d Sess. 11 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2305, 2315; *see also infra* note 65 and accompanying text. In 1977, the Senate Human Resources Committee re-emphasized Congress's intention to give miners "the benefit of any doubt." S. REP. NO. 209, 95th Cong., 1st Sess. 13 (1977), *reprinted in* HOUSE COMM. ON EDUCATION AND LABOR, 96TH CONG., BLACK LUNG BENEFITS REFORM ACT AND BLACK LUNG BENEFITS REVENUE ACT OF 1977, at 616 (1979).

Although the Benefits Review Board had never referred to the favoring of workers' claims as "applying a true doubt rule," it had employed the same principles embodied in this "new" rule for decades under the LHWCA. *Greenwich*, 114 S. Ct. at 2259-60 (Souter, J., dissenting). The practice actually originated in 1932, when the District of Columbia Court of Appeals first resolved a LHWCA case of equal evidence in favor of a worker and his family. *See* Fidelity & Casualty Co. v. Burris, 59 F.2d 1042, 1044 (D.C. Cir. 1932); *see also infra* notes 60-61 and accompanying text.

8. Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1988). Significantly, the APA was not made applicable to the LHWCA until 1972. H.R. REP. No. 1441, 92d Cong., 2d Sess. 11 (1972). Because the BLBA incorporates parts of the LHWCA, the APA has applied to the BLBA since it was made applicable to the LHWCA. *See Greenwich*, 114 S. Ct. at 2254; *infra* note 9.

9. The APA only applies to those congressional acts that have adopted it in full or in part. Both the BLBA and the LHWCA have adopted the APA in part, including the relevant section in *Greenwich*—§ 7(c). Black Lung Benefits Act, 30 U.S.C. § 932(a) (1988) (incorporating parts of the LHWCA that incorporate the APA); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 919(d) (1988). *But see infra* notes 42-43 and accompanying text (presenting the argument that neither the BLBA nor the LHWCA intended to incorporate § 7(c) of the APA).

claim could not be resolved in the claimant's favor.[10] Although all of the Justices engaged in historical analysis to arrive at their opinions, the split decision revealed that the Justices' understandings of history were not the same. At stake was the meaning of the legal phrase "burden of proof," as well as the future of the true doubt rule.[11] In the end, two claimants who had relied on the true doubt rule were left with worthless claims unless, upon remand, they could produce more convincing evidence in their favor. After summarizing the facts,[12] this Note briefly reviews the *Greenwich* opinion.[13] Next, the Note sketches the development and application of the true doubt rule,[14] the evolution of the phrase "burden of proof,"[15] and the Court's previous scrutiny of section 7(c) of the APA and the true doubt rule.[16] The Note then examines the *Greenwich* opinion in detail,[17] concluding that the Court may have based its conclusions on an incomplete historical analysis.[18] Finally, the Note examines the likely effects of the *Greenwich* decision,[19] suggesting that Congress may act to reinstate use of the true doubt rule in the future.[20] Regardless of Congress's reaction, however, the central issue—whether the true doubt rule violates section 7(c) of the APA—is closed.[21]

In *Greenwich*, the Court reviewed two Third Circuit decisions. The first, *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, involved a claim by Andrew Ondecko for disability benefits under the BLBA.[22] A coal miner for thirty-one years, Ondecko claimed that he had been totally disabled by pneumoconiosis (black lung disease) because of years of exposure to coal dust.[23] After a preliminary determination by the Department

10. *Greenwich*, 114 S. Ct. at 2259.
11. *Id.* at 2255-57; *id.* at 2260-62 (Souter, J., dissenting).
12. *See infra* notes 23-36 and accompanying text.
13. *See infra* notes 37-54 and accompanying text.
14. *See infra* notes 55-71 and accompanying text.
15. *See infra* notes 72-100 and accompanying text.
16. *See infra* notes 101-07 and accompanying text. For the text of section 7(c), see *infra* note 96.
17. *See infra* notes 108-33 and accompanying text.
18. *See infra* notes 134-37 and accompanying text.
19. *See infra* notes 138-47 and accompanying text.
20. *See infra* notes 148-52 and accompanying text.
21. *See infra* note 124 and accompanying text.
22. 990 F.2d 730, 731 (3d Cir. 1993), *aff'd*, 114 S. Ct. 2251 (1994).
23. *Greenwich*, 114 S. Ct. at 2253. Ondecko filed the claim within a month of ceasing work in January 1989. Ondecko v. Greenwich Collieries, 1990 BLA LEXIS 1105, at *3, *rev'd sub nom.*, Greenwich Collieries v. Director, Office of Workers' Compensation

of Labor that he had no disease or disability, Ondecko received a hearing before a Department of Labor Administrative Law Judge (ALJ).[24] The ALJ relied on the true doubt rule to resolve in Ondecko's favor the first two elements of his claim: (1) that he had the disease[25] and (2) that he was totally disabled by it.[26] In ruling on the third and final element of Ondecko's claim—that his pneumoconiosis resulted from his work—the ALJ applied the rebuttable presumption that a claimant who has worked more than ten years in the mines developed the disease from the job.[27] After the Benefits Review Board upheld Ondecko's award,[28] the Third

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Programs, 990 F.2d 730 (3rd Cir. 1993), *aff'd*, 114 S. Ct. 2251 (1994). Ondecko left the job on the advice of his doctor, after more than seven years of treatment for shortness of breath. *Id.* at *8.

24. *Greenwich*, 990 F.2d at 731-32.

25. At the hearing, Ondecko and his employer together presented more than 40 x-rays, along with several different physicians' interpretations, readings, and re-readings. *Ondecko*, 1990 BLA LEXIS 1105, at *4-7, *11. Although a considerable number of physicians' readings concluded that Ondecko had black lung disease, more concluded that he did not. *Id.* at *16. Nevertheless, the ALJ stated that "the fact that at least one Board-certified radiologist and B-reader repeatedly found evidence of pneumoconiosis is significant enough to raise true doubt on the issue of pneumoconiosis." *Id.* Thus, the judge applied the true doubt rule to conclude that Ondecko had black lung disease. *Id.*

26. *Greenwich*, 114 S. Ct. at 2253-54. Total disability in black lung cases may be established by the results of a blood gas study or a pulmonary function study, by evidence of pulmonary heart disease, or by physician opinion. *Ondecko*, 1990 BLA LEXIS 1105, at *12; *see also* Black Lung Benefits Act, 20 C.F.R. § 718.204(c)1-4 (1993) (listing the standards by which evidence shall establish a miner's total disability). In Ondecko's case, the blood gas levels were not indicative of total disability, nor was there evidence of cor pulmonale. *Ondecko*, 1990 BLA LEXIS 1105, at *17-18. While some of the physicians concluded Ondecko was so restricted that he was unable to continue his work in the mines, others disagreed. *Id.* at *19. These physicians attributed any breathing problems to Ondecko's cigarette smoking from 1943 to 1967 and pipe smoking from 1967 to 1986, and concluded that he was not totally disabled. *Id.* at *19 & n.12. Finding that he could infer from several physicians' testimony that Ondecko was prevented from performing his usual work in the coal mines, the ALJ concluded that "the fact that the Claimant's treating physician considers him totally disabled [raises] true doubt in face of the Employer's experts['] opinions. As stated above, true doubt is to be resolved in favor of the Claimant." *Id.* at *21.

