UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
WASHINGTON, D.C. 20230

IN THE MATTER OF: Mark Cordeiro and Willie Etheridge III, Respondents.	Docket No: SE040289

DETERMINATION AND ORDER ON DISCRETIONARY REVIEW

I. INTRODUCTION

This matter arises from a petition for discretionary review filed by Mark Cordeiro and Willie Etheridge III (Respondents) in the above captioned case. This is the second time this case has been before the Administrator; the case was reviewed by the Administrator and remanded in 2008 for further consideration by the Administrative Law Judge (ALJ). In this second petition, Respondents claim ALJ Parlen M. McKenna committed legal error in his Decision and Order Following Remand issued January 5, 2011. Specifically, Respondents contend that the ALJ imposed an improper burden of proof when Respondents sought to rebut the statutory presumption of shark finning established in the Magnuson-Stevens Fishery Conservation Act (Magnuson-Stevens Act).

For the reasons set forth below, the ALJ's Decision and Order Following Remand is affirmed except with respect to the permit sanction, which is hereby suspended subject to conditions set forth below.

II. LEGAL BACKGROUND

This case involves charges of "shark finning," a practice prohibited under the Magnuson-Stevens Act. Shark finning is defined in NOAA's regulations to mean "taking a shark, removing a fin or fins (whether or not including the tail), and returning the remainder of the shark to the sea."[1] Under the Magnuson-Stevens Act as in effect at the time of the alleged violation[2] it was

[1] 50 C.F.R. § 600.1202(a).

[2] These provisions were amended in December 2010 to require that shark fins must remain attached to the carcass,

unlawful: (1) to remove any fins of a shark (including the tail) and discard the carcass of the shark at sea; (2) to have custody, control, or possession of any such fin aboard a fishing vessel without the corresponding carcass; or (3) to land any such fin without the corresponding carcass.[3]

The Magnuson-Stevens Act also established a rebuttable presumption that shark finning had occurred when "the total weight of shark fins landed or found on board [a fishing vessel] exceeds 5 percent of the total weight of shark carcasses landed or found on board."[4] This presumption is often referred to as "the 5 percent rule."

NOAA promulgated rules implementing the shark-finning provisions of the Magnuson-Stevens Act, including the 5 percent rule.[5] In adopting these regulations, NOAA explained:

> This final rule establishes a rebuttable presumption that any shark fins possessed on board a U.S. fishing vessel, or landed from any fishing vessel, were taken, held or landed in violation of these regulations if the total weight of the shark fins exceeds 5 percent of the total dressed weight of shark carcasses landed or found on board the vessel. It would be the responsibility of the person conducting the activity to rebut the presumption by providing evidence that the fins were not taken, held or landed in violation of these regulations.[6]

III. FACTUAL AND PROCEDURAL BACKGROUND

On eighteen occasions in 2003 and 2004, Respondents Mark Cordeiro and Willie Etheridge III landed shark fins that exceeded 5 percent of the dressed weight of the corresponding shark carcasses.[7] These facts were established by Respondents' landing tickets and processing receipts, and Respondents do not dispute their accuracy.

In April 2006, NOAA's Office of Law Enforcement issued to Respondents a Notice of Violation and Assessment of Administrative Penalty and a Notice of Permit Sanction based on 18 charges of shark finning. In response to these charges, Respondents sought a hearing before an ALJ. Following a hearing, the ALJ issued an Initial Decision upholding the agency on all 18 charges and imposing penalties of $180,000 and a 180-day permit suspension. Notably, at this initial hearing the ALJ treated the matter as a strict liability case, and did not entertain evidence from Respondents seeking to rebut the presumption established by the 5 percent rule.

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among other requirements. The changes do not affect this appeal, which is considered under the provisions in effect at the time of the alleged violation.

[3] 16 U.S.C. § 1857(1)(P).

[4] *Id.*

[5] 50 C.F.R. § 600.1203(b).

[6] 67 Fed. Reg. 6195 (February 11, 2002).

[7] Unless otherwise noted, the facts in this section are derived from the ALJ's Decision and Order Following Remand (January 5, 2011).

