ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR Petitioner v. GREENWICH COLLIERIES, ET AL.

CASE NO: 93-744

PLACE: Washington, D.C.

DATE: Monday, April 25, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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DIRECTOR, OFFICE OF WORKERS' :
COMPENSATION PROGRAMS, :
DEPARTMENT OF LABOR
Petitioner :
v. : No. 93-744
GREENWICH COLLIERIES, ET AL. :

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Washington, D.C.

Monday, April 25, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

EDWARD C. DuMONT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

MARK E. SOLOMONS, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 93-744, the Director of the Office of Workman's Compensation v. The Greenwich Collieries.

Mr. DuMont.

ORAL ARGUMENT OF EDWARD C. DuMONT

ON BEHALF OF THE PETITIONER

MR. DuMONT: Thank you, Mr. Chief Justice, and may it please the Court:

In adjudications under the Black Lung Benefits Act and the Longshore and Harbor Workers' Compensation Act, the Department of Labor and the courts have long applied an evidentiary tie breaker known as the "true doubt" rule. There are three points fundamental to understanding the proper outcome of this case: what the "true doubt" rule is, where it comes from, and why its application does not contravene the Administrative Procedure Act.

First, it's important to understand what the "true doubt" rule does and does not say. It's applied in the adjudication of contested benefit claims. It resolves factual issues in favor of a claimant if, but only if, two prior conditions are met.

First, each party, both the claimant and the

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employer, must have adduced substantial, competent evidence to support the position that that party is taking in the adjudication. And second, the trier of fact must have evaluated the evidence and concluded that the evidence produced on each side is equally probative. In those rare circumstances of evidentiary equipoise, the "true doubt" rule intervenes to direct that judgment be rendered for the claimant.

QUESTION: How rare is rare, Mr. DuMont? One of the amicus briefs says it seems to happen all the time.

MR. DuMONT: Well, I think that we can see that it doesn't happen all the time from the fact that, as the statistics quoted in our brief point out, under current law, black lung claimants are successful in achieving benefits only in about 7 percent of the cases. Now, if the "true doubt" rule were being applied all the time, one would assume that it would be somewhere between 50 and 100 percent.

QUESTION: What percentage of those 7 percent are "true doubt" cases, do you know?

MR. DuMONT: Those are the cases -- well, we don't know. Presumably, less than all of them, so that in even a smaller percentage is the "true doubt" rule determinative of the outcome. Now, it may be that in many cases the rule is recited, or it may be in some cases that

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the rule determines one issue but it does not determine the outcome, because there are various cases where a claimant prevails on one issue because of the "true doubt" rule but another issue goes in favor of the employer.

QUESTION: Was -- go ahead.

QUESTION: Well, I'm just pursuing that. One ALJ seems to have found "true doubt" in four cases in one year, complete equipoise of the evidence, which one would think would be extraordinary.

MR. DuMONT: Well, we think that in some of these cases there are reasons why the ALJ -- particular reasons why the ALJ's may find equipoise more commonly than normal, particularly because you often have cases such as the early cases under the Longshore Act or the Maher case here, where there's a complicated question of medical causation, you have respectable medical opinions on both sides of the issue. In some cases the ALJ --

QUESTION: Do you have figures for the rarity under the Longshore Workers' Act comparable to the Black Lung Benefits? Is it the same?

MR. DuMONT: There are no comparable compiled or published statistics. The Department of Labor informs us that the "true doubt" rule is involved in approximately 7 or 8 percent of Longshore cases, so the figure would be comparable to that extent.

QUESTION: Well, and that is your definition of very rare, 7 or 8 percent of the cases.

MR. DuMONT: Well, we would simply point out that it's not being applied across the board and indiscriminately by ALJ's to avoid their responsibility to evaluate the evidence and to reach conclusions as to which party has produced preponderance, where one party or the other has produced a preponderance.

We think that the evidence is generally to the effect that the ALJ's take their responsibility very seriously, and that the Benefits Review Board and the courts of appeals, in turn, take their responsibility seriously to review those judgments and to make sure that in cases where this rule is applied, one can fairly say that the fact finder was not able to determine that one side had produced a preponderance.

QUESTION: Mr. DuMont, what is the standard of review of the ALJ on whether or not it was correct to say the evidence was in equipoise?

MR. DuMONT: Both the Benefits Review Board and the court of appeals apply a substantial evidence standard of review, in general, to ALJ decisions. And in this case they would apply the same standard of review that a court would normally apply on any ultimate finding of fact, which is to say they will be deferential to the resolution

of factual issues by the fact finder.

QUESTION: Does that mean that, as a practical matter, if the ALJ says there's equipoise and there is some evidence on both sides, that that will be accepted?

MR. DuMONT: Not always. It does mean that in many cases -- in a case where it's appropriate to apply the rule, it is probable that any one of three decisions would be upheld; decision in favor of either party or decision that the evidence is in equipoise and therefore that the doubt goes to the claimant.

But it's important to point out that both the Benefits Review Board and the courts of appeals have reversed decisions below applying the "true doubt" rule, on the ground that as in any other ultimate finding of fact, the trier of fact was simply out of line in concluding that the evidence was in equipoise or favored one party or the other.

Now, the last thing I'd like to point out about the "true doubt" rule and how it applies is that it never - it's important to understand this. It never permits a claimant to be awarded benefits without having produced evidence, substantial evidence to support his entitlement under the statute in the regulations. And it never denies the employer a full and fair opportunity to meet that evidence and to establish that benefits should

not be awarded under the statutory criteria.

The "true doubt" rule grows out of a long tradition of adjudication by the courts primarily under the Longshore Act. You will recall that that Act was passed in 1927, with the district courts primarily the forum for litigation. As long ago as 1944, the Second Circuit, in the F. H. McGraw v. Lowe case, upheld an administrative decision on facts remarkably similar to those in the Maher Terminals case. In other words, in that case a worker had sustained a head injury at work, developed Parkinson's disease, and the question was whether causation could be shown or inferred.

QUESTION: And there was no reliance there, I take it, on any administrative regulation.

MR. DuMONT: There was no regulation. But what there was was an administrative finding by the agency, by the deputy commissioner, that the evidence was essentially in equipoise, that he couldn't tell from the respectable medical opinions in front of him which was the better scientific answer, and that therefore, as a matter of administrative policy, the doubt should be resolved in favor of the claimant because of the remedial purposes of the Act and because the risk of error should be placed on the party best able to bear it.