27. *Greenwich*, 114 S. Ct. at 2254. The ALJ applied § 718.203(b) of the BLBA, which states: "If a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment." *See* Black Lung Benefits Act, 20 C.F.R. § 718.203(b) (1993) (explaining how to establish the relationship of pneumoconiosis to the employment); *Ondecko*, 1990 BLA LEXIS 1105, at *17. Since Greenwich Collieries could not produce evidence of an alternative cause of the pneumoconiosis, the ALJ ruled in favor of Ondecko. *Id.*

28. *Greenwich*, 990 F.2d at 731. Greenwich argued to the Board that several sections of the United States Code (5 U.S.C. §§ 551-59, 701-06 (1988)) adopted in the BLBA required that all propositions in Ondecko's claim be proven by a preponderance of the

Circuit Court of Appeals vacated the Board's ruling on the theory that the true doubt rule violated the BLBA and conflicted with precedent.[29] Following the court's ruling, the Department of Labor appealed to the United States Supreme Court.[30]

The second case, *Director, Office of Workers' Compensation Programs v. Maher Terminals, Inc.*, involved a claim by the widow of Michael Santoro under the LHWCA.[31] The claim alleged that a work-related injury to her husband's back and neck rendered him disabled and led to his death.[32] The ALJ found the evidence on both sides of the claim equally probative and applied the true doubt rule to resolve the claim in Santoro's favor.[33] The Benefits Review Board affirmed the ALJ's decision, and Maher Terminals appealed.[34] The Third Circuit Court of Appeals reversed the ALJ's ruling, holding that the true doubt rule violated section 7(c) of the APA.[35] The Department of Labor appealed the court of appeals' decision to the Supreme Court.[36] Because the Third Circuit decisions in both *Greenwich* and *Maher* had invalidated the true doubt rule, the

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evidence. *Id.* If true, such a requirement would invalidate the use of the true doubt rule because the rule only requires that prima facie evidence equal to the employer's be put forward by the claimant. *Id.*; *see also supra* note 7 and accompanying text.

29. *Greenwich*, 990 F.2d at 735-37. These two conclusions actually went hand-in-hand. The court of appeals applied the Supreme Court's holding in Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135, 138 (1987)—that a claimant must prove the existence of pneumoconiosis by a preponderance of the evidence—to conclude that Ondecko had not produced sufficient evidence. *Greenwich*, 990 F.2d at 733. The court of appeals then examined § 718 of the BLBA, which states, in pertinent part, that "the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making such allegations." Black Lung Benefits Act, 20 C.F.R. § 718.403 (1993), *quoted in Greenwich*, 990 F.2d at 734. The court concluded that the Act's use of the term "proving" placed a burden of persuasion on the claimant that also precluded use of the true doubt rule. *Greenwich*, 990 F.2d at 734. Thus, the two conclusions were consistent.

30. Brief for Petitioner Director, Office of Workers' Compensation Programs, Department of Labor at 1, *Greenwich*, 114 S. Ct. 2251 (No. 93-744).

31. 992 F.2d 1277, 1278 (3d Cir. 1993), *aff'd*, 114 S. Ct. 2251 (1994).

32. *See id.* at 1278-79. Santoro was injured while driving a vehicle off of a ship for Maher Terminals, Inc.; he had to jerk back to avoid a shackle swinging toward him. *Id.* at 1279. Several weeks later Santoro was diagnosed with a tumor on his spinal cord, and he died within eight months. *Id.* at 1279. There was extensive medical evidence at the hearing to establish a link between the injury at work, Santoro's subsequent disability, and the nerve cancer that killed him. *See Greenwich*, 114 S. Ct. at 2254; *Maher*, 992 F.2d at 1279.

33. *Greenwich*, 114 S. Ct. at 2254.

34. *Id.*

35. *See Maher*, 992 F.2d at 1281-83, 1285.

36. Petitioner's Brief at 1, *Greenwich*, 114 S. Ct. 2251 (No. 93-744).

Department of Labor appealed the cases together.[37] Noting that the Third Circuit's conclusions on the true doubt rule contradicted a recent decision in the Seventh Circuit Court of Appeals,[38] the United States Supreme Court granted certiorari to determine the proper application of section 7(c) of the APA.[39]

A divided Supreme Court[40] affirmed the Third Circuit decisions, holding that the true doubt rule may no longer be applied to settle claims under the BLBA or the LHWCA because it violates section 7(c).[41] The majority first found that section 7(c) of the APA applies to administrative proceedings under the LHWCA[42] and the BLBA.[43] The Court then determined that the proper meaning of "burden of proof" as used in section 7(c) of the APA was "burden of persuasion" rather than mere "burden of production."[44] In reaching its conclusion, the majority sought to "ascertain the ordinary meaning of 'burden of proof' in 1946, the year the APA was enacted."[45] The

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37. *Id.*

38. *Greenwich*, 114 S. Ct. at 2254 (explaining that the Third Circuit's decisions directly conflicted with the Seventh Circuit's holding in Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs, 988 F.2d 706 (7th Cir. 1993)).

39. Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 114 S. Ct. 751 (1994).

40. The Court split six to three. *Greenwich*, 114 S. Ct. at 2253. Joining in Justice O'Connor's opinion were Chief Justice Rehnquist and Justices Scalia, Kennedy, Thomas, and Ginsburg. *Id.* at 2253. Joining in the dissenting opinion were Justices Souter, Blackmun, and Stevens. *Id.* at 2259 (Souter, J., dissenting).

41. *Id.* at 2259.

42. *Id.* at 2254. The Department of Labor argued that the LHWCA was not intended to employ § 7(c) of the APA because the "Board shall not be bound by common law or statutory rules of evidence or by . . . rules of procedure, except as provided by this chapter." *Id.* at 2254 (quoting 33 U.S.C. § 923(a) (1988) (quotation omitted)). The majority responded by explaining that "assignment of the burden of proof is a rule of substantive law," so it is "not clear whether this [section] even applies." *Greenwich*, 114 S. Ct. at 2254 (citing American Dredging Co. v. Miller, 114 S. Ct. 981, 988 (1994)). More important, the majority pointed out that the LHWCA explicitly states that hearings under the Act will be "conducted in accordance with [the APA]." *Id.*; 33 U.S.C. § 919(d) (1988).

43. *Greenwich*, 114 S. Ct. at 2254. The Department of Labor argued that the regulations state that "Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of . . . disability," *id.* (quoting Black Lung Benefits Act, 20 C.F.R. § 718.3(c) (1993) (quotation omitted)), and "[the LHWCA is to be incorporated] except as otherwise provided . . . by regulations of the Secretary." *Id.* (quoting 30 U.S.C. § 932(a) (1988) (quotation omitted)). The Department of Labor contended that these provisions together allowed the Secretary to apply the true doubt rule, regardless of APA regulations, in order to aid claimants as Congress intended. *Id.* The majority responded that "the regulation fail[s] to mention the true doubt rule or § 7(c) . . . [or] burden shifting or burdens of proof [and thus] does not overcome the presumption that . . . adjudications under the BLBA are subject to § 7(c)." *Id.*

44. *Id.* at 2257.

45. *Id.* at 2255.

Court concluded that although "burden of proof" had been used to mean "burden of production" throughout the nineteenth century, its meaning as "burden of persuasion" had become settled some two decades prior to the enactment of the APA.[46] Assuming that Congress, upon adoption of the APA, intended "burden of proof" to have the same meaning as that generally accepted in the legal community at the time, the majority reasoned that Congress intended the APA's use to mean "burden of persuasion."[47] The Court therefore held that the true doubt rule was invalid under the APA.[48]

Justice Souter, writing for the dissenters,[49] agreed that section 7(c) of the APA applied to the LHWCA and the BLBA, but disagreed with the majority's interpretation of "burden of proof."[50] According to the dissenters, the meaning of the phrase was still unsettled in 1946,[51] and the best evidence of congressional intent is found in House and Senate reports on the APA at the time of its enactment.[52] In light of that legislative history, the dissenters believed that Congress intended to impose only a "burden of

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46. *Id.* at 2257. The majority examined various treatises and court cases on the meaning of "burden of proof" and pointed to Hill v. Smith, 260 U.S. 592 (1923), as the Supreme Court case that clarified the meaning of the term. In *Hill*, the Court adopted the reasoning of Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts, who in 1833 had determined that "burden of proof" means "burden of persuasion." *Greenwich*, 114 S. Ct. at 2256 (citing Powers v. Russell, 30 Mass. 69 (1833)). The majority then cited several cases decided between 1923 and 1945 to show that the Court had consistently used "burden of proof" to mean "burden of persuasion" after *Hill*. *Id.* at 2256. Finally, the Court showed that Congress, when it enacted the APA, was aware of the distinction the Court was using because it had explicitly distinguished "burden of persuasion" from "burden of proof" in the Communications Act of 1934. *Id.* at 2257; *see also* 47 U.S.C. §§ 309(e), 312(d) (1988) (using language supporting a distinction between "burden of proof" and burden of producing evidence).