Respondents timely sought discretionary review of the ALJ's decision. The NOAA Administrator accepted review and, in February 2008, remanded the matter for further consideration.[8] Specifically, the Administrator determined that the ALJ had erroneously treated the 5 percent rule as an irrebuttable presumption. On remand, the ALJ was instructed to allow Respondents to present evidence to rebut the presumption they were shark finning.

The hearing following remand was held in October 2009. At hearing, Respondents introduced evidence explaining why their fin-to-carcass ratio was so high. Among other reasons, Respondents explained that they: (1) took all eight fins from the sharks they landed – not just the four primary fins; (2) landed a majority of sandbar sharks, which due to their body structure have a high fin-to-carcass weight ratio; (3) cut the fins with extra meat attached adding additional weight to the fins landed; (4) soaked and iced the fins, which also added to the fin weight; and (5) dressed the carcasses such that their weight was reduced. All of these factors tend to increase the fin-to-carcass ratio.

The ALJ took Respondents' evidence into consideration as he examined each of the 18 charges. For 13 of the 18 charges, the ALJ found the adjustments resulting from the rebuttal evidence were not sufficient to explain the full amount by which the fin-to-carcass ratio exceeded the 5 percent threshold and thus the violations were proven. For the remaining 5 charges, the ALJ found Respondents had provided sufficient evidence to explain the full amount of the overage and thus rebut the presumption, and accordingly found the charges unproven. For the proven violations, the ALJ imposed a penalty of $19,500 and a permit sanction of 60 days, limited to any Federal shark permits held.

The ALJ's Decision and Order Following Remand (Decision) was issued on January 5, 2011. Respondents timely petitioned for discretionary review.

IV. DISCUSSION

The sole issue in this case is whether the ALJ committed legal error when he found that Respondents failed to successfully rebut the presumption of shark finning for 13 of the 18 alleged violations. Respondents contend that the ALJ imposed an overly stringent burden of proof on Respondents, and, had the appropriate burden been applied, the ALJ should have found Respondents successfully rebutted the presumption on all charges.

For the reasons discussed below, the ALJ's Decision and Order Following Remand is affirmed in part and modified in part.

A. Defining Respondents' Burden

In the Decision, the ALJ spent considerable time explaining the parties' differing views on the applicable burden of proof, and the effect of the rebuttable presumption underlying the 5 percent rule on that burden.[9] As an initial matter, the ALJ explained that to prevail in the case, the

[8] *In re Mark Cordeiro and Willie Etheridge, III*, 2008 WL 948340 (NOAA App. February 25, 2008).

[9] Decision at 22-38.

agency must prove each violation by a preponderance of the evidence, which means the agency must show "it is more likely than not a respondent committed the charged violation."[10]

In the current case, to meet its burden of proof on the shark-finning charges, the agency relied on the rebuttable presumption set forth in the Magnuson-Stevens Act.[11] The ALJ found – and Respondents do not contest – that the agency "clearly established its *prima facie* case to invoke the statutory presumption."[12] However, the analysis does not end there. On remand, Respondents were afforded the opportunity to present evidence to rebut the presumption of shark finning, and the ALJ accordingly was required to consider what evidentiary burden Respondents would have to meet in order to overcome the presumption.

At hearing, Respondents argued (and they reassert in their current Petition for Discretionary Review) that once they offer any credible evidence to rebut the presumption of shark finning, the presumption completely disappears. The agency disagreed, and argued instead that, once invoked, the presumption shifts the ultimate burden of proof to Respondents, akin to the burden Respondent would face when asserting an affirmative defense. The ALJ examined these competing views and rejected them both.

Specifically, the ALJ found that shifting the ultimate burden of proof to Respondents – as the agency proposed – would effectively force Respondents to prove a negative (*i.e.*, that they did not engage in the prohibited practice of shark finning). Such a burden he found "patently onerous" and unfair.[13] Nevertheless, while the ultimate burden of proof remains with the agency, in order to overcome the presumption of shark finning, Respondents must come forward with evidence sufficient to rebut it, and – contrary to Respondents' views – simply producing *any* credible evidence is not enough; rather, Respondent must come forward with "reliable, credible and probative evidence to establish reasons why the particular fin-to-carcass ratio in a given charge exceeded the statutory/regulatory threshold."[14]

The ALJ's finding is well founded. In the face of legislative history and regulatory preambles that provide little guidance, the ALJ examined applicable policy and precedent and made a reasoned determination on the appropriate standard to apply.

