

hearing the burden “to present information relating to the issuance and continuance of such order [Section 104(a) withdrawal order].” *Id.* at 36 (bracketed text in original). The court agreed:

We think that an examination of the statutory scheme as a whole, as well as a review of the legislative history of the Act \* \* \*, supports respondents’ argument that the Secretary’s regulation is consistent with the intent of Congress to place upon the mine operator the primary responsibility for the safety of miners.

*Id.* The court found “no compelling indications that the Secretary was wrong in interpreting the Act to place the burden of proof on the petitioner.” *Id.* On Petition for Rehearing, the court clarified that, “[i]n practice \* \* \*, the burden of proof is split, with the Government bearing the burden of going forward [to establish a prima facie case], and the mine operator bearing the ultimate burden of persuasion.” *Id.* at 39, 40.

Since *Old Ben* dealt with the exception language in 5 U.S.C. 556(d), rather than the meaning of the term “burden of proof,” it remains good law after the Supreme Court’s decision in *Greenwich Collieries*. II Richard J. Pierce, Jr., *Administrative Law Treatise* § 10.7 (4th ed. 2002), at 760–61.

A similar examination of SMCRA’s language and legislative history demonstrates that the allocation of the burden of proof in 43 CFR 4.1171 is likewise consistent with the intent of Congress. The purpose of the hearing provided in section 525(a)(1) is not for the Secretary to prove that a violation exists but “to enable *the applicant* \* \* \* to present information relating to the issuance and continuance of [the] notice or order \* \* \*,” (emphasis supplied). Thus SMCRA itself places the burden of proof on the applicant. This interpretation is clear from the legislative history:

In order to assure expeditious review and due process for persons seeking administrative relief of enforcement decisions of Federal inspectors under the provisions of section [521], section [525] establishes clear, definitive administrative review procedures. Those persons having standing to request such administrative review include permittees against whom notices and orders have been issued pursuant to section [521] and persons having an interest which is or may be adversely affected by such notice or order. Any person with standing may request a public hearing which must be of record and subject to the Administrative Procedure Act. *The person seeking review shall have the ultimate burden of proof in proceedings to review notices and orders issued under Section [521].* Pending review the notice or order complained of will remain in effect. \* \* \*

S. Rep. No. 95–128, 95th Cong., 1st Sess., 92–93 (1977).

The legislative history also confirms what is obvious from the language of the two statutes, namely, that SMCRA’s enforcement provisions were modeled after those in the Coal Mine Health and Safety Act. *Id.* at 58. Thus, comparable to the regulation at issue in *Old Ben*, 43 CFR 4.1171 properly allocates to OSM the burden of going forward to establish a prima facie case as to the validity of the notice of violation or cessation order (or its modification, vacation, or termination), and to the applicant for review the ultimate burden of persuasion.

#### B. Civil Penalty Proceedings

Section 518(a) of the Act, 30 U.S.C. 1268(a), provides that a permittee who violates the Act or a permit condition may be assessed a civil penalty. Section 518(b) provides that the penalty may only be assessed after the person charged with a violation has been given the opportunity for a public hearing conducted in accordance with section 554 of the APA. Section 518(c) provides that the person charged may contest the amount of the penalty or the fact of the violation.

Section 518(b) also provides that, when there has been a hearing, “the Secretary shall \* \* \* issue a written decision as to the occurrence of the violation and the amount of the penalty which is warranted” and “shall consolidate such hearings with other proceedings under section 521” when appropriate.

When OHA originally adopted the regulation governing burdens of proof in civil penalty proceedings, 43 CFR 4.1155, it allocated both the burden of going forward to establish a prima facie case and the burden of persuasion to OSM, with respect to both the fact of violation and the amount of the penalty. 43 FR 34376, 34393 (Aug. 3, 1978). The result was that the allocation of the ultimate burden of persuasion as to the fact of a violation was inconsistent with the legislative history of the Act discussed above in connection with section 525. In addition, when there was a consolidated hearing to review a notice or order issued under section 521 and a civil penalty proposed under section 518, there were contradictory provisions allocating the ultimate burden of persuasion as to the fact of a violation: § 4.1171 to the applicant for review and § 4.1155 to OSM. 52 FR 38246–38247 (October 15, 1987).

In 1988, therefore, OHA amended § 4.1155 to provide that “OSM shall have the burden of going forward to establish a prima facie case as to the fact

of the violation and the amount of the civil penalty and the ultimate burden of persuasion as to the amount of the civil penalty.” A person who petitions for review of a proposed assessment of a civil penalty, however, has “the ultimate burden of persuasion as to the fact of the violation.”

Viewing the statutory scheme as a whole, including the interplay among SMCRA sections 518, 521, and 525, and in view of the legislative history and case precedent discussed above, OHA concludes that the burden of proof as to the fact of the violation in civil penalty proceedings fits within the exception language of 5 U.S.C. 556(d) and that 43 CFR 4.1155 is consistent with Congressional intent.

#### C. Individual Civil Penalty Proceedings

Section 518(f) of the Act, 30 U.S.C. 1268(f), provides that, when a corporate permittee violates a condition of its permit or fails or refuses to comply with any order issued under section 521 of the Act or any order in a final decision by the Secretary (with certain exceptions), any director, officer, or agent of the corporation who willfully and knowingly authorized, ordered, or carried out the corporation’s violation or its failure or refusal to comply, “shall be subject to the same civil penalties \* \* \* that may be imposed upon a person” under section 518(a).

43 CFR 4.1307(a) allocates to OSM the burden of going forward with evidence to establish a prima facie case that (1) the corporation violated a permit condition or failed or refused to comply with an order; (2) the individual was a director, officer, or agent of the corporation at the time of the violation; and (3) the individual acted willfully and knowingly. Section 4.1307(b) imposes on the individual the ultimate burden of persuasion as to (1) whether the corporation violated a permit condition or failed or refused to comply with an order and (2) whether he or she was a director or officer at the time of the violation or refusal. Section 4.1307(c) imposes on OSM the ultimate burden of persuasion as to (1) whether the individual was an agent of the corporation and (2) the amount of the individual civil penalty.

Just as the statutory scheme, legislative history, and court precedent discussed above assign the burden of persuasion as to the fact of a violation to a corporate permittee under section 518(a), so they support allocating the burden of proof on that issue to the individual under section 518(f). However, the same conclusion cannot be drawn as to the individual’s role in the corporation. Since SMCRA does not