47. *Greenwich*, 114 S. Ct. at 2257. Certainly, in the absence of any evidence suggesting Congress intended otherwise, it would be proper to assume that Congress used the phrase in accordance with its accepted meaning at the time of enactment. *See Greenwich*, 114 S. Ct. at 2557 (citing Holmes v. Securities Investor Protection Corp., 112 S. Ct. 1311, 1312 (1992); Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990); Cannon v. University of Chicago, 441 U.S. 677, 696-98 (1979)).

48. *Greenwich*, 114 S. Ct at 2255.

49. *Id.* at 2259 (Souter, J., dissenting). Justices Blackmun and Stevens joined in the dissent. *Id.* (Souter, J., dissenting); *see also supra* note 40.

50. *Id.* at 2260 (Souter, J., dissenting).

51. *Id.* (Souter, J., dissenting). The dissenters pointed to several treatises and cases between the decision in *Hill* (relied on by the majority) and the enactment of the APA that suggested the phrase "burden of proof" was still being used in 1946 to mean both "burden of persuasion" and "burden of production." *Id.* at 2260-61 (Souter, J., dissenting). *But cf. supra* note 46 and accompanying text (discussing *Greenwich* majority's argument that "burden of proof" has been used since *Hill* to mean only "burden of persuasion").

52. *Greenwich*, 114 S. Ct. at 2261-62 (Souter, J., dissenting).

production" on the proponent of a rule or order.[53] They would have upheld the true doubt rule as consistent with section 7(c).[54]

Greenwich was decided in the wake of decades of confusion over the meaning of one of the judicial system's most familiar phrases.[55] In trying to define "burden of proof" as that phrase is used in the APA, the Court was challenged by the humanitarian function of the true doubt rule,[56] the history of dual meanings for "burden of proof,"[57] and the peaceful coexistence for nearly half a century of section 7(c) of the APA and the true doubt rule.[58]

The concept of the true doubt rule was first articulated in *Fidelity & Casualty Co. v. Burris*.[59] The court observed that workers' compensation laws were developed because of the notion that those best able to bear the burden should compensate victims of faultless accidents.[60] In applying this general principle, the District of Columbia Circuit Court of Appeals began the practice of resolving compensation claims with equal evidence on both sides in favor of the claimant.[61] The practice continued for more than fifty years under the LHWCA and has been applied even more frequently under the BLBA since its passage in 1969.[62]

Although various courts of appeals approved of the practice initiated in *Burris*,[63] the term "true doubt rule" seems to have arisen

53. *Id.* at 2262 (Souter, J., dissenting).

54. *Id.* at 2267 (Souter, J., dissenting).

55. *Id.* at 2255; *see also* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 355-84 (1898). Black's Law Dictionary suggests that "burden of proof" may mean burden of producing a preponderance of the evidence or burden of coming forward with the evidence, but gives no preference for either meaning. *See* BLACK'S LAW DICTIONARY 196-97 (6th ed. 1990).

56. The rule is derived from Congress's desire to favor injured workers' claims. *See supra* note 7; *infra* notes 59-61 and accompanying text.

57. *See infra* notes 72-95 and accompanying text.

58. *See infra* notes 96-107 and accompanying text.

59. 59 F.2d 1042 (D.C. Cir. 1932); *see also* Maher Terminals, Inc. v. Director, Office of Workers' Compensation Programs, 992 F.2d 1277, 1280 (3d Cir. 1993), *aff'd*, 114 S. Ct. 2251 (1994) (indicating that the true doubt rule first appeared in *Burris*).

60. *Burris*, 59 F.2d at 1044.

61. Stephen Yula, Recent Decision, *Workers' Compensation—Black Lung Benefits Act—True Doubt Rule*, 32 DUQ. L. REV. 361, 366 (1994).

62. *Greenwich*, 114 S. Ct at 2259-60 (Souter, J., dissenting).

63. *See* Young & Co. v. Shea, 397 F.2d 185, 188 (5th Cir. 1968) (stating that the Commissioner at an LHWCA hearing is to resolve all doubtful fact questions in favor of the injured employee) (citing J.V. Vozzolo, Inc. v. Britton, 377 F.2d 144, 147 (D.C. Cir. 1967); Howell v. Einbinder, 350 F.2d 442, 444-45 (D.C. Cir. 1965); Hancock v. Einbinder, 310 F.2d 872, 875 (D.C. Cir. 1962); General Accident Fire & Life Assurance Corp. v. Donovan, 251 F.2d 915, 917 (D.C. Cir. 1958); Friend v. Britton, 220 F.2d 820, 821 (D.C. Cir. 1955); Southern Pacific Co. v. Sheppeard, 112 F.2d 147, 148 (5th Cir. 1940); Hartford

since Congress implemented the BLBA. According to a Seventh Circuit Court of Appeals panel that investigated the rule,[64] the term "derives from a Senate Report accompanying the 1972 amendments to the black lung program which noted that the Act 'is intended to be a remedial law. . . . In the absence of definitive medical conclusions there is a clear need to resolve doubts in favor of the disabled miner or his survivors.' "[65] Although the endorsement of favorable treatment of miners' claims was clear from the Senate report and the Congressional mandate accompanying the BLBA, it was not until 1978 that the Benefits Review Board announced that they would apply a "true-doubt rule" to decide black lung cases.[66]

Challenges to the use of the true doubt rule, such as those raised by the employers in *Greenwich*, began surfacing in the late 1980s and continued to increase in number during the early 1990s.[67] These cases consistently affirmed ALJs' use of the true doubt rule in black lung cases,[68] with the exceptions of *Greenwich* and *Maher*.[69] Those courts of appeals that found the true doubt rule consistent with the APA often suggested that the United States Supreme Court had given

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Accident & Indem. Co. v. Cardillo, 112 F.2d 11, 13 (D.C. Cir. 1940)).

64. *See* Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs, 988 F.2d 706 (7th Cir. 1993).

65. *Freeman*, 988 F.2d at 710 (quoting S. REP. NO. 743, 92d Cong., 2d Sess. 11 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2305, 2315).

66. *See* Grizzle v. Pickands Mather & Co., 994 F.2d 1093, 1096 n.3 (4th Cir. 1993) (citing Provance v. United States Steel Corp., 1 BLACK LUNG REP. 1-483 (1978)). The Senate report language is obviously close to the language employed by many courts that applied the true doubt rule to LHWCA cases, and it seems plausible that many ALJs applied the "rule" without the formal term long before *Provance*. Nevertheless, in his dissent in an important 1987 black lung case, Justice Marshall stated that "the Director has failed to bring to our attention . . . one instance in which the true-doubt rule actually has been applied by an ALJ in evaluating a miner's claim." Mullins Coal v. Director, Office of Workers' Compensation Programs, 484 U.S. 135, 163 n.2 (Marshall, J., dissenting). *But see infra* note 70 (indicating that ALJs applied the true doubt rule to numerous cases prior to *Mullins Coal*).