Theories on the effect of rebuttable presumptions and the proof required to overcome them vary widely.[15] Long-standing efforts to formulate a single governing rule have failed, and therefore it is necessary to view each presumption based on the policy and law that give rise to it.[16]

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[10] Decision at 22 (*citing* 5 U.S.C. § 556(d); *In re Cuong Vo*, 2001 WL 1085351 (N.O.A.A. 2001); *Herman & Maclean v. Huddleston*, 459 U.S. 375, 390 (1983)).

[11] 16 U.S.C. § 1857(1)(P).

[12] Decision at 28.

[13] Decision at 31-32.

[14] Decision at 37.

[15] 2 McCormick on Evid. § 344 ("The problem of the effect of a presumption when met by proof rebutting the presumed fact has literally plagued the courts and legal scholars.")

[16] *Id.*

The rebuttable presumption underlying the 5 percent rule was enacted in 2000 with the enactment of the Shark Finning Prohibition Act (Act).[17] The purpose of the Act was "to eliminate shark-finning by addressing the problem comprehensively at both the national and international levels." Act at § 2. The Act amended the Magnuson-Stevens Act by making it unlawful to engage in shark finning and added the rebuttable presumption at issue in this case.[18] Nothing in the legislative history of the Shark Finning Prohibition Act indicates Congress's intent with respect to the burden of proof necessary to overcome this presumption.[19]

When NOAA proposed rules implementing the Act, it discussed the 5 percent rule, and indicated that when this presumption applied "[i]t would be the responsibility of the person involved to rebut the presumption by providing evidence that there is a *good reason* for the weight of the fins to exceed the 5-percent threshold."[20] In its final rule, the agency further explained that to rebut the presumption the person conducting the activity would need to provide "evidence that the fins were not taken, held or landed in violation of these regulations." [21]

While there are no cases examining the burden of proof necessary to rebut the presumption underlying the 5 percent rule, analogous agency precedent supports the ALJ's approach. For example, in a NOAA case involving illegal clamming, the ALJ concluded respondents had not met their burden to disprove the agency's *prima facie* case of violation when respondents failed to "adduc[e] reliable, probative, and convincing evidence" to rebut the presumption that the undersized clams seized had been taken in Federal waters.[22]

Respondents rely on the Federal Rules of Evidence, Rule 301, to suggest that the burden imposed on them by the ALJ was too stringent. While the Federal Rules do not strictly speaking apply to agency proceedings,[23] the Rule's discussion of presumptions is instructive, and – contrary to Respondents' contention – supports the ALJ's approach. Rule 301 provides:

> 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

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[17] Pub. L. No. 106-557, 114 Stat. 2772 (December 21, 2000).

[18] The ALJ noted that the presumption "serves a legitimate enforcement purpose" by allowing the agency to make its *prima facie* case on indirect, paper evidence of finning (i.e., fin-to-carcass ratios in landing reports), because it would be impossible to have agents on the docks for every landing to physically match fins to every carcass. Decision at 28-29.

[19] *See* Cong. Rec. H11571-11572 (daily ed. October 30, 2000) and S11744-11745 (daily ed. December 7, 2000) (House of Representative and Senate remarks on the Shark Finning Prohibition Act). The lack of clarifying legislative history is acknowledged by the ALJ. Decision at 34.

[20] 66 Fed. Reg. 34401 (June 28, 2001) (emphasis added).

[21] 67 Fed. Reg. 6194 (February 12, 2002).

[22] *In the Matter of William Granau and Curtis Smith*, 4 O.R.W. 163, 168 (NOAA April 25, 1985), 1985 WL 69229. *Compare, In the Matter of Bruce Heck*, 6 O.R.W. 816, 819 (NOAA July 15, 1992), 1992 WL 347559 (finding respondents faced a "heavy burden" when attempting to overcome a statutory rebuttable presumption arising under the National Marine Sanctuaries Act).

