

ADMINISTRATIVE REVIEW BOARD  
UNITED STATES DEPARTMENT OF LABOR  
WASHINGTON, D.C.

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In the Matter of:

ADMINISTRATOR, WAGE AND HOUR  
DIVISION, U.S. DEPARTMENT OF  
LABOR,

Prosecuting Party,

ARB CASE NO. 2019-0079

v.

BROADGATE, INC.,

Respondent.

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**ADMINISTRATOR’S REPLY BRIEF**

Broadgate’s response brief contends that the Administrative Review Board (“ARB” or “Board”) should not permit the Administrator of the Wage and Hour Division (“WHD”) to rely on a long-established legal principle, the presumption of regularity, to support the authority of a WHD District Director to issue a determination letter. The Supreme Court and multiple federal appellate courts have previously approved use of the presumption in similar circumstances to support the authority of federal administrative officials to act. Broadgate cites no authority in which federal courts or the ARB have declined to allow use of the presumption under such circumstances. Instead, the company states that language in the Administrative Procedure Act (“APA”) placing the burden of proof on the proponent of an order precludes application of the presumption. However, as discussed below, the pertinent APA language does not impose a burden of proof on the Administrator with respect to the parties’ dispute over the District Director’s authority; indeed, the APA’s language suggests that it places the burden on Broadgate

rather than the Administrator with respect to the dispute. Moreover, even if the language places the burden of proof on the Administrator, the Administrator met that burden through the introduction of evidence before the ALJ demonstrating the District Director's authority to issue the determination letter.

**A. THE FIRST SENTENCE OF SECTION 556(d) OF THE ADMINISTRATIVE PROCEDURE ACT—THAT “THE PROPONENT OF A RULE OR ORDER HAS THE BURDEN OF PROOF”—DOES NOT IMPOSE A BURDEN OF PROOF ON THE ADMINISTRATOR WITH RESPECT TO THE PARTIES’ DISPUTE REGARDING WHETHER THE DISTRICT DIRECTOR WAS AUTHORIZED TO ISSUE THE DETERMINATION LETTER.**

1. The opening sentence of section 556(d) of the APA provides, in pertinent part, that the “proponent of a rule or order has the burden of proof.” 5 U.S.C. 556(d). Broadgate asserts that this language precludes applying the presumption of regularity to determine whether the District Director was authorized to issue the determination letter because it would “shift from the Administrator to the respondent the burden of proving that a[n Administrator’s] determination . . . occurred.” Broadgate Response Brief (“Resp. Br.”) at 6. Broadgate’s argument misses its mark because the first sentence in section 556(d) does not impose a burden of proof on the Administrator with respect to the parties’ dispute regarding the District Director’s authority. Rather, the language in section 556(d) only requires an administrative agency (here WHD) or claimant *to prove the underlying substantive violation or claim*. See, e.g., *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 269 (1994) (because section 556(d) obligates a black lung benefit claimant to prove his benefit claim, a regulatory practice that renders the claimant the prevailing party when the evidence is “evenly balanced” with respect to the benefit claim itself violates the APA); *Steadman v. SEC*, 450 U.S. 91, 102 (1981) (section 556(d) obligates the SEC to prove by a preponderance of the evidence that the regulated party committed antifraud violations); *National Mining Association v. Department of Labor*, 292 F.3d

849, 870 (D.C. Cir. 2002) (finding *Greenwich Collieries*' interpretation of section 556(d) "inapplicable" to DOL regulation because the regulation does not "relieve[] claimants of the burden of proving [black lung disease] and the credibility of the doctor's opinion" finding that the pulmonary disorder was "compensable" under the program); *Glen Coal Co. v. Seals*, 147 F.3d 502, 514 (6th Cir. 1998) (section 556(d) "places the burden of proof on the claimant to prove his claim by a preponderance of the evidence") (emphasis added); *Maher Terminals Inc. v. Director, OWCP*, 992 F.2d 1277, 1282 (3d Cir 1993) (section 556(d) requires claimant that "seeks to have an order issued that she is entitled to benefits . . . to bear[] the burden of proving entitlement to benefits by a preponderance of the evidence") (emphasis added). Indeed, the very definition of "order" at 5 U.S.C. 551(6), which encompasses "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form" (emphasis added), strongly suggests that a presumption, such as that of agency regularity, is not the focus of the APA's burden of proof standard at 5 U.S.C. 556(d).