67. *See, e.g.*, Old Ben Coal Co. v. Battram, 7 F.3d 1273, 1277 (7th Cir. 1993); Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs, 999 F.2d 291, 292-93 (7th Cir. 1993); *Grizzle*, 994 F.2d at 1096-97; Skukan v. Consolidation Coal Co., 993 F.2d 1228, 1236 (6th Cir. 1993); *Freeman*, 988 F.2d at 709; Greer v. Director, Office of Workers' Compensation Programs, 940 F.2d 88, 90 n.3 (4th Cir. 1991); Old Ben Coal Co. v. Luker, 826 F.2d 688, 692 (7th Cir. 1987). Several cases are still pending that reached the courts of appeals after the Supreme Court's decision in *Greenwich* to examine the true doubt rule in light of the regulations of the APA. *See infra* note 148 and accompanying text.

68. *See, e.g., Battram*, 7 F.3d at 1277; *Freeman*, 999 F.2d at 292; *Grizzle*, 994 F.2d at 1096; *Skukan*, 993 F.2d at 1236; *Freeman*, 988 F.2d at 712; *Greer*, 940 F.2d at 91; *Luker*, 826 F.2d at 692.

69. As noted earlier, the Third Circuit Court of Appeals heard both of these cases.

its approval to the use of the true doubt rule in dictum.[70] Regardless of their conclusions, though, the courts of appeals that examined the true doubt rule faced the same task that the Court faced in *Greenwich*: how to interpret "burden of proof" as used in section 7(c) of the APA.[71]

Little doubt exists that at the turn of the century the term "burden of proof" was used in various ways in both American and British courts.[72] The two most prominent meanings, and the two meanings at issue in *Greenwich*, were "burden of going forward with the evidence" (also referred to as "burden of production") and "burden of persuasion."[73] "Burden of proof," when used to mean "burden of going forward with the evidence," means that the party with the burden of proof has to come forward with prima facie evidence to support its propositions.[74] Quite distinct from this burden is the "burden of persuasion," which imposes a duty on the party making a proposition to establish that proposition by a preponderance of the evidence.[75]

70. These courts of appeals were referring to dictum in *Mullins Coal*, a case in which the Court was examining the "burden of proof that the claimant must satisfy to invoke" an interim presumption of eligibility for black lung benefits. *Mullins Coal*, 484 U.S. at 138; Petitioner's Brief, at 6 n.4, *Greenwich* (No. 93-744). Although the questions presented were similar to those in *Greenwich*, the Court carefully avoided an actual examination of the true doubt rule in *Mullins Coal*. *See Freeman*, 999 F.2d at 293.

Nevertheless, the Court did repeat the Secretary's words about the true doubt rule: "The Act embodies the principle that doubt is to be resolved in favor of the claimant, and that principle plays an important role in claims determinations both under the interim presumption and otherwise." *Mullins Coal*, 484 U.S. at 156 n.29 (citing 43 Fed. Reg. 36826 (1978)). Moreover, the *Mullins Coal* Court noted that the Benefits Review Board " 'has consistently upheld the principle that, where true doubt exists, that doubt shall be resolved in favor of the claimant.' " *Mullins Coal*, 484 U.S. at 144 n.12 (quoting Lessar v. C.F. & I. Steel Corp., 3 BLACK LUNG REP. 1-63, 1-68 (1981)). Several courts of appeals concluded that the Court's acknowledgement of the Secretary's words and the Benefits Review Board's practice, without its disapproval, was effectively approval of the true doubt rule by the Court. *See Grizzle*, 994 F.2d at 1096 n.3; *Skukan*, 993 F.2d at 1235; *Greer*, 940 F.2d at 90 n.3.

71. *Greenwich*, 114 S. Ct. at 2255.

72. THAYER, *supra* note 55, at 355-84.

73. Since the APA applies to hearings in which the true doubt rule is used, this distinction is paramount. If § 7(c)'s "burden of proof" is merely a burden of production, then the true doubt rule escapes its application unscathed because this is exactly the burden that the rule imposes on the claimant. However, if it imposes a "burden of persuasion," then the true doubt rule is clearly inappropriate. *See Greenwich*, 114 S. Ct. at 2255.

74. BLACK'S LAW DICTIONARY, *supra* note 55, at 196.

75. *Id.*

The confusion at the turn of the century frustrated legal scholars,[76] causing many to support efforts to clear up the ambiguity of the phrase.[77] A leading solution to the problem was the one offered by the Supreme Judicial Court of Massachusetts in *Powers v. Russell*.[78] In that case, Chief Justice Lemuel Shaw stated: "Where the party having the burden of proof establishes a prima facie case, and no proof to the contrary is offered, he will prevail .... [T]he other party ... must produce evidence of *equal* or greater weight ... or he will fail."[79]

The United States Supreme Court, perhaps welcoming the opportunity to clear up the ambiguity, attempted to adopt the Massachusetts approach with its 1923 decision in *Hill v. Smith*.[80] Writing for a unanimous Court, Justice Holmes even suggested that the distinction drawn by the Massachusetts court was "now very generally accepted."[81] Although Holmes's conclusion is doubtful,[82] the Court made a valiant attempt in *Hill* to limit the meaning of "burden of proof" to "burden of persuasion." In the years following *Hill*, the Court distinguished its own use of the terms "burden of proof" and "burden of going forward with the evidence" in many cases.[83] However, even Justice Holmes was compelled to admit in

76. *Greenwich*, 114 S. Ct. at 2255 (citing 4 JOHN HENRY WIGMORE, EVIDENCE §§ 2486-87, 3524-29 (1905)).

77. *Greenwich*, 114 S. Ct. at 2255; *see, e.g.*, Smith v. Hill, 232 Mass. 188, 190 (1919); Powers v. Russell, 30 Mass. 69, 76-77 (1833); *see also supra* notes 46, 79 and accompanying text. The majority referred to the comments of Charles Chamberlayne and Justice Thayer, who both sought to narrow the meaning of "burden of proof" from two meanings to one. *See Greenwich*, 114 S. Ct. at 2255-56; THAYER, *supra* note 55, at 384-85; 2 CHARLES FREDERIC CHAMBERLAYNE, MODERN LAW OF EVIDENCE § 936, 1096-98 (1911).

78. 30 Mass. 69 (1833).

79. *Id.* at 76 (emphasis added); *see also supra* note 46.

80. 260 U.S. 592 (1923), *aff'g* Smith v. Hill, 232 Mass. 188, 190 (1919); *see also supra* note 46.

81. *Hill*, 260 U.S. at 594 (supporting the distinction between burden of proof and burden of "producing evidence to meet that already produced" drawn by the court below); *see also Greenwich*, 114 S. Ct. at 2256 (quoting Holmes in *Hill*).

82. *See supra* notes 72-79 and accompanying text.

83. *Greenwich*, 114 S. Ct. at 2256. The majority cited a number of decisions in which the Court, between the *Hill* decision and the APA's enactment in 1946, recognized that "burden of proof" imposed a "burden of persuasion." *See id.* (citing Webre Steib Co. v. Commissioner, 324 U.S. 164, 171 (1945) (noting that a claimant bears the "burden of going forward with evidence ... as well as the burden of proof"); Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104, 111 (1941) (stating that the party with the burden of proof has the burden of persuasion, but the opposing party may have the burden of production); Radio Corp. of America v. Radio Eng'g Lab., Inc., 293 U.S. 1, 7-8 (1934) (holding that the party bearing the burden of proof bears the burden of persuasion); Brosnan v. Brosnan, 263 U.S. 345, 349 (1923) (noting that the burden of proof

Hill that the distinction the Court tried to make was still "blurred by careless speech."[84]

Such "careless speech" apparently continued even after the *Hill* opinion. According to several legal treatises published in the late 1930s, 1940s, and early 1950s, the confusion over the meaning of "burden of proof" still existed.[85] One treatise serves as a testimony to the general state of confusion:

> The expression "burden of proof" has not a fixed and unvarying meaning and application. On the contrary, it is used, at times indiscriminately, to signify one or both of two distinct and separate ideas. Courts and commentators have striven to correct this variable usage and bring clarity and uniformity to the subject, but without noticeable success.[86]

These comments, reflecting little change from the turn of the century,[87] express the same level of confusion that the Court had tried to clear up in *Hill*.