QUESTION: So the court of appeals simply upheld

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that decision.

MR. DuMONT: That's correct.

QUESTION: Under what legislation was this?

MR. DuMONT: That was under the Longshore Act.

QUESTION: And who was the suit against, it was against an employer?

MR. DuMONT: The suit was by an employer against the deputy commissioner who had rendered the decision granting benefits. The controversy was between an employee and the employer.

QUESTION: But the pocket was not the Government's pocket; it was an employer's pocket in that case.

MR. DuMONT: That's correct.

QUESTION: Is there a counterpart for any State workers' compensation schemes? It was not clear from the brief whether this is simply under the Federal programs, Black Lung Benefits and worker -- and the Longshore Act. In State workers' compensation laws, in their administration, does any State system have a "true doubt" rule?

MR. DuMONT: I am not aware of any State that does. I have not surveyed those cases.

QUESTION: There was a suggestion, I think, in one of the briefs that no State does.

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MR. DuMONT: I know there's a wide variety of State rules on these issues, and I'm not aware of whether any State imposes a rule comparable to the "true doubt" rule.

QUESTION: Thank you.

MR. DuMONT: The decision announced in -- or the principle announced in F. H. McGraw v. Lowe, this tie-breaking principle resolving doubts in favor of a claimant in doubtful cases, continued to be announced consistently by the courts of appeals in reviewing Longshore Act cases, and it continues to be applied in such cases today.

QUESTION: Excuse me. Was it court of appeal? I thought you said the Secretary had established the principle. Did the court of appeal establish it or did it simply accept the Secretary's enunciation of it?

MR. DuMONT: In F. H. McGraw v. Lowe there was an administrative enunciation that was accepted by the court of appeals and ratified by the court of appeals.

QUESTION: Right, okay. So the courts didn't develop this. It was developed by the Agency, and you're telling us that the courts had accepted it.

MR. DuMONT: It's not entirely clear where the -- who made the first "true doubt" decision. Presumably it happened -- in F. H. McGraw the court announced that there -- it was principle frequently

articulated by the courts, is the way they put it, that doubt shall be resolved in favor of the claimant. Now, that was partly a statutory principle in the early cases interpreting the statute, that the statute should be construed favorably to the award of benefits, but it was naturally adapted to the context of resolving factual disputes when those made a difference to the outcome.

QUESTION: Don't some people attribute it to the D.C. Circuit back in 1932?

MR. DuMONT: Well, there's the Burris case back in 1932, and that was certainly one of the early cases that announced the principle that, in terms of statutory interpretation, benefits should -- the benefit of the doubt should go to the claimant, that's correct.

In the early 1970's the Congress changed the adjudication structure and brought in the Benefits Review Board as a part of the Department of Labor, to do the initial level of review of these cases. The Benefits Review Board continued the courts' general policy and they refined it into the narrow and clearly articulated rule that was applied in these cases and is before the Court today, that in cases of evidentiary equipoise, the claimant should receive the benefit of the doubt on factual issues.

QUESTION: What is your theory for squaring

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718.403 of 20 CFR, which says that the burden of proving a fact alleged in connection with any provision of this part shall rest with the party making the allegation? Is your theory that that is a general statement and that's superseded by the more specific provisions of 718.3(c)?

MR. DuMONT: Well, that is one way of reading it. But, in fact, the Secretary interprets the burden of proving language in the 403 regulation as imposing only a burden of going forward, not a burden of persuasion. In much the same way, this Court has interpreted the same or closely similar language in the Administrative Procedure Act, in section 7(c), to refer only to a burden of production and not a burden of persuasion.

QUESTION: It's odd to talk about the burden of going forward in the context of burden of proving effect. That's a very odd use for a phrase that's intended to apply simply to the burden of going forward.

MR. DuMONT: I will admit that it seems a little odd until, frankly, you start reading some of the cases in this area and the legislative history of the Administrative Procedure Act, and you realize that the terms "burden of proving" and "burden of proof" are used quite loosely, and they quite often are used in contexts where it's not clear or not necessary to distinguish whether one is talking about the burden of persuasion or

the burden of production.

The APA is probably the best example. The APA uses the term "burden of proof" in section 7(c), but this Court has clearly held, and held correctly, that in light of the legislative history of section 7(c), that term refers only to a burden of going forward.

QUESTION: We didn't hold that. We said it in a footnote in a dictum, didn't we?

MR. DuMONT: Well, respectfully, I would say it's not dictum, because if it were -- if the Court had not held that, it would have had to go on to consider the issue raised by the employer in that case, that regardless of the administrative policies under the Labor Board's interpretation, the Administrative Procedure Act, of its own force, required that the general counsel bear the burden on all issues in adjudication.

QUESTION: You don't think we could follow a rule of general application that law is not made in footnotes, that holdings are not stated in footnotes?

MR. DuMONT: Well, I can say that I think we would feel very reluctant to ignore a flat statement, even in a footnote, in one of this Court's opinion. And --

QUESTION: But if it's so important, why is it in a footnote?

MR. DuMONT: Well, because it was not

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essential -- the reason it's important is because the Court decided that it was not essential to reach that issue in Transportation Management.

QUESTION: Well, then -- but then doesn't your argument that it was a holding fall apart, if it wasn't essential?

MR. DuMONT: No. Because the reason it was not necessary to reach that issue in Transportation Management was because the term "burden of proof" in section 7(c) was construed to mean burden of production, and not persuasion. If the Court had construed it to mean burden of persuasion, or thought that there was a serious issue there, it would have really had to evaluate -- give it a full-dress evaluation, because otherwise the employer would have had quite a substantial claim.

QUESTION: It seems to me that to draw something out of what is the third sentence in a footnote and say this is what decides the case is extraordinary.

MR. DuMONT: Well, we certainly don't rely on simply the fact that the Court has said that before. As I said, that was -- we think of it as a holding, but whether it was a holding or not, it was correct as a statement of the law. The Court, in that footnote, cited the Environmental Defense Fund case from the D.C. Circuit.