As pertinent here, the Administrator proposed that the ALJ issue an order ruling that Broadgate willfully and substantially failed to provide notice of its filing of LCAs. The ALJ concluded that the Administrator "has proven by a preponderance of evidence that [Broadgate] willfully and substantially failed to provide notice of the filing of LCAs . . . on 14 occasions." D&O at 39, ¶29. Thus, the ALJ found, correctly, that the Administrator presented evidence to support her claim that Broadgate committed the applicable violation that satisfied the governing standard of proof under section 556(d) of the APA. *See Steadman*, 450 U.S. at 102 (ruling that the preponderance of evidence standard applies under section 556(d)).<sup>1</sup> Because section 556(d)

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<sup>1</sup> Although the ALJ found the Administrator proved that Broadgate committed 14 notice violations, he reversed and vacated the Administrator's determination with respect to the notice

solely requires the Administrator to prove the violations at issue and does not impose a burden of proof on the Administrator with respect to the parties' dispute regarding whether the District Director was authorized to issue the determination letter, Broadgate is mistaken that section 556(d) proscribes application of the presumption of regularity to the authority question. Moreover, federal courts reviewing federal administrative decisions have regularly employed the presumption of regularity to conclude that federal officials possessed authority to act. *See, e.g., R.H. Stearns Co. of Boston, Mass. v. U.S.*, 291 U.S. 54, 62-63 (1934) (presuming that IRS Commissioner was authorized to credit tax overassessment); *Coreas v. Holder*, 526 F.App'x 322, 326 (4th Cir. 2013); *Parra-Morela v. Holder*, 504 F.App'x 461, 462 (6th Cir. 2012); *Ochoa-Artega v. U.S. Attorney General*, 322 F.App'x 768, 771-72 (11th Cir. 2009); *Kohli v. Gonzalez*, 473 F.3d 1061, 1069 (9th Cir. 2007).

2. *Greenwich Collieries* is not helpful to Broadgate's APA argument because, as noted above, it solely interpreted section 556(d) to impose a burden of proof with respect to the underlying substantive claim (for black lung benefits). In addition, *Greenwich Collieries* determined that the "true doubt" rule at issue there was inconsistent with section 556(d) because it "essentially shifts the burden of persuasion to the party opposing the benefits claim." 512 U.S. at 269. The Supreme Court characterized the burden of persuasion as the "notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Id.* at 272. Application of the presumption of regularity does not shift the burden of persuasion to Broadgate because the Administrator retains complete responsibility to prove by a preponderance of the evidence that Broadgate willfully and substantially failed to provide notice of the filing of the

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violations based on his legal conclusion that the District Director lacked authority to issue the determination letter. D&O at 40-44.

LCAs. For example, if, subsequent to application of the presumption to the parties' authority dispute, the Administrator only produced evidence equal in weight to the evidence produced by Broadgate with respect to the alleged notice violations, the Administrator, consistent with the reasoning and holding in *Greenwich Collieries*, would not prevail.<sup>2</sup>

3. Whether the District Director was authorized to issue the determination letter is unrelated to the Administrator's obligation to prove the elements of Broadgate's notice violation under section 556(d). Indeed, the ALJ himself perceived the authority issue and the Administrator's burden to prove the underlying violation as sufficiently distinct that he opined on them separately. *Compare* D&O at 39, ¶29 (finding that the Administrator "has proven by a preponderance of evidence that [Broadgate] willfully and substantially failed to provide notice of the filing of LCAs . . . on 14 occasions") *with* D&O at 42, ¶54 ("The Administrator's determination issued to Respondent on December 28, 2018 . . . is invalid and unenforceable with

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<sup>2</sup> Subsequent to *Greenwich Collieries*, appellate courts have reasoned that the use of presumptions is permissible under section 556(d) because, consistent with *Greenwich Collieries'* holding, the statutory provision proscribes solely the shifting of the burden of persuasion and presumptions typically shift the burden of production. *See, e.g., Cablevision Sys. Corp. v. F.C.C.*, 649 F.3d 695, 716 (D.C. Cir. 2011) (upholding rebuttable presumptions that "shift only the burden of production"); *Glen Coal Co.* 147 F.3d at 512 (finding presumption to be "valid under *Greenwich Collieries* because it reallocates only the burden of production, and not the ultimate burden of proof," though ultimately rejecting it as inconsistent with the Black Lung Benefits Act); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 452 (8th Cir. 1997) (presumptions that "ease a black lung claimant's burden of production, but do not shift the burden of persuasion," do not violate section 556(d)); *see also Garvey v. Nat'l Transp. Safety Bd.*, 190 F.3d 571, 580 (D.C. Cir. 1999) (describing the "typical role of presumptions in modern evidence law" as shifting "only the burden of production"); Fed. R. Evid. 301 ("In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally."). These authorities strongly suggest that the Administrator's reliance on the presumption here does not run afoul of *Greenwich Collieries*.

respect to [the notice violations].”).<sup>3</sup> Because resolution of the District Director’s authority to issue the determination letter does not relate to the Administrator’s obligation to prove the underlying substantive violation, section 556(d) itself does not impose a burden on the Administrator to prove that the District Director possessed such authority.<sup>4</sup>

**B. TO THE EXTENT THAT THE FIRST SENTENCE OF SECTION 556(d) IS DEEMED TO APPLY TO THE PARTIES’ DISPUTE REGARDING WHETHER THE DISTRICT DIRECTOR WAS AUTHORIZED TO ISSUE THE DETERMINATION LETTER, IT PLACES THE BURDEN OF PROOF ON BROADGATE AS IT IS THE PROPONENT OF AN ORDER RULING THAT THE DISTRICT DIRECTOR LACKS SUCH AUTHORITY.**

In its “Closing Argument” to the ALJ, Broadgate proposed that the ALJ issue an order ruling that the District Director lacked authority to issue the determination letter. *See Broadgate’s Closing Argument* at 5 (“[T]his Court should issue a verdict to Broadgate on all issues, inasmuch as there is no evidence that the Administrator or her designee . . . issued findings or assessed violations in this matter.”). Broadgate is now proposing that the Board issue an order upholding the ALJ’s order concluding that the District Director lacked authority.