[23] 15 C.F.R. § 904.251(a)(2).

presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

In the explanatory note accompanying Rule 301, the view espoused by Respondents – the so-called "bursting bubble" theory of presumptions, where a presumption vanishes upon the appearance of any contradictory evidence – is discounted because "it gives presumption too slight an effect."[24] Likewise, a presumption that shifts the ultimate burden of proof – as the agency argued at hearing – was also disfavored because it "lends too great a force to presumptions." The note goes on to explain that Rule 301is designed to adopt an intermediate approach.

Such an approach is precisely what the ALJ adopted in the current case. The ALJ left the ultimate burden of persuasion on the agency, but required Respondents to provide reliable, credible and probative reasons why the particular fin-to-carcass ratio for a given charge exceeds the threshold of 5 percent in order to rebut the statutory/regulatory presumption.

In sum, the ALJ analyzed apposite law and policy, and came to a well-reasoned decision on the burden placed on Respondents when seeking to rebut the statutory presumption of shark finning. In their Petition, Respondents provide no persuasive arguments why this decision should be disturbed.

B. Applying the Standard

Having appropriately defined Respondents' evidentiary burden, the ALJ carefully applied it. Respondents' evidence was given substantial weight.[25] The ALJ examined this evidence on a charge-by-charge basis to determine whether Respondents provided an adequate – *i.e.,* reliable, credible and probative – reason why their fin-to-carcass ratios was in excess of 5 percent. Each charge involved a unique set of variables: the fin weight per landing, types of sharks, and other parameters varied on each occasion. By taking into account the factors for which Respondents provided evidence, and applying the factors to the specific parameters underlying each charge, the ALJ calculated what level of fin-to-carcass ratio above 5 percent had been adequately explained. He literally showed his math.

So, for example, for the first charge the fin weight equaled 297 pounds and the carcasses 3,973 pounds (a fin-to-carcass ratio of 7.48 percent). Accounting for the factors introduced by Respondents – *e.g.,* Respondents cut the fins with extra meat attached, soaked and iced the fins, dressed the carcasses in a manner that reduced their weight, took eight fins instead of just the primary four fins, etc. – the ALJ determined Respondents had adequately explained some, but not all, of the overage above the 5 percent rule (fin weight representing 0.12 percent of the carcass weight remained unexplained), and the ALJ accordingly determined that the statutory presumption had not been rebutted and the charge had been proven. The same approach was

[24] Fed. R. Evid. 301, note.

[25] Decision at 39 ("Given the total absence of direct evidence of shark finning and the seriousness of the charges, the undersigned reviewed all the record evidence to give as much credence to Respondents' contentions as reasonable based on a preponderance of the evidence.")

taken with respect to each charge. In the end, the ALJ found Respondents had provided sufficient reasons to explain their overages (and therefore successfully rebutted the presumption of shark finning) for 5 of the 18 charges.

While generally acknowledging the ALJ's examination of the evidence was thorough and well reasoned,[26] Respondents nevertheless contend that the ALJ: (1) should have found the presumption underlying the 5 percent rule fully rebutted when any amount of overage was explained (whether or not their evidence explained only part of the overage); and (2) did not give sufficient weight to Respondents' testimony denying that they engaged in finning.

With respect to the first argument, Respondents' proposed approach is both illogical and unsupported. If Respondents' view were accepted, the presumption of shark finning would vanish the moment any evidence was provided explaining a fin-to-carcass ratio above 5 percent. So, if Respondents provided an adequate explanation for a fin-to-carcass ratio of 5.01 percent, they would have successfully rebutted the presumption of shark finning, even if the actual fin-to-carcass ratio demonstrated by their landing reports was much higher. In short, Respondents' theory relieves them of the need to explain the extent of their overage. Their evidentiary burden to defeat the presumption would be the same whether they had a 6 percent fin-to-carcass ratio, a 10 percent fin-to-carcass ratio, or an even higher ratio. Taken to its extreme, Respondents would be able to overcome a presumption of shark-finning based upon evidence explaining a fin-to-carcass ratio only a scintilla above 5 percent no matter how egregious the actual overage – even if they landed only fins (a 100 percent fin-to-carcass ratio).[27] As discussed above, there is no basis in the Magnuson-Stevens Act, NOAA regulations, or relevant legislative history and case law to suggest this rebuttable presumption of shark finning should be given so slight an effect.