Although many state cases from the late 1920s and the 1930s suggested adoption of the Court's distinction in *Hill*,[88] cases from the

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imposes the burden of persuasion, not just the burden of establishing a prima facie case)). The majority in *Greenwich* also suggested that the courts of appeals made a similar distinction, and cited decisions from eight different courts as support. *See Greenwich*, 114 S. Ct. at 2256 n.*** (citing New York Life Ins. Co. v. Taylor, 147 F.2d 297, 301 (D.C. Cir. 1945); Commissioner v. Bain Peanut Co., 134 F.2d 853, 860 n.2 (5th Cir. 1943); Cory v. Commissioner, 126 F.2d 689, 694 (3d Cir.), *cert. denied*, 317 U.S. 642 (1942); Rossman v. Blunt, 104 F.2d 877, 880 (6th Cir. 1939); Department of Water & Power v. Anderson, 95 F.2d 577, 583 (9th Cir.), *cert. denied*, 305 U.S. 607 (1938); United States v. Knoles, 75 F.2d 557, 561 (8th Cir. 1935); Lee v. State Bank & Trust Co., 38 F.2d 45, 48 (2d Cir. 1930)).

84. *Hill*, 260 U.S. at 594; *see also Greenwich*, 114 S. Ct. at 2256 (quoting Holmes in *Hill*).

85. *See* 1 BURR W. JONES, LAW OF EVIDENCE IN CIVIL CASES §§ 176, 310 (4th ed. 1938); JOHN MACARTHUR MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 175-76 (1947); CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 635-39 (1954); JOHN JAY MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE 94 (5th ed. 1944). However, McKelvey states that "the duty of the person alleging the case to prove it [sic] . . . is the proper meaning of the term. . . .," seemingly implying that the proper meaning of "burden of proof" is "burden of persuasion." MCKELVEY, *supra*, at 94.

86. JONES, *supra* note 85, at 309, *quoted in Greenwich*, 114 S. Ct. at 2261 (Souter, J., dissenting).

87. *See supra* notes 72-76 and accompanying text.

88. *See, e.g.*, Smith v. Hollander, 257 P. 577, 580 (Cal. Ct. App. 1927) (stating that "burden of proof" and "burden of producing evidence" are not the same); Behnke v. President & Bd. of Trustees, 9 N.E.2d 232, 233 (Ill. 1937) (concluding that "burden of proof" should be restricted to mean establishing a fact by preponderance of the evidence); Thompson v. Dyson, 244 P. 867, 868 (Kan. 1926) (stating that "burden of proof" means preponderance of the evidence); Carroll v. Royal Mail Steam Packet Co., 279 P. 861, 864 (Or. 1929) (explaining that "burden of proof" is not to be confused with "burden of evidence"); Chattanooga-Dayton Bus Line v. Lynch, 6 Tenn. App. 470, 479-81 (1927)

late 1930s and 1940s again promoted the confusion.[89] Contributing to the ambiguity, many courts of appeals interpreted "burden of proof" to mean "burden of persuasion,"[90] but others admitted that "burden of proof" could mean either "burden of persuasion" or "burden of production."[91] Although less clearly, even the Supreme Court apparently interpreted "burden of proof" as "burden of production" in *Heiner v. Donnan*.[92] The Court suggested that "[a] rebuttable [prima facie] presumption clearly is a rule of evidence which has the effect of shifting the burden of proof."[93] In shifting the burden of proof, this "prima facie presumption" acts to place upon the opponent the duty of producing contrary evidence.[94] Using "burden of proof" in this sense comes close to using it in its "production" sense, because *shifting* the burden of proof only makes sense if "burden of proof" is used as burden of production.[95]

(showing that "burden of proof" and "burden of evidence" are distinct concepts).

89. *See* In re Hampton's Estate, 127 P.2d 38, 49 (Cal. Ct. App. 1942) (explaining that "burden of proof" is used in several different senses); Wilson v. Findley, 275 N.W. 47, 56-57 (Iowa 1937) (stating that "burden of proof" can mean "to establish a proposition" or "to go forward with the evidence"); Nelson v. Hammett, 189 S.W.2d 238, 243 (Mo. 1945) (explaining that "burden of proof" has two distinct meanings). There were also state cases in the 1940s which supported restricting "burden of proof" to "burden of persuasion." *See, e.g.*, Shiman Bros. & Co. v. Nebraska Nat'l Hotel Co., 18 N.W.2d 551, 554 (Neb. 1945) (explaining that less confusion would result if "burden of proof" and "burden of evidence" were kept distinct).

90. *See, e.g.*, Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 178 F.2d 541, 546 (9th Cir. 1949) (admitting that there is much speculation on the meaning of "burden of proof").

91. *See, e.g.*, Commissioner v. Bain Peanut Co., 134 F.2d 853, 857 (5th Cir. 1943); Northwestern Elec. Co. v. Federal Power Comm'n, 134 F.2d 740, 743 (9th Cir. 1943), *aff'd*, 321 U.S. 119 (1944); Pacific Gas & Elec. Co. v. Securities & Exch. Comm'n, 127 F.2d 378, 382 (9th Cir. 1942), *aff'd*, 324 U.S. 826 (1945); Wong Kam Chong v. United States, 111 F.2d 707, 710 (9th Cir. 1940); Department of Water and Power v. Anderson, 95 F.2d 577, 583 (9th Cir. 1938), *cert. denied*, 305 U.S. 607 (1939); Lee v. State Bank & Trust Co., 38 F.2d 45, 48 (2d Cir. 1930).

92. 285 U.S. 312 (1932).

93. *Id.* at 329 (citing Mobile, Jackson, & Kansas City R.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910) (explaining that the legal effect of shifting the burden of proof is to cast the duty of producing some evidence on the defendant)).

94. *See Turnipseed*, 219 U.S. at 43; *see also Greenwich*, 114 S. Ct. at 2260 (Souter, J., dissenting) (explaining that the *Heiner* court was in line with Hawes v. Georgia, 258 U.S. 1, 2 (1922), and Tot v. United States, 319 U.S. 463, 470-71 (1943), in holding that the "burden of proof," used in the sense of "burden of production," could be placed on either party).

95. Although the burden of producing evidence may shift, "[t]here is a . . . mystic doctrine, with tremendous authoritative backing, that burden of persuasion *never* shifts." MAGUIRE, *supra* note 85, at 177 (emphasis added); *see also* MCCORMICK, *supra* note 85, at 636 (discussing how the burden of producing evidence may shift).

In the midst of these conflicting understandings of the phrase "burden of proof," Congress implemented the APA with section 7(c) and its allocation of "burden of proof."[96] Reports of both the House of Representatives and the Senate Judiciary Committee indicated that, under the Act's "burden of proof," both parties to a proceeding had a "general burden of coming forward with a prima facie case."[97] The House Report went further, explaining that, if either party failed to meet its burden of persuasion, then that party would lose.[98] Soon after the APA's passage, the United States Attorney General expressed confusion regarding section 7(c)'s "burden of proof." In his manual, he explained that the phrase, as employed in the Act, seemed to be synonymous with the "burden of going forward."[99] Although commentators agreed with the Attorney General's conclusions, some expressed dissatisfaction with the section.[100] Regardless of their

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96. The relevant portion of § 7(c) of the APA at issue in *Greenwich* provides:

> Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

Administrative Procedure Act, § 7(c), 5 U.S.C. 556(d) (1988).

97. S. REP. NO. 752, 79th Cong., 1st Sess. 22 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, 79TH CONGRESS [hereinafter LEGISLATIVE HISTORY], S. DOC. NO. 248, 79th Cong., 2d Sess. 208 (1946); H.R. REP. NO. 1980, 79th Cong., 2d Sess. 36-37 (1946), *reprinted in* LEGISLATIVE HISTORY, *supra*, at 270-71.