QUESTION: Which hadn't been cited by the

parties. Indeed, the parties in the case had not even made the argument that appears in the footnote. The briefs in the case did not assert that section 706 applied only to burden of production. It came out of nowhere. I don't understand where the footnote came from.

MR. DuMONT: Respectfully, I believe that the employer's brief in Transportation Management did raise that argument, which is why the Court was responding to it in the footnote.

QUESTION: I don't think they did. Not as it appears in the footnote, that the whole section -- but let's talk about the section. Why do you say -- never mind the footnote; let's look at the section. What does it say?

MR. DuMONT: Exactly. Section 7(c) has two sentences that are considered to be relevant here. It's reprinted at the end of our brief, on page 1a. The first sentence of section 7(c) says: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Now, there's two things to note about that.

First is the word "the proponent." Now, respondents labor mightily to convince us that there's a natural reading to "the proponent," but we simply point out that in any case that's before the agency, the agency

is going to have to render one decision or the other, and there is always a proponent of both results. There's a proponent of benefits in these cases and there's a proponent of the denial of benefits.

So 7(c)'s first sentence, by itself, doesn't tell us who it's talking about. In the legislative history --

QUESTION: Well, but it does say "the proponent of a rule or order." Now, in an ordinary proceeding who is that? Would it not be the claimant who wants the board to order payment?

MR. DuMONT: Well, the claimant has brought the case to the board and the claimant wants the board to order payment, or wants the ALJ to award benefits. But it's equally true that once the case is there, the employer wants an order denying benefits, and is a proponent of that order. And I think that's quite clear, if you look at the --

QUESTION: Or perhaps he's an opponent of the order.

MR. DuMONT: That's possible. One can phrase it either way. Interestingly, I think if we look at the legislative history of the Administrative Procedure Act and of this section, what Congress said, what the committee said was that: "The proponent of a rule or

order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward, but that other parties who are proponents of some different result also, for that purpose, have a burden to maintain."

And we think that that makes it quite clear that what Congress had in mind in using this language was a burden of coming forward, and a burden of coming forward that applies to every party, including an agency in a case where there's only an agency and, say, someone seeking a license.

QUESTION: But does that language suggest that that's all that it means? I mean, you really assert that when you speak of who has the burden of proof, that the normal meaning of that is not burden of persuasion?

MR. DuMONT: I think it's very difficult, after you look at all the cases, to say that it has a normal meaning. It has a meaning which encompasses both burdens of persuasion and burdens of production.

QUESTION: It can -- it seems to me that the legislative history you refer to can be explained as simply addressing the only part of the first sentence that might be ambiguous, whether it referred, in addition to the burden of proof, also to the burden of persuasion. But --

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MR. DuMONT: Well, I will simply point out that if you interpret -- if one interprets it to mean burden of production, as the D.C. Circuit did -- and this is something the D.C. Circuit pointed out -- then it is perfectly consistent to say that both parties, all parties in the litigation have the same burden, which is what the legislative history says. Now, if we interpret it to mean burden of persuasion, that's incoherent, because only one party in any proceeding can have the burden of persuasion if there's a preponderance established.

QUESTION: And you think it's not incoherent to read section 7(c) -- the third sentence, you assert, establishes a preponderance of the evidence rule, right? It says that: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts," of it, "and supported by and in accordance with the reliable, probative, and substantial evidence." That's essentially a preponderance of the evidence rule, right?

MR. DuMONT: It certainly speaks to both the quantity and quality of evidence, yes.

QUESTION: So Congress is shaking its finger at the agencies and saying you must -- proof must be made by a preponderance of the evidence. And in the first sentence it says but, of course, you can put the burden of

establishing that preponderance on any side you want. What kind of a restriction is that on the agencies? It's none at all.

MR. DuMONT: Well --

QUESTION: I find that so extraordinary, to think that Congress is going to go to the trouble of establishing a preponderance rule and say anybody in the world can be given the burden of carrying the preponderance.

MR. DuMONT: Well, with respect, I don't think that's correct. If you look at the legislative history, what Congress was particularly getting at when they passed the APA, in the substantial evidence portions, was to try to make sure that there was substantial evidence in the record to support any decision that was rendered by an Agency, to get away from a sort of scintilla standard that some courts had applied before in upholding agency decisions. Now, they did that by saying, look, there must be competent, probative, substantial evidence in the record to support whatever result in reached.

This Court, in Steadman, did say that no external consideration of equity could supervene to require an agency to carry a higher burden of proof than the preponderance of the evidence under section 7(c). That's what Steadman really stands for. But even taking

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it to say that section 7(c) in the third sentence imposes a preponderance standard as the norm in all APA-governed litigation, the important thing to realize about a standard of evidence like preponderance is that it tells us absolutely nothing about what to do when the evidence is in equipoise. The --

QUESTION: Well, but it seems to me ordinarily it does tell you. It says the party upon whom the burden of proof is placed fails if the evidence is in equipoise.

MR. DuMONT: The burden -- the party upon whom the burden of persuasion is placed fails, that's exactly right, but that's why you need a burden of persuasion rule which is different from the standard of proof. Now, the standard of proof may be preponderance of the evidence.

QUESTION: Well, where do you get this distinction? I mean, it doesn't seem to me it comes out of the APA.

MR. DuMONT: Well, I think if you look at the first and third sentences of section 7(c), you can see that there is a distinction between talking about burdens of going forward and burdens of persuasion, which is really covered by the first sentence, and talking about the standard of evidence that whoever bears the burden of persuasion on a particular point has to meet.

QUESTION: When was 718.403 adopted, the

regulation that Justice Kennedy inquired about?

MR. DuMONT: So far as I know, it was part of the original 718 regulations, which were adopted in 1980, I believe.

QUESTION: As a response to the enactment by Congress of the Black Lung Program?

MR. DuMONT: Well, as a response, in general, to the transfer of functions from the Secretary of HHS to the Secretary of Labor.

QUESTION: Well, did it have a predecessor in HHS, the reg, 718.403?

MR. DuMONT: I don't believe that there was a specific predecessor to that regulation, no.

QUESTION: And was there any comment in connection with its adoption, by the Secretary at the time of its adoption?

MR. DuMONT: Yes. There was a preamble -- a standard sort of preamble that went along with them.

QUESTION: And it's 7 -- is 718.493, is that the regulation you rely on to say that the Secretary's conduct here was justified, that it supports the "true doubt" rule?

