

R.C.T. ENGINEERING, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 88-157

Decided October 28, 1991

Appeal from a decision of Administrative Law Judge Joseph E. McGuire denying applications for review of Cessation Orders (CO) Nos. 86-84-407-001 and 86-84-407-002. Hearing Division Docket Nos. NX7-7-R and NX6-103-R.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: State Program: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

Under SMCRA, a state with an approved state program has primary responsibility for enforcing its state standards, but OSM, in an oversight role, has the responsibility of enforcing those same standards on a mine-by-mine basis, if the state fails to do so.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: State Regulation: Generally

The doctrines of collateral estoppel and res judicata will not preclude OSM from issuing its own cessation order in situations where a similar cessation order was issued and litigated by a state regulatory authority because the statutory scheme of SMCRA evidences a countervailing statutory policy against application of those doctrines in such a situation.

3. Evidence: Hearsay

Hearsay evidence is admissible in an administrative proceeding if it is relevant and material, and may constitute "substantial evidence" within the meaning of 5 U.S.C. § 706(2)(E) (1988), if it is reliable and probative. A multifactor analysis is used to assure reliability when hearsay evidence is the sole basis for agency action, and a decision by an Administrative Law Judge is properly reversed if the resolution of a dispositive issue is based solely on hearsay evidence that fails to satisfy the required analysis.

APPEARANCES: Marilyn Benge McGhee, Esq., London, Kentucky, for appellant; Paul A. Molinar, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

R.C.T. Engineering, Inc. (RCT), has appealed from the November 25, 1987, decision of Administrative Law Judge Joseph E. McGuire denying its applications for review of Cessation Orders (CO) Nos. 86-84-407-001 and 86-84-407-002. These CO's were grounded on the following asserted violation: "Mining without a valid surface coal mining permit from the State of Kentucky (Exceeding two acres)." 1/

When these CO's were issued, section 528(2) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), P.L. 95-87, 91 Stat. 514, provided that the Act would not apply to "the extraction of coal for commercial purposes when the surface mining operation affects two acres or less." The 2-acre exemption "turned out to be the most misused and abused provision of SMCRA" (H.R. Rep. No. 59, 100th Cong. 1st Sess. 3 (1987)), and was eliminated by the Act of May 7, 1987, P.L. 100-34, 101 Stat. 300. Departmental regulations implementing the statutory exemption similarly provided that SMCRA applied to all surface mining and related activities except those "where the surface coal mining and reclamation operation, together with any related operations, has or will have an affected area of two acres or less." 30 CFR 700.11(b)(1984); see Fresa Construction Co. v. OSM, 106 IBLA 179, 95 I.D. 293 (1988). Under both 30 CFR 700.11(b)(2) and 405 KAR 7:030.1(2), surface coal mining operations are considered related if they occur within 12 months of each other, are physically related, and are under common ownership or control. 2/ The circumstances which led to issuance of the CO's and this appeal provide one example of an attempt to exploit the 2-acre exemption to mine a larger site without having to meet the reclamation requirements of SMCRA.

A parcel of land in Leslie County, Kentucky, owned by Sarah Thrasher, who is not a party to this case, contains an area of more than 3 acres that has been disturbed by surface mining. A highwall more than 500 feet long and about 30 feet high remains on the site (Tr. 110-11). Had this area been mined pursuant to a permit for a mine exceeding 2 acres, the permittee would have been required by section 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3)

1/ CO No. 86-84-407-002 (Exh. R-13) was issued first for the stated violation. This CO, based on an Aug. 19, 1986, inspection, was served on appellant on Aug. 20, 1986. Subsequently, CO No. 86-84-407-001 (Exh. R-15) was issued and served on Sept. 22, 1986, for failure to abate the violation cited in the earlier CO.

2/ After Congress eliminated the 2-acre exemption, the Office of Surface Mining Reclamation and Enforcement (OSM) suspended 30 CFR 700.11(b) insofar as it exempts any surface coal mining operations commencing on or after June 6, 1987, and any surface coal mining operations conducted on or after Nov. 8, 1987. 52 FR 21229 (June 4, 1987).