98. H.R. REP. NO. 1980 at 36-37, *reprinted in* LEGISLATIVE HISTORY, *supra* note 97, at 270-71. The House Report stated:

> In other words, this section means that every proponent of a rule or order or the denial thereof has the burden of coming forward with sufficient evidence therefor.... The first and second sentences of the section therefore mean that, where a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted.

Id.

99. ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 75 (1947) (footnote omitted); *see also Greenwich*, 114 S. Ct. at 2262 n.2 (Souter, J., dissenting) (citing Attorney General's manual).

100. In its opinions on the then-proposed APA, the New York State Bar Association and the New York City Bar Association indicated that "the first sentence [of § 7(c)] is confusing... [and] should be eliminated from the bill." COMMITTEE ON ADMINISTRATIVE LAW OF NEW YORK STATE BAR ASS'N AND ASS'N OF THE BAR OF THE CITY OF NEW YORK, JOINT REPORT ON PROPOSED FEDERAL ADMINISTRATIVE PROCEDURE ACT 16 (Dec. 26, 1945); *see also Greenwich*, 114 S. Ct. at 2262 (Souter, J., dissenting) (citing the New York report). More recent commentators have concluded without any lamentation that "the term 'burden of proof' [in § 7(c)] was intended to denote the 'burden of going forward.' " 1 CHARLES H. KOCH, ADMINISTRATIVE LAW AND PRACTICE § 6.42, at 486

opinions, however, the general consensus for many years seems to have been that no conflict existed between the true doubt rule and the APA because "burden of proof" in the APA meant only the "burden of production."

The first time the Supreme Court examined the meaning of section 7(c)'s "burden of proof" was in *NLRB v. Transportation Management Corp.*[101] In *Transportation Management*, the Court considered, as a minor issue, whether regulations that placed the burden of persuasion on the employer in unfair labor practice hearings violated section 7(c)'s imposition of the "burden of proof" on the proponent of a rule or order.[102] A unanimous Court responded in a footnote that section 7(c) "determines only the burden of going forward, not the burden of persuasion."[103] Before *Greenwich*, the Court had expressed no reservations about its conclusions in *Transportation Management*, and even cited it in a subsequent opinion.[104]

Subsequent to *Transportation Management*, courts of appeals considering the validity of the true doubt rule under section 7(c) usually referred to the case because it seemed to provide clear and conclusive evidence of the Court's understanding of "burden of proof" in the APA.[105] With the Court's confidence that the Secretary of

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(1985); 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 16.9, at 257-58 (2d ed. 1980); 4 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 24.02, at 24-25 (1994).

101. 462 U.S. 393 (1983). The Court had earlier examined the third sentence of § 7(c) to see if it imposed a standard of "clear and convincing evidence" or merely a "preponderance of the evidence" in the assessment of sanctions for antitrust violations. *See* Steadman v. Securities and Exch. Comm'n, 450 U.S. 91, 95 (1981). Although the *Steadman* Court admitted that the "language of [7(c)] . . . is somewhat opaque concerning the precise standard of proof," *id.* at 100, the majority concluded that Judiciary Committee comments on the third sentence of § 7(c) indicated that Congress intended to impose a "preponderance-of-the-evidence standard" on the parties, *id.* at 102; *see* H.R. REP. NO. 1980 at 37, *reprinted in* LEGISLATIVE HISTORY, *supra* note 97, at 271; *see also Steadman*, 450 U.S. at 100-01 (analyzing the House of Representatives Judiciary Committee's comments on § 7(c)). The *Steadman* Court did not look to the first sentence of § 7(c)'s "burden of proof" as a standard of proof, perhaps because the Court believed the phrase only imposed a "burden of production."

102. *Transportation Management*, 462 U.S. at 403-04 n.7.

103. *Id.* (citing Environmental Defense Fund, Inc. v. EPA, 548 F.2d 998, 1004, 1013-15 (D.C. Cir. 1976), *cert. denied sub nom.* Velsicol Chem. Corp. v. EPA, 431 U.S. 925 (1977)).

104. Ward's Cove Packing Co. v. Atonio, 490 U.S. 642, 660 (1989) (holding that in Title VII disparate-impact cases lower courts and the Supreme Court had used the term "burden of proof" to mean only "burden of production"); *see also infra* note 133.

105. *Greenwich*, 114 S. Ct. at 2264 (Souter, J., dissenting); *see, e.g.*, Grizzle v. Mather, 994 F.2d 1093, 1100 (4th Cir. 1993); Skukan v. Consolidation Coal Co., 993 F.2d 1228, 1235 (6th Cir. 1993); Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs, 988 F.2d 706, 711 (7th Cir. 1993).

Labor knew how to apply his own regulations properly[106] and the Court's acknowledgement that the Department often applied the true doubt rule,[107] lower courts other than the Third Circuit did not seem to question the consistency of the true doubt rule with the APA.

The Supreme Court's decision in *Greenwich* signals that "preponderance of the evidence" will be the new standard to be met by all claimants under acts applying the procedural rules of the APA.[108] For the first time, the Court was asked to face the phrase "burden of proof" in section 7(c) of the APA head on, rather than merely as an incidental issue.[109] In *Greenwich*, the Court reached a surprising conclusion, not only because it replaced previous interpretations of the APA's "burden of proof,"[110] but also because in doing so, the Court overcame considerable precedent[111] and brought about a significant change in what seemed to be established statutory interpretation.[112]

Although the Court examined conflicting comments in legal treatises and case law about the meaning of "burden of proof" before 1946, the majority was confident that the legal community had settled on a single meaning for the phrase prior to the APA's passage.[113] The Court acknowledged the frustration of writers at the turn of the century with the ambiguity of the term,[114] but concluded that, because writers in the 1930s and 1940s appeared less frustrated by the phrase's dual meanings, usage of the term was settled at that time.[115] Also, while relying on *Hill v. Smith*[116] and post-*Hill* cases[117] that

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106. *See* Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135, 138 (1987); *see also supra* note 29.

107. *See Mullins Coal*, 484 U.S. at 144 n.12; *see also supra* note 70.

108. Had Congress chosen to do so, it could have displaced § 7(c) of the APA with substitute legislation permitting application of the true doubt rule. *See Greenwich*, 114 S. Ct. at 2254-55; *see also supra* notes 42-43.

109. At best, this was the situation in Steadman v. Securities & Exch. Comm'n, 450 U.S. 91 (1981), *see supra* note 101, and in *Mullins Coal*, *see supra* note 29. In *Transportation Management*, the Court did examine § 7(c)'s "burden of proof," but only as a minor issue. *See supra* notes 101-04, *infra* note 130, and accompanying text.

110. *See supra* notes 99-100 and accompanying text.

111. *See infra* notes 121-24 and accompanying text.

112. *See infra* notes 130-33 and accompanying text.

113. *Greenwich*, 114 S. Ct. at 2257.

114. *Id.* at 2255-56 (citing ELLIOTT, LAW OF EVIDENCE § 129, at 184-85 & n.3 (1904); THAYER, *supra* note 55, at 355, 384-85; 4 WIGMORE, *supra* note 76, at 3521-22, 3524-29).

115. *Id.* (citing JOHN J. MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE 64 (4th ed. 1932); WILLIAM P. RICHARDSON, EVIDENCE 143 (6th ed. 1944)).

116. 260 U.S. 592 (1923); *Greenwich*, 114 S. Ct. at 2256; *see also supra* notes 46, 81-82 and accompanying text (discussing this case and its holding that "burden of proof" should mean "burden of persuasion").

used "burden of proof" to mean "burden of persuasion," the majority seemingly overlooked cases that used the phrase to mean "burden of production."[118] Overall, the Court's historical analysis may have failed to consider that the secondary meaning of "burden of proof" as "burden of production" might still be prominent in some sections of the legal community.[119]

Nevertheless, having concluded that, by 1946, "burden of proof" meant "burden of persuasion" in virtually all legal circles, the Court suggested that Congress intended to adopt this meaning in the APA.[120] After holding that Congress intended "burden of proof" in section 7(c) to mean "burden of persuasion," the Court acknowledged that it had come to a different conclusion in *Transportation Management*.[121] Although that case had often been cited as the definitive statement on section 7(c)'s "burden of proof,"[122] the majority felt that, because the conclusion in *Transportation Management* was only cursory, the decision did not warrant "the same level of deference we typically give our precedents."[123] Because the true doubt rule imposed only a burden of production on claimants, the Court concluded that it violated section 7(c) of the APA.[124]

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117. *See Greenwich*, 114 S. Ct. at 2256; *see also supra* note 88 (listing the post-*Hill* cases).