Respondents' argument regarding the weight the ALJ afforded their testimony also lacks merit. During the hearing, Respondents consistently denied finning. The ALJ considered this testimony, but ultimately found it was not sufficient to rebut the presumption of shark finning.[28] This is consistent with NOAA precedent.[29] Further, NOAA regulations and past administrative decisions clearly provide that an ALJ is endowed with broad authority to determine what evidence is relevant, reliable, and probative to the case at hand.[30] It is the ALJ's role as finder of fact to determine witness credibility and assess all germane evidence, based upon all relevant

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[26] Petition at 10 ("[T]he ALJ clearly spent a significant amount of time analyzing the evidence in this case" and "did an admirable job set[ting] forth expected fin to carcass ratios. . . .")

[27] The ALJ provides a similar hypothetical clarifying why Respondents' approach is unworkable, and concludes: "Surely at some point a fin-to-carcass ratio reaches proportions that are simply not explainable with reference to the rebuttal evidence proffered and the Agency is entitled to a finding of charge proved based on a preponderance of the evidence and respondent's failure to adequately rebut the presumption triggered by exceeding the 5% fin-to-carcass ratio." Decision at 37 n.18.

[28] Decision at 31 ("A mere denial is simply not enough from an interested party.").

[29] *See, e.g., In the Matter of William Granau, Curtis W. Smith*, 4 O.R.W. 163, 167-68 (NOAA April 25, 1985), 1985 WL 69229 (finding respondents' testimony denying violations to be insufficient to rebut the presumption that the illegal clamming occurred in Federal waters).

[30] Magnuson-Stevens Act regulations specify that an ALJ is empowered to "receive, exclude, limit and otherwise rule on...evidence." 15 C.F.R. § 904.204(h); *In re Billy P. Archer, Linda M. Archer, & F/V Seminole Wind*, 2010 WL 2395562 (NOAA 2010).

facts and surrounding testimony.[31] These findings are not disturbed upon review unless the judge has committed an abuse of discretion.[32] There is no indication of an abuse of discretion in this case.

C. Penalty and Permit Sanction

The ALJ reduced the penalty from the original $180,000 to $19,500, reflecting a monetary penalty of $1,500 per proved violation, and reduced the permit sanction from 180 days to 60 days, limited to any Federal shark permits held. I affirm the $19,500 penalty assessed by the ALJ that I have determined is reasonable and supported by the record. However, I suspend the 60 day permit sanction, subject to the condition that Respondents have committed no subsequent violations since the violations giving rise to this enforcement action.

V. CONCLUSION

The ALJ's Decision and Order on Remand is affirmed in part and modified in part. The $19,500 penalty is affirmed. The 60 day permit sanction is suspended, subject to the condition that Respondents have committed no violations of any fisheries law between July 29, 2004, and the date of this order. If either Respondent has committed a violation within this time period, the 60 day permit sanction against that Respondent's shark permit shall become effective, and shall be imposed in the next fishing year or, in the event final agency action has not yet occurred on the violation, in the fishing year after the violation becomes final. This order constitutes the final administrative decision in this matter.

OCT 11 2012

Date

Jane Lubchenco, Ph.D.
Under Secretary of Commerce
for Oceans and Atmosphere

[31] *In re Town Dock Fish, Inc.*, 6 O.R.W. 580 (NOAA App. 1991), 1991 WL 432066; *In re Meredith Fish Company*, 4 O.R.W. 914 (NOAA App. July 15, 1987), 1987 WL 119980.

[32] *U.S. v. Becton*, 601 F.3d 588, 594-97 (D.C. Cir. 2010).

Certificate of Service

I hereby certify that this Determination and Order on Discretionary Review has been served by certified mail, return receipt requested, on the following persons or their designated representatives:

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