MR. DuMONT: No, not at all. There is --

QUESTION: Well, what regulation is it?

MR. DuMONT: If you look on the previous page of

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our brief, on page 1a, the regulation 718.3(c).

QUESTION: 718.3(c).

MR. DuMONT: Right.

QUESTION: And what does that say?

MR. DuMONT: That says that -- it says two things. First of all, that in enacting the Black Lung Act, Congress intended that claimants be given the benefit of all reasonable doubt as to the existence of total or partial disability or death due to pneumoconiosis. And that, of course, is taken straight out of several iterations of legislative history on the acts.

QUESTION: But that doesn't certainly support the use of the "true doubt" rule the way it was used in this case, does it?

MR. DuMONT: Well, we believe it does. We believe that when it goes on to say, "this part shall be construed and applied in that spirit and is designed to reflect that intent," it certainly embodies the intent of the "true doubt" rule, which is on any particular factual issue.

QUESTION: Well, that's very vague about embodies the intent of the "true doubt" rule. Certainly this is remarkably imprecise, if that's your principal basis of reliance.

MR. DuMONT: It does not state the "true doubt"

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rule in terms.

QUESTION: It certainly doesn't.

MR. DuMONT: That's right. We would say -- we have two points about this. First of all, that there has been not -- there has not been a need under either Act to promulgate a specific regulation on this issue because, up until very recently it has not been challenged. There's been a long course of consistent adjudication and there's been no reason to articulate a more specific policy.

A specific policy, including the "true doubt" rule in the terms on which we rely, has been articulated in the seventies and through the eighties in the decisions of the Benefits Review Board which, of course, is part of the Department of Labor. Now, had the Secretary been dissatisfied with the way the BRB was applying these rules, presumably he might have issued a regulation on this issue, but there's been no need to do that.

QUESTION: Well, Mr. DuMont, is the burden of proof a matter of substantive law, do you suppose?

MR. DuMONT: It can be.

QUESTION: Yes.

MR. DuMONT: The --

QUESTION: So I'm not sure it's even open to regulatory change, is it?

MR. DuMONT: It would not be open to regulatory

change if the statute itself provided a rule for the burden of persuasion. But the statutes in this case, if you look at them, are quite interesting the way they're phrased. They're not phrased in terms of a claimant is entitled to benefits if he or she persuades the adjudicator that X, Y, and Z. They're phrased in terms -- in much more passive terms; benefits will be provided in respect of certain conditions and that sort of thing. There's nothing in the statute that resolves the issue of where the ultimate burden of persuasion lies on a contested factual point, in that context.

QUESTION: Except its incorporation of the APA, if we disagree with you on the meaning of the APA.

MR. DuMONT: If you agree -- if you believe that the APA imposes a preponderance standard on all litigation where it applies, then we would still say we win this case, because we think that the APA -- section 7(c) in particular, and the APA in general, provide for exceptions. Section 7(c) starts out "except as otherwise provided by statute." And we think, as we've articulated in our brief, that there are provisions of both statutes that can be read to accept this particular application of an evidentiary rule from the sweep of the APA.

QUESTION: But if you're right about your first interpretation, that the statute -- assuming the statute

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doesn't speak to it and 7(c) is only production burden, are you saying that every agency that doesn't have a specific statutory allocation of the persuasion burden can decide for itself whether to have a "true doubt" rule or require preponderance, so it's totally the agency's option?

MR. DuMONT: Well, we think it puts within the agency's sphere of decision making the same kind of issue it has -- the same kind of decision it has on many issues, which is what is consistent with congressional policy and the intent of the statute. And any such decision would be subject to review, and in many contexts one would find that it would not be plausible to believe that Congress had intended for there to be a burden of persuasion placed on one party or the other.

QUESTION: Do you have any idea how many agencies are in this situation, they have no explicit statutory allocation of the persuasion burden and so they have only 7(c), which you say is only the burden of coming forward?

MR. DuMONT: I'm not aware of exactly what a count would be, no.

QUESTION: Counselor, your position is that if a statute says "except as provided by statute, the rule shall be X," and there's another statute that says

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"agencies may promulgate regulations in accordance with the purposes of this Act," that the latter overcomes the former. I find that an extraordinary contention.

MR. DuMONT: You're speaking in terms of the Black Lung Act and its incorporation.

QUESTION: Well, yes. You say except as provided -- otherwise provided by statute can be overcome by another statute which says an agency can promulgate a rule.

MR. DuMONT: Well, I think it's important to note that when the APA is incorporated in the Black Lung Act, for instance, it's incorporated under a regime which first of all says that the APA doesn't apply except as specifically provided. Then it's incorporated from the Longshore Act, but with a specific statutory proviso that it's except as otherwise provided by regulation. And we think that by the time you work through the various levels of statutory and regulatory analysis, it's fairly clear that the Secretary has the ability --

QUESTION: Do you have any authority for a case which imposes a similar analysis and comes to a similar conclusion?

MR. DuMONT: I'm not aware of a case that involves quite this kind of statutory structure.

With your permission, I'd like to reserve the

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remainder of my time.

QUESTION: Very well, Mr. DuMont.

Mr. Solomons, we'll hear from you.

ORAL ARGUMENT OF MARK E. SOLOMONS

ON BEHALF OF THE RESPONDENTS

MR. SOLOMONS: Mr. Chief Justice, and may it please the Court:

The "true doubt" rule is not some policy that's based on fairness and experience; it's an arbitrary and opportunistic principle that has come to this Court in search of a justification, on the basis of a theory that was developed, I think, exclusively for this litigation. There is no valid --

QUESTION: Well, they do have something to look at in that footnote in Transportation Management. It's not new with this litigation, I suppose.

MR. SOLOMONS: Well, I think the footnote in Transportation Management, in their argument, is taken out of its context. If you read that last sentence in the footnote, it certainly does say that section 7(c) imposes only a burden of production, but that's not right because section 7(c) does a myriad of things. It's a whole instruction book.

QUESTION: Well, for your to prevail do we have to disavow that footnote?

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MR. SOLOMONS: No, I don't have to disavow the footnote. The footnote, in context, says that that first sentence imposes a burden of production. I think that section 7(c), in its totality, also imposes a burden of persuasion, as well as a burden of production. It carries through the proceedings by providing -- it provides guides to the administrative law judge on how to conduct the proceedings, how to find facts, and how to do the things that the administrative law judge has to do.