118. *See supra* notes 89-95 and accompanying text (discussing state cases, courts of appeals cases, and one Supreme Court case that used "burden of proof" in its "burden of coming forward with evidence" sense).

119. The majority suggested that the "commentators almost unanimously agreed that the definition was settled." *Greenwich*, 114 S. Ct. at 2257. *But see supra* notes 72-79 and accompanying text (suggesting that the secondary meaning was still quite prominent).

120. *Greenwich*, 114 S. Ct. at 2257. The Court suggested that Congress was aware of the predominant meaning of "burden of proof" in legal circles because it used that meaning in the Communications Act of 1934. *Id.* (citing the Communications Act of 1934, Pub. L. No. 94-309, §§ 2(c)-8, 90 Stat. 683 (codified as amended in various sections of 47 U.S.C.), which made a clear distinction between the terms "burden of proof" and "burden of production"); *see also supra* note 46. Although the majority examined the legislative history of section 7(c), its conclusion that, even if Congress "intended to impose a burden of production, [this did] not mean that Congress did not also intend to impose a burden of persuasion," *Greenwich*, 114 S. Ct. at 2258-59, seems suspicious. The Court was only suggesting that the legislative history provided incomplete evidence of Congress's intentions in the APA; in its analysis, however, the majority may have also denied that this was the best evidence of Congress's intentions.

121. *Greenwich*, 114 S. Ct. at 2257; *see also supra* notes 101-03 and accompanying text (explaining that, in a cursory footnote, the unanimous Court in *Transportation Management* concluded that § 7(c) only imposed a "burden of production" on either party).

122. *See supra* notes 104-05 and accompanying text.

123. *Greenwich*, 114 S. Ct. at 2257.

124. *Id.* at 2259.

The three dissenters found that the phrase "burden of proof" had not reached a settled meaning before 1946.[125] Admitting that the preferred meaning of "burden of proof" today may be "burden of persuasion,"[126] Justice Souter argued that "commentators did not think the ambiguity of the phrase had disappeared before passage of the APA."[127] Because "burden of proof" had no settled meaning, the dissenters placed great reliance on the legislative history and interpretations of Congress's intended meaning after the APA's passage.[128] To the dissenters, the language of the legislative reports, viewed in light of the unsettled meaning of the phrase, clearly indicated that Congress intended "burden of proof" in section 7(c) of the APA to mean only "burden of production".[129]

Adding to the dissenters' frustration was the fact that the Court's conclusions directly conflicted with the statement in *Transportation Management* regarding section 7(c).[130] The dissenters noted that " '[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for . . . Congress remains free to alter what we have done.' "[131] Indeed, Congress had not disapproved of any ALJ's application of the true doubt rule to BLBA or LWCHA claims before or after *Transportation Management.*[132] Because numerous Department of Labor hearings, courts of appeals decisions, and evidence treatises had relied on *Transportation Management* for the conclusion that "burden of proof" in section 7(c) meant only "burden of production," the dissenters saw the majority opinion as an unwise uprooting of settled statutory interpretation.[133]

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125. *Id.* at 2261 (Souter, J., dissenting).

126. *Id.* at 2260 (Souter, J., dissenting).

127. *Id.* at 2261 (Souter, J., dissenting).

128. *See id.* at 2261-62 (Souter, J., dissenting); *see also supra* notes 97-98 and accompanying text. The dissenters first looked to the Attorney General's manual as supplemental material to help interpret Congress's meaning. *See Greenwich*, 114 S. Ct. at 2262 (Souter, J., dissenting); *see also supra* note 99 and accompanying text. Although the dissenters also examined several treatises, only one of these was published prior to *Transportation Management*, calling into question these treatises' conclusions about the APA. *See Greenwich*, 114 S. Ct. at 2262 (Souter, J., dissenting) (citing DAVIS, *supra* note 100, at 257-58).

129. *See Greenwich*, 114 S. Ct. at 2261-62 (Souter, J., dissenting).

130. *Id.* at 2263 (Souter, J., dissenting).

131. *Id.* (citing Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989)); *accord* Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 424 (1986); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977).

132. At a minimum, Congress had not expressed any frustration with or disapproval of the practice of applying the true doubt rule to claims under the BLBA or the LHWCA.

133. *Greenwich*, 114 S. Ct. at 2262-66 (Souter, J., dissenting). The dissenters cited seven supporting courts of appeals decisions rendered between 1984 and 1993. *See id.* (citing

Although different historical understandings between the Court's majority and dissent are not ordinarily disturbing, they are in *Greenwich* because the opinion focused on historical interpretation.[134] Upon close examination, it is difficult to understand the majority's conclusion that little or no ambiguity about the meaning of "burden of proof" existed when Congress passed the APA.[135] The fact that "burden of proof" was used in the sense of "burden of production" both before and after enactment of the APA[136] suggests that the majority may have presented a "selective history" to support a particular conclusion rather than examining the historical record fully. Even if the Court's holding is correct, then, the gaps in the majority's historical recitation—many of which were filled by the dissent[137]—render debatable the *Greenwich* Court's method of determining the meaning of "burden of proof."

More important than the process used by the Court to resolve the issues in *Greenwich*, however, are the potential effects of its decision. Not only has application of the true doubt rule been eliminated because of procedural rules, but the Court's conclusions also raise questions about judicial review of agency decisions and the use of the phrase "burden of proof" outside of the APA.

The *Greenwich* opinion eradicates the established practice of favoring workers' compensation claimants when their evidence is equal to that of their employers, a principle that had been embodied in the true doubt rule.[138] However, rather than examining the appropriateness of the true doubt rule in workers' compensation

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Skukan v. Consolidation Coal Co., 993 F.2d 1228, 1236-38 (6th Cir. 1993); Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs, 988 F.2d 706, 711 (7th Cir. 1993); Dazzio v. FDIC, 970 F.2d 71, 77 (5th Cir. 1992); Merritt v. United States, 960 F.2d 15, 18 (2d Cir. 1992); Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 366 (D.C. Cir. 1989); Bosma v. United States Dep't of Agric., 754 F.2d 804, 810 (9th Cir. 1984); Alameda City Training & Employment Bd./Assoc. Comm. Action Program v. Donovan, 743 F.2d 1267, 1269 (9th Cir. 1984)). The dissenters added that the Court itself had applied *Transportation Management* in 1989 to support the proposition in a Title VII suit that "an employer's 'burden of proof' . . . should have been understood to mean an employer's production—but not persuasion—burden," Ward's Cove Packing Co. v. Atonio, 490 U.S. 642, 660 (1989) (citing *Transportation Management*, 462 U.S at 404 n.7). The dissenters noted that the *Ward's Cove* Court was aware of the true doubt rule that presupposed § 7(c)'s reading in *Transportation Management*. *Greenwich*, 114 S. Ct. at 2265 (Souter, J., dissenting).

134. *Id.* at 2255-57.

135. *See id.* at 2257; *see also supra* notes 72-95 and accompanying text.

136. *See Greenwich*, 114 S. Ct. at 2260-61 (Souter, J., dissenting); *see also supra* notes 72-79, 85-95 and accompanying text.

137. *See Greenwich*, 114 S. Ct. at 2260-61 (Souter, J., dissenting).