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<sup>3</sup> Broadgate cites the Board’s decision in *Santiglia v. Sun Microsystems*, 2005 WL 182774, ARB Case. No. 03-076 (ARB July 29, 2005), to support its proposition that the Administrator has the burden of proof “as to all issues.” Resp. Br. at 5. However, the Board in *Santiglia* did not hold that the prosecuting party in an H-1B matter bears the burden of proof with respect to all issues that arise in litigation; it more narrowly held that the prosecuting party must prove the elements of its claim. *Santiglia*, 2005 WL at \*4 (quoting Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* §63 (2d Ed. 1994) for the proposition that “the broadest and most accepted idea [is] . . . that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims”). Because the ALJ himself concluded that the Administrator has proven all the elements of her claim that the company failed to provide notice of its filing of LCAs, *Santiglia*’s analysis related to the burden of proof supports the Administrator’s rather than Broadgate’s position.

<sup>4</sup> Because the Administrator’s obligation to prove the elements of the notice violation is unrelated to whether the District Director possessed authority to issue the determination letter, Broadgate is incorrect when it asserts that establishing the District Director’s authority to issue the determination letter “is an element of” proving the underlying substantive violation. Broadgate Br. at 6.

Throughout this proceeding, the Administrator has merely opposed the company's proposal that Department adjudicators issue an order ruling the District Director lacked authority to issue the determination letter. Accordingly, section 556(d) places the burden on Broadgate, as the order's proponent, to prove that the District Director lacks such authority. *See* S.Rep. No. 752, 79th Cong., 1st Sess., 22 (1945) (APA Legislative History) ("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 with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain.").

**C. TO THE EXTENT THAT THE FIRST SENTENCE OF SECTION 556(d) APPLIES TO THE PARTIES' DISPUTE REGARDING WHETHER THE DISTRICT DIRECTOR WAS AUTHORIZED TO ISSUE THE DETERMINATION LETTER AND PLACES THE BURDEN OF PROOF ON THE ADMINISTRATOR, THE ADMINISTRATOR HAS SUBMITTED SUFFICIENT EVIDENCE PROVING THE DIRECTOR'S AUTHORITY TO ISSUE THE LETTER.**

Even if one assumes that section 556(d) requires the Administrator to prove that the District Director possessed authority to issue the determination letter, the Administrator submitted sufficient evidence substantiating the Director's authority. First, the Department introduced evidence showing that District Directors are responsible for all enforcement activity within their respective offices, including scheduling investigations and determining their scope, and that this particular District Director had previously issued an H-1B determination letter to Broadgate. *See Administrator's Opening Brief* ("Admin. Br.") at 12-13, 17-18. The H-1B investigative process culminates in the issuance of a determination letter. *See* 20 C.F.R. 655.806(b). Thus, the responsibility to oversee an office's enforcement activities includes the authority to issue an office's ultimate enforcement document.

Second, a Department regulation defines "Administrator" to include "authorized

representatives . . . designated to perform” her “functions.” 20 C.F.R. 655.715. The Administrator relied on evidence in the record, including a District Director’s status as a subordinate of the Administrator selected to perform duties that the Administrator has approved, to show that the District Director is an authorized representative of the Administrator pursuant to the definition of *Administrator* at section 655.715. *See* Admin. Br. at 16-18.

The Administrator has accordingly submitted compelling and sufficient evidence demonstrating that a District Director possesses authority to issue a determination letter.

### **CONCLUSION**

For the foregoing reasons and those provided in the Administrator’s Opening Brief, the Administrator requests that the Board reverse the ALJ’s decision concluding that the WHD District Director did not have the authority to issue the H-1B determination letter in this case, and issue an order of debarment against Broadgate.



Respectfully submitted,

KATE S. O'SCANNLAIN  
Solicitor of Labor

JENNIFER S. BRAND  
Associate Solicitor

SARAH K. MARCUS  
Deputy Associate Solicitor

PAUL L. FRIEDEN  
Counsel for Appellate Litigation

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QUINN PHILBIN  
Senior Attorney  
U.S. Department of Labor  
Office of the Solicitor  
200 Constitution Ave., N.W.  
Room N-2716  
Washington, D.C. 20210  
(202) 693-5561

**CERTIFICATE OF SERVICE**

I hereby certify that on December 16, 2019, I served the foregoing Administrator's Reply

Brief on the following by sending a copy via first-class mail to:

Steven D. Bell  
Administrative Law Judge  
Office of Administrative Law Judges  
36 E. 7th St., Ste. 2525  
Cincinnati, Ohio 45202

Michael Piston  
225 Broadway, Suite 307  
New York, New York 10007

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Quinn Philbin