And what it says is that if there are facts to be found, administrative law judge, then they must be supported by the weight of the evidence. It does not trouble me at all, and I hope it doesn't trouble the Court, that when a party, as was the case in Transportation Management, put new facts into play in the form of an affirmative defense, that the administrative law judge there also was required, if the facts were to be found, to find them, if they were in accordance with the preponderance of the evidence.

QUESTION: Well, that's just to say that the decision was right in the case. It's not to say that the sentence, which we're focusing on, was right. You're going to spend an awful lot of your argument explaining why that sentence is right, if you insist on saying we don't have to repudiate it. It's a lot easier to explain

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why we should repudiate it, it seems to me.

MR. SOLOMONS: Well, it's easy to explain how you should repudiate it, but they've taken it out of context in making the argument that's based on it. I don't think it makes any sense. I don't think that it --

QUESTION: When you say they've taken it out of context, all you mean is that the case should have been decided that way anyway, but not on the ground -- surely not on the ground that the section in question involves only the burden of production, rather than the burden of persuasion.

MR. SOLOMONS: I do not believe that section 7(c) involves only the burden of production. I don't see how you can reach that conclusion, reading it or reading the materials that are in the legislative history of the APA. It simply doesn't say that. That is a restrictive and narrow reading which does not gain any support from either the provision itself or from the legislative history or from any normal, ordinary, common usage of those kinds of provisions.

QUESTION: We used the same usage -- the Court did in the Ward's Cove opinion, didn't it, in describing the so-called burden of proof on the business justification? They said that was just a burden of going forward.

MR. SOLOMONS: Well --

QUESTION: So the footnote doesn't seem to be unique, I guess is the point.

MR. SOLOMONS: No, I don't think that it -- it may not be unique, but that's not an Administrative Procedure Act case, as I recall.

QUESTION: Well, it isn't, but the terms that it's using are common terms and we're still talking about burden of proof.

MR. SOLOMONS: Yes. And I think that what you will find in the jurisprudence is that occasionally the terms "burden of proof" are used to mean only burden of production, but I think rarely. And in certain circumstances the terms -- the term "burden of proof" is meant to encompass the whole fact-finding process. I think the more natural reading of it is to encompass the whole fact-finding process.

But I think that it is not necessary, in the context of the Administrative Procedure Act, to get too much involved in that first sentence only. Because even in the legislative materials, they say you must read all of these provisions together. If you read all of the provisions together, then I think it becomes clear that they mean by burden of proof -- they mean burden of persuasion, because they said it two sentences later.

QUESTION: Well, would it make much sense for this Court to have interpreted the first sentence when, in the very same section, the ultimate control, as you say, is the third sentence? That wouldn't make a whole lot of sense, to have a footnote that says, well, this is what the first sentence says, but that is going -- that initial impression is going to be contradicted by the third sentence.

MR. SOLOMONS: Justice Ginsburg, you're right. The problem, I think, in this case was that it was not -- was the way it was briefed. I have reviewed the briefs in Transportation Management, and although the case comes after this Court's decision in Steadman, which I think explains all of this very clearly, Steadman wasn't mentioned.

The Government does not argue what it argues here. The Government argued in their briefs in that case that this was an affirmative defense and it was perfectly fine to have those facts introduced and to place the burden, if it was the agency's choice to do that, on the party that was the proponent of those facts. That's precisely what they argued. I think it was a failure of advocacy in that case, not a fully informed footnote, perhaps.

QUESTION: But, in any event, we -- I think that

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we can agree that the Government didn't make up its position for this case. We're told in the briefs -- and I don't think you question it -- that the "true doubt" notion has been around since the thirties, since that Burris case.

MR. SOLOMONS: Well, I take issue with that. I don't think that's true. The "true doubt" notion, that is this kind of non -- the rule of nonpersuasion, is pretty new. I think it probably first emerged in a Department of Labor brief within the last year.

It is certainly true that for many years there was a principle, and it's a principle that still exists, that when interpreting these remedial statutes where there is an ambiguity in the statute that cannot be resolved in some natural way, that you may resolve it in favor of the claimant.

QUESTION: Well, that's -- in other words, on an issue of statutory interpretation?

MR. SOLOMONS: Yes. And I believe that in the early cases that the Department is referring to, you will never see -- certainly never see the words "true doubt." You will never see an analysis from those courts that looks anything like what you have in the briefs here.

What you will see is a situation where the employer has gone in in the face of some proof, and argued

on appeal, under the substantial evidence standard, that the claimant didn't prove to some very substantial degree that he should have been awarded benefits. And the courts are saying, well, he doesn't have to do it to that degree; these are remedial statutes.

And in some of the other cases -- these are simply embellishments on the substantial evidence review, in those cases. If you want to find --

QUESTION: What practical difference is there between the kind of standard you say the courts did apply and the "true doubt" rule?

MR. SOLOMONS: Well, I think that the standard that the courts did apply in those other cases has nothing to do with tied evidence. I think it has --

QUESTION: Nothing to do with what?

MR. SOLOMONS: Tied evidence.

QUESTION: Oh, tied like it counts for running, yes.

MR. SOLOMONS: Right. What we have -- the rule that we're talking about, I think first emerges in a 1968 decision of the Fifth Circuit and then it's reiterated -- this is with any kind of articulation that makes sense -- by the Fifth Circuit and then once or twice by some other courts. What they say is that in these programs the standard of proof is something less than a preponderance,

although the Fifth Circuit itself admits they don't know what to call it or how much less. And that's something we clearly take issue with.

The "true doubt" rule, as it's presented to you, is the Department of Labor on its best behavior, arguing about something that seems somewhat more reasonable than we believe it to be. Certainly, in our experience it has not operated that way.

QUESTION: Well, how is it applied and interpreted? I mean, if the claimant puts on a minimum amount of evidence and there is substantial evidence on the other side, is deference given on appellate review to the initial fact finder's determination that the evidence is in equipoise, even though the appellate reviewer might not have thought it could be in equipoise?

MR. SOLOMONS: Almost always.

QUESTION: Almost always what?

MR. SOLOMONS: Almost always, deference is given to the finder of fact by the appellate reviewer. Department of Labor has a couple of cases that they can bring out and say, well, this time some control was exercised over what the administrative law judge did, but that is extremely rare.

And I would offer these two cases as examples of that. These two cases present evidence that, for those of

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us who are familiar with these kinds of cases, is not that close. We have cited in our briefs, and many other cases are cited in the amicus briefs where administrative law judges are resolving all doubt, any doubts, any reasonable doubt, imposing a beyond-a-reasonable-doubt standard, and that's not controlled.

QUESTION: How, how could a reviewing court determine that the evidence was, in fact, in equipoise, when it is not even permitted to determine whether there was a preponderance? I mean, in the ordinary case where the agency is applying a preponderance standard, the appellate court doesn't review to see whether there really was a preponderance; it just reviews to see whether there was substantial evidence. So it seems to me quite impossible for a reviewing court to determine whether there was really an equipoise. All it could say is there was no substantial evidence on one side.

MR. SOLOMONS: Justice Scalia, that is -- it is as impossible to do that as it is for administrative law judges to repeatedly, in case after case after case, find this complex evidence absolutely tied, but that's what we see in these cases.

QUESTION: Well, we're told that the figure is under 10 percent, so it's not case after case after case. Under the Black Lung Act, that that was a figure for total

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plaintiffs -- claimants' recoveries, wasn't it?

MR. SOLOMONS: I would dispute that figure. I can't imagine how the Department could empirically come to that. What we did was we looked at the Benefits Review Board Reporter, which reports selected administrative law judge decisions, far from all of them. And what we found was an increasingly utilization of the "true doubt" rule from a percentage back in the early eighties, when it wasn't necessary in the Black Lung Program because we had all these presumptions, to somewhere in the neighborhood of 17 to 20 percent in current cases.

But we see it all the time. And in Longshore -- in Longshore cases they see it all the time as well. One of the things about the Longshore cases is that 90 to 95 percent of them are never litigated. They are not contested by the employer. It's only the hard cases that are contested by the employer.

QUESTION: But you're not contesting that on these records, the fact finder could have found for the claimant by a preponderance. And the Third Circuit said that the case would have to go back for the ALJ to make that ultimate decision, so the Third Circuit must have felt there was enough evidence for a fact finder to find the preponderance in favor of the claimant.

MR. SOLOMONS: Well, I think the Third Circuit

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didn't want to engage in fact finding. I would expect that in both of these cases, if they went back and were reviewed under a preponderance of the evidence standard, that benefits would probably be denied. But that's not -- I haven't analyzed the records in these cases in a way that puts me in the shoes of the judge, and I think the Third Circuit was correct to let the judge do the job on that account.

There are several observations that I would like to bring to the Court's attention, that I think will help focus the case. First among those is that there is no word or phrase or provision in the Black Lung Act or in the Longshore Act that prescribes or, for that matter, even suggests a "true doubt" rule. There is nothing even close.

The Department of Labor has asked you to defer to its interpretation of these statutes. The Department of Labor has not cited a single word of any of these statutes --

QUESTION: May I ask in that connection, Mr. Solomons, do you contend that 20 CRF 718.3(c) is invalid?

MR. SOLOMONS: No, I don't think it's invalid. I think that, first of all, it's a preamble rule. I don't think that it can be read to establish a "true doubt" principle. Let me say that there are three provisions in

the Department of Labor's regulations way back in 718.300's and 400's, and then there's a published commentary in the Federal Register where the Department of Labor says the burden of proving these things is on the claimant, and where this presumption doesn't apply, the burden of proving is going to be on the claimant, two separate provisions.

And then they even went so far as to publish commentary in the Federal Register -- when the statute was amended and all of these burden-shifting presumptions in Black Lung were repealed in 1981, they published new provisions in the Federal Register and there they said that we want facts now to be decided for the claimants in accordance with the weight of the evidence.

Now, they've said that that doesn't mean anything, but it seems to me that when you have a complex of regulations over here that seem to very specifically address these kinds of questions in a way that is fully consistent with the Administrative Procedure Act and the ordinary normal way that adjudications occur, the Department goes over here to a preamble provision which doesn't say what they say it says, by its plain language.

QUESTION: Indeed, if you follow its plain language, they would have to apply a --

MR. SOLOMONS: Criminal standard.

QUESTION: -- A criminal standard to the employer. He would have to show that he's not liable beyond a reasonable doubt.

MR. SOLOMONS: And then I think we would ask you to do a rational basis analysis. I don't see that that is appropriate.

QUESTION: What about the narrow argument under the Black Lung Act that -- under 718.403, the issue is an issue of the administer -- of the Secretary's interpretation of the Department's own regulations. And if they may reasonably interpret the reg as being simply a production reg, rather than a burden of persuasion reg, that there certainly isn't any conflict between that and the "true doubt" rule, and that therefore that ought to dispose of the Black Lung case which is before us here.

MR. SOLOMONS: Well, first, I think you have to deal with the Administrative Procedure Act there, and in the cases that deal with efforts by agencies to alter the Administrative Procedure Act, some very recent ones on the D.C. Circuit and some older ones by this Court, the holdings have uniformly been that the agency may not write a regulation that is inconsistent with one of the minimum basic standard of the Administrative Procedure Act. If that doesn't --

QUESTION: Which turns the argument into the

invalidity of the regulation as the Secretary construes it, in other words.

MR. SOLOMONS: As it is construed, yes, it does. But it's not necessary to construe it that way because I think the regulation still serves a useful purpose. There have been cases where there is -- there are in those regulations -- we've cited one, and it's a good case for this; it's called Amax Coal v. Anderson, I believe.

And there there was a -- the Department of Labor has prescribed standards for total disability, some very complex medical standards, and there was just kind of a gap. And the Court said, well, we're going to resolve this gap in favor of the claimant because that's an appropriate method of construction for these statutes. And I don't dispute that.

QUESTION: Mr. Solomons, can I go back to the regulation? I must confess that I'm not sure I follow either you or Justice Scalia's comment. Because it says that all reasonable doubt shall be resolved in favor of the claimant; it doesn't have any requirement of proof beyond a reasonable doubt in it. And I was just wondering why is not true doubt when the evidence is in perfect equipoise a species of reasonable doubt?

MR. SOLOMONS: Well, I suppose that --

QUESTION: I mean, I suppose that -- if the

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hearing officer just does -- can't make up his mind and a reasonable judge couldn't, wouldn't you say that he has reasonable doubt about the outcome?

MR. SOLOMONS: Well, the hearing officer has got a job to do, and his job is to conduct these proceedings in accordance with the normal rules and the APA rules. I mean, I can't really argue with you about whether this was a species, and maybe it is a species, but it still does not say -- if -- the Department has told the told the Court that this has been going for 60 some years. This is a big, important rule in this litigation, both under the Longshore Act and under the Black Lung Act. And there's nothing that articulates the rule anyplace in these regulations.

Now, if this reflects 60 years of jurisprudence, then I don't see it. Now, maybe it could be read into it, but I think it's a very hard read, and it becomes a more difficult read if you look at the rest of the regulations. And, of course, in Longshore, then, they have to give up on the case entirely because there's nothing.

QUESTION: The rest of the regulations require to read burden of proof to mean burden of persuasion which, of course, is not an unreasonable reading. But isn't that what you're referring to in the rest of the regulations?

MR. SOLOMONS: Well, there's more to it than that. There's some discussion -- there's commentary in the regulations. There are two separate regulations which address burden of proof by using language -- actually, burden of proving, which may be a little difficult; it implies something more than just burden of proof -- that are apparently directly on point. And --

QUESTION: Indeed. I thought your point was that the third sentence of 718.3(c) itself contradicts that reading of the first sentence, since it goes on to say notwithstanding what we said in the first sentence, you don't make an award unless there's a reasonable basis for awarding it.

MR. SOLOMONS: Well, and I'm sure the Department --

QUESTION: And it's not a reasonable basis to say, well, we really can't tell whether there's a reasonable basis.

MR. SOLOMONS: Well, I'm sure the Department would say that a tie is a reasonable basis. I can't -- the debate --

QUESTION: Because they require a prima facie case.

MR. SOLOMONS: -- I think ultimately goes no place.

QUESTION: They require a prima facie case, and were only concerned that the employer meets the case with evidence of equal weight. It would have been a reasonable basis if there had been no defense put out; that's the way they read that.

MR. SOLOMONS: And that could be. But, I mean, look at even with the title. It's: "The scope and intent of this part." That doesn't seem to announce a rule. And then you have another rule which talks about -- which is entitled -- has a title having something to do with burdens, and you'd certainly expect to go look to the rule that talked about burdens to find out what the burdens were, and not to kind of general discussion of what the statute was all about.

It's very difficult, I think, and it is not the natural or normal reading of 718.3 to come to the conclusion that the Department comes to. I think they come to it because there's no authority, and that's -- that has always been the problem with this, with the rule. The rule is optionally applied by administrative law judges, and from our point of view it is --

QUESTION: Are you referring to the so-called "true doubt" rule?

MR. SOLOMONS: I'm going back. Yeah, I'm going back to the "true doubt" rule.

QUESTION: Where do we first find the words "true doubt" used to describe this rule that is being supported here by the Government?

MR. SOLOMONS: In a Benefits Review Board decision in 1978, not so much naming a rule but, I guess, distinguishing it from some other kind of doubt. It was a case called Provance, which is cited to you, where the Department -- where the claimant had gone in and said you have to resolve all debts for me because I'm a claimant. And the Board said, no, we only resolve the true doubts for you, in that particular case.

QUESTION: Can't disagree with that, can you?

MR. SOLOMONS: Well, I do disagree with it. I don't think that that is correct.

Some other points that I think are important. And this is not a rule that's used, or anything like it, in State workers' compensation laws. We have surveyed them. It's not a rule that's used in the Federal Employees Compensation Act that covers this Court and the Department of Labor and the folks from the Solicitor General's Office. It's not a rule that's used in the common law. It's not a rule that's used by the Society Security Administration. And all of these are remedial -- these are remedial programs or statutes or just provisions of the law that recognize the rights of people to recover

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monetary damages for their losses. And --

QUESTION: Maybe the agency's just being too honest. I mean, what goes on in many administrative programs in the State, I gather, which are set up to benefit these workers, is that if it's close, in fact the decision maker will just say we'll apply this, in effect, and say in close cases I'll find a preponderance in favor of the worker. And you'd have no problem with that.

MR. SOLOMONS: None at all.

QUESTION: I mean, you'd have to take it on appeal, and on appeal --

MR. SOLOMONS: We'd lose.

QUESTION: -- The court would look at it and it would reweigh and it'd just say, well, there's some substantial evidence favoring the claimant and we have a generous decision here; we'll let it stand.

MR. SOLOMONS: And that's why this rule engenders such amazing hostility. And it would be hard for me to articulate the degree of hostility this rule engenders on the defense side of these cases.

QUESTION: You're used to getting bad calls, but not used to its being admitted, is that it?

(Laughter.)

MR. SOLOMONS: Well, if the administrative law judge is held to the rigor of a normal standard of proof,

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then the administrative law judge is going to be required to carefully review the record. Sure, in a close case -- I don't think there has ever been a close enough -- a real close case, a tie, where an administrative law judge, or any judge, couldn't find a reason to rule in whatever direction the judge thought was appropriate.

That's why this rule is so problematic for us, because the cases where the rule is ordinarily applied are cases where it isn't that close, and then we have to take it up on appeal. And this rule also, by the way, increases the volume of litigation in these cases very substantially, because the defense is so mad at having been treated this way and having had the evidence, that it often has painstakingly developed, thrown out the window or discounted just because they don't like them, they don't like the party.

QUESTION: But why do you say that -- you're saying that if the administrative law judge doesn't like the party.

MR. SOLOMONS: Well, I think the rule doesn't -- the rule discounts the evidence because of the identity of the party. The rule says that the persuasion of this evidence -- not the bulk weight, we're not talking about that -- but the persuasion of this evidence is going to be reduced because we want to favor a particular party. That

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makes a litigant mad. It's not a fair adjudication, as far as we're concerned, when that kind of rule applies.

QUESTION: Well, but, you know, supposing that you're talking about a court case and the ordinary rule is that a plaintiff has to prove his side of the case by a preponderance, but Congress steps in and says well in this particular kind of case you've got to prove it by clear and convincing evidence. Well, surely, that doesn't make all plaintiffs mad that they've been told they have to meet a higher standard of proof.

MR. SOLOMONS: No, I don't think so. And I think when Congress does it, it does make it go down an awful lot easier, and that's particularly true in these programs. I mean, workers' compensation laws are vehicles for the largest privately funded social insurance programs in the United States, and they're very carefully balanced and controlled. Even if their primary objective is the compensation of deserving workers, they have lots of other objectives.

And in workers' compensation legislation -- this is true on the Federal side and it's certainly true on the State side as well -- the employers and insurance carriers and unions and claimant advocates work together with legislatures to make sure that these programs are at an appropriate level of acceptability and that they provide

appropriate benefits to people.

They're complex programs, and if that kind of provision was in a workers' compensation law, then I can assure you that it was a provision that was bargained for, that was properly debated in the legislative process, and that was understood even if somebody lost the debate. It becomes a more acceptable proposition.

What we have here is a situation where -- and clear and convincing in reverse, I guess, is perhaps what the Department of Labor is talking about. But here we have a situation where the Department, without any authority, without having tested this principle in the ordinary way, through the analyses that it's put to in Congress -- the Department of Labor has just decided that they would like to have this principle used, and that they would like to have the volume of approved claims increased.

Or for whatever reason; it doesn't really make any difference. It's not -- I think that from what I gather from the people that I talk to about this, we can't get the kind of fair hearing that we want to have if this principle, for this kind of principle -- because it's a very important one and it's a very powerful one, just by litigating it against the Government and looking at statutes. This is the kind of thing that Congress does

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control, first of all. And that's not an unimportant point. It ought to control.

QUESTION: May I ask, just to be sure I understand your position before you sit down, on the section 7(c) of the Administrative Procedure Act, do you disagree with the interpretation of the Administrative Procedure Act in the footnote?

MR. SOLOMONS: I think that the footnote is incomplete, and therefore I disagree with it.

QUESTION: But, now, do you take the position that in any administrative proceeding in which the defendant or respondent has an affirmative defense, that the agency has the burden of persuasion that the affirmative defense is insufficient?

MR. SOLOMONS: No, I don't think that's the way it works. I think that if somebody puts facts into play by alleging an affirmative defense that's supported by facts, then the administrative law judge, in the ordinary course of things, is going to have to find those facts or not find them.

QUESTION: The statute, if you read it as burden of persuasion, says the proponent of the order has the burden of persuasion. You don't read it that literally?

MR. SOLOMONS: Well, it troubles me, because I think that we don't -- I know where my interpretation goes

with these statutes. I guess it troubles me to think that we're simply throwing that outcome, so I can't answer that for you and so I'm not comfortable just saying it. It might be -- it may be right. It certainly has some logic to it.

Thank you. If there are no further questions.

QUESTION: Thank you, Mr. Solomons.

Mr. DuMont, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF EDWARD C. DuMONT

ON BEHALF OF THE PETITIONER

MR. DuMONT: Thank you, Your Honor.

A couple of brief points. First of all, this position that -- the "true doubt" rule was not developed for this litigation. On the Longshore side, let me refer you just back once again to the F. H. McGraw case, which I think you will find factually strikingly similar to the Maher case, and other sources. The Department's instructions --

QUESTION: Well, it doesn't mention the word "true doubt," does it?

MR. DuMONT: No, it does not use the same words, but I really think that's irrelevant.

QUESTION: I thought respondent's contention was that the so-called "true doubt" rule is kind of putting a label on something that has been going on for a long

while.

MR. DuMONT: Well, it puts a label on it. And, frankly, I think all you could say about this is the Department of Labor and the Benefits Review Board have narrowed and made this concept much more specific to the rule that's in front of the Court today. And they're hardly to be faulted for having taken something that was more general and more vague and made it more specific and confined its application.

The rule, in these terms, is in the Secretary's instructions to adjudicators which were promulgated in 1980, which are cited in note 20 -- note 14 on page 27 of our brief. It's in commentary to regulations that were issued in the early 1980's. It's in a long series of board decisions from the seventies and eighties. It's simply not true -- it's been accepted by five or six circuits. It's simply not true to say that this is something we made up for this case.

QUESTION: McGraw was before the APA, wasn't it?

MR. DuMONT: That's correct.

QUESTION: So that rule could -- may have been okay before then.

MR. DuMONT: I think it's equally fair to infer that Congress, when it passed the APA, did not intend to disturb well settled principles of adjudication under

preexisting statutes.

QUESTION: Didn't an earlier version of section 7(c) read "the proponent of a rule or order shall have the burden of proceeding except as statutes otherwise provide," and that was changed in the final version to "burden of proof?"

MR. DuMONT: That was changed, and I think the legislative history makes quite clear that change did not import any substantive change.

QUESTION: Did not eliminate the burden of proceeding.

MR. DuMONT: It did not eliminate it. But I think it would be a bit difficult, again, to have a situation where you have burdens of persuasion on two different parties, where that's clearly what Congress contemplated, was that whatever burden they were talking about was going to be on more than one party in the case.

Finally, I'd like to point out that there's really nothing -- there's nothing necessary about calling something an affirmative defense. As you pointed out, Justice Scalia, saying that something's an affirmative defense states a conclusion, not some sort of natural fact.

In Transportation Management the point was whether or not somebody was liable for a violation of the

Federal labor laws. The Labor Board had decided, as a matter of its discretion in administering the statute, to put a burden of proof on one issue involved in deciding that on the employer, and the Court upheld that as a matter of policy, deferring to the Board's judgment and finding that it was reasonable for the Board to take that judgment.

That's why it's called an affirmative defense, because it was reasonable to place the burden of proof on the employer. And all it really points out is that you have to look, in every statutory context, at the particular context involved. And in workers' compensation we have a context where of course you want to require, as we do require, the employee to come forward with evidence.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. DuMont.

The case is submitted.

(Whereupon, at 11:03 a.m., the case in the above-entitled matter was submitted.)

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DIRECTOR, OFFICE OF WORKERS'COMPENSATION PROGRAMS, DEPARTMENT OF LABOR Petitioner v. GREENWICH COLLIERIES, ET AL.
No. 93-744

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Marie Federico

(REPORTER)