138. *Id.* at 2259-60 (Souter, J., dissenting).

cases, the majority's analysis was limited to interpretation of a procedural phrase. Perhaps because the Court wished to standardize placement of the "burden of persuasion" throughout federal agency adjudications,[139] the majority's conclusion eliminates the flexibility that the true doubt rule gave ALJs to err on the side of workers.[140] Consistency throughout the executive branch is important, but the elimination of a fifty-year-old practice approved of or overlooked by Congress and the courts for that same period of time seems to be a drastic step to take in the name of standardization. Considering that the APA is intended to serve only as a procedural overlay, it should not be used to overturn the purposes and goals of acts that adopt it, such as the BLBA and LHWCA.[141]

The BLBA, LHWCA, and other workers' compensation acts create an insurance-like system that, while perhaps providing benefits in a few inappropriate cases, is designed to compensate as many needy and deserving beneficiaries as arise. Employers benefit from the system, too, because they avoid more costly tort claims by disabled workers. Without the true doubt rule—which the Department of Labor had developed and applied in accordance with its mandate to meet the congressional purposes of the LHWCA and BLBA—disabled workers with cases that are especially difficult to prove may be left without a remedy.[142]

139. *See id.* at 2259 (explaining that the APA was intended to provide a standardized procedural framework for hearings in different federal agencies).

140. Although the *Greenwich* decision imposes a preponderance-of-the-evidence standard on claimants under the BLBA or LHWCA, the majority acknowledged Congress's recognition that these claims are hard to prove. *Id.* at 2259. However, the Court explained that several statutory presumptions other than the true doubt rule operate in the claimants' favor. *Id.* (referring to 33 U.S.C. § 920 (1988); 30 U.S.C. § 921(c) (1988); 20 C.F.R. §§ 718.301-306 (1993)). The Court concluded that the true doubt rule went one step too far. *Id.*

141. *See id.* at 2254 (arguing that because the BLBA was designed to give claimants the benefit of reasonable doubt, it must not have adopted APA provisions that conflict with this purpose). The fact that, for 48 years since the APA was passed, Congress had not expressed any concern over application of the true doubt rule suggests that Congress did not intend for the APA to override its goals for the LHWCA or the BLBA. Absent such intentions, Congress probably meant "burden of proof" to mean only "burden of production," and the majority in *Greenwich* should not have allowed its contemporary understanding of "burden of proof" to control its determination of congressional intent of 50 years ago.

142. Many of these disabled workers may be coal miners claiming benefits under the BLBA, because establishing the existence of black lung disease and a causal link to employment are especially difficult to prove. Yauk v. Director, Office of Workers' Compensation Programs, 912 F.2d 192, 194 (8th Cir. 1993).

Because the true doubt rule was the application of a principle developed in accord with the Department of Labor's mandates in the BLBA and LHWCA, the holding in *Greenwich* may create confusion with respect to judicial review of an agency's statutory interpretation.[143] Although agency interpretations of statutes cannot bind courts,[144] "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[145] In *Greenwich*, the majority essentially afforded no deference to the agency's interpretation, even though the Department of Labor's practice of applying the true doubt rule was an exceedingly reasonable approach based on Congress's mandates for both the BLBA and LHWCA and on the Court's own interpretation of section 7(c) in *Transportation Management*.[146] Although the Court may return to its policy of deferring to reasonable agency statutory interpretations in the future, *Greenwich* will stand out as inconsistent with those decisions. Perhaps the inconsistency will be justified because *Greenwich* involved interpretation and application of a procedural act, but such a justification begs the question of why the Court should allow procedural matters to take precedence over the arguably more important policy issue that the true doubt rule was designed to further.

If *Greenwich* does not disturb the state of judicial review of agency decisions, the opinion nonetheless may affect any federal statutory scheme that involves application of the term "burden of proof." Statutes that shift the "burden of proof" rather than the "burden of production" may be open to challenge on the basis that, according to *Greenwich*, the "burden of proof" cannot be shifted. In fact, because the Supreme Court has determined in *Greenwich* that "burden of proof" only means "burden of persuasion," any statute that uses the phrase in its "burden of production" sense may also be challenged. Although courts may limit the holding in *Green-*

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143. *See Greenwich*, 114 S. Ct. at 2267 (Souter, J., dissenting) (explaining that the true doubt rule accords with Congress's order to the Department of Labor to create standards giving the benefit of the doubt to employees under the BLBA and that the true doubt rule applied a reasonable interpretation of the Department of Labor's own regulations). *But see* Respondent Maher Terminals' Brief at 4-5, *Greenwich* (No. 93-744) (arguing that the APA is "not a statute that the agency administers" and therefore no deference is owed to the agency's interpretation).

144. Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth., 464 U.S. 89, 98 n.8 (1983).

145. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984).

146. *See supra* notes 101-03 and accompanying text.

wich—that "burden of proof" means "burden of persuasion"—to cases arising under the APA, such a limitation would betray the Court's real conclusion that, when the party using the phrase is aware of this "settled" meaning for the phrase, "burden of proof" can mean only "burden of persuasion."[147]

Whether or not *Greenwich* produces any long-term effects beyond the elimination of the true doubt rule, the parties to several appellate cases that were pending when *Greenwich* was decided are sure to feel its short-term effects.[148] Of these cases, all of which involve claims by coal miners for black lung benefits, the first to be considered after *Greenwich* was *Miller v. Director, Office of Workers' Compensation Programs*,[149] which may be an example of what will follow in the remaining cases. *Miller* was pending because the employer asserted that the true doubt rule applied by the ALJ violated section 7(c) of the APA.[150] The Court, relying on *Greenwich*, remanded the case for determination of whether a preponderance of the evidence in favor of the claimant existed.[151] Although the ultimate ruling of the ALJ may be the same in this particular case, it seems that, as a whole, employers should expect more victories in close pneumoconiosis claims.[152]

As the courts adjust to the legal effects of *Greenwich*, it will also be interesting to see how Congress reacts. Considering that the BLBA and LHWCA were implemented to further the interest of workers, Congress may act to withdraw adoption of section 7(c)'s procedural rules from both the BLBA and the LHWCA in light of the Court's decision in *Greenwich*. The integrity of both the APA and the compensation acts would then remain intact, and the true doubt rule could be reinstated.

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147. *See Greenwich*, 114 S. Ct. at 2257 (concluding that Congress intended to use "burden of proof" in the sense generally prevailing at the time of the APA's passage).

148. *See* Miller v. Director, Office of Workers' Compensation Programs, 1994 WL 478058, at **5 (4th Cir. Sept. 6, 1994); Ratliff v. Jewell Ridge Coal Co., 1994 WL 198824, at **2 (4th Cir. May 20, 1994).

149. 1994 WL 478048.

150. *See id.* at **5.

151. *Id.*

152. It has not been unusual for a few positive readings of x-rays or other tests for pneumoconiosis to outweigh a greater number of negative readings under the true doubt rule. Without the true doubt rule, ALJs may be forced to rule against the claimant in these types of cases. It is unclear whether the relative monetary resources of the claimant and employer correspond to the numbers of readings in their favor that they are able to submit into evidence, but such a relationship appears likely.

While the *Greenwich* opinion may be a significant step toward ending the confusion over the meaning of the phrase "burden of proof," other effects of the Court's conclusions raise the question of whether it was worth the trouble. The majority's arguably incomplete analysis may frustrate the efforts of some deserving BLBA claimants to win compensation for their disabilities, in direct contradiction of Congress's expressed desire to "promulgate standards which give the benefit of any doubt to the coal miner."[153] Moreover, the opinion raises serious doubts over the Court's position on both agencies' statutory interpretations and the value of policy concerns over procedural matters. Although standardization of procedures for agency hearings may be admirable, its seems truly doubtful whether the *Greenwich* Court has furthered congressional objectives.

JEFFREY THOMAS SKINNER

153. S. REP. NO. 209, 95th Cong., 1st Sess. 13; *see also* 43 Fed. Reg. 36825-26 (1978).