(1988), to reclaim the site by eliminating the highwall and restoring the site to its approximate original contour.

In December 1983, RCT leased a portion of the site from Thrasher. ^{3/} On May 14, 1984, the Kentucky Department for Surface Mining Reclamation and Enforcement (DSMRE) issued a "Two Acres or Less Surface Coal Mining and Reclamation Operations Permit" No. 866-0063 to RCT, effective May 11, 1984, to May 11, 1986 (Exh. R-1). Surface mining under this permit was conducted during May and June 1984 (Tr. 146), and upon completion of reclamation work in October, RCT applied for and was granted a grade release from DSMRE (Decision at 6). Appellant's Exhibits A through O are State mine inspection reports for RCT's permit that show monthly inspections of the site by Anthony Charles from June to October 1984 (Exhs. A-E).

By application dated March 5, 1984, Sarah Thrasher, whose signature was notarized by Robin McGhee, RCT's President, filed an application for a permit to mine 2 acres or less on land that abutted the northwest boundary of RCT's permit and overlapped it to some extent. ^{4/} This application was prepared by Jerry L. McGraner, a professional engineer employed by RCT who had also prepared the application for permit No. 866-0063. Robin McGhee testified that although there is no other relationship between Thrasher and appellant, his firm prepared the permit application along with about 35 or 40 other permit packages in 1984 (Tr. 150-51). Mining on the Thrasher permit was not conducted by appellant (Tr. 149).

Permit No. 866-0097 was issued on January 9, 1985, and was due to expire on January 9, 1987. Contour mining under the Thrasher permit was conducted between January and March 1985 (Tr. 265-66).

Kentucky's DSMRE had assembled a task force of inspectors to inspect mines for which 2-acre permits were issued. Inspector Ed Asher's inspections of the RCT permit did not commence until March 1985 (Exh. F), when operations on the Thrasher permit were being completed. Thus, Asher did not have the opportunity to observe where surface disturbance by RCT ended and where mining on the Thrasher permit began. After his April 16, 1985, inspection, Asher issued a Notice of Non-Compliance citing appellant for mining without a valid permit, noting that approximately 2.11 acres were disturbed (Exh. P). Appellant was ordered to either obtain a permanent program permit or return the highwall to approximate original contour. Appellant was also issued another notice of non-compliance dated June 3,

^{3/} The December 1983 lease from Sarah Thrasher is identified as the source of RCT's right to mine the area in the permit application package. The permit application package for the RCT permit was referred to in the testimony at the hearing as Exhibit S (Tr. 117, 148). This exhibit was apparently not marked with the exhibit letter as it was received with the record identified as an unmarked exhibit.

^{4/} The Thrasher permit package, including DSMRE inspection reports, was identified at the hearing as Exhibit R (Tr. 117, 262-63), but like Exhibit S, was received with the record as an unmarked exhibit.

1985 (Exh. Q). A survey conducted by Jessie Gilpin referred to in the State hearing officer's decision is said to have calculated the acreage at 2.08 acres.

At the hearing initiated by Asher's notices, Robin McGhee and James H. Fields testified that a survey by Fields, a professional engineer, showed that RCT had disturbed only 1.55 acres and that an obvious overlap involving an adjoining permit was readily apparent because of the difference in the color of vegetation used to reclaim each of the permit areas. These proceedings culminated in the issuance of a decision on November 9, 1985, by DSMRE Hearing Officer Tilden L. Combs who concluded as follows:

Once again, we have a contradiction in the total amount of area that has been disturbed by this permittee. However, there seems to be no contradiction that the reclamation work has all been completed satisfactorily. There is no evidence that the possibility of environmental harm exists. The testimony regarding the measurement of the permitted area by the president of the company and an inspector is not contradicted. Therefore, it is recommended that the Non-Compliance and Cessation Order issued herein be dismissed in their entirety.

Natural Resources & Environmental Protection Cabinet v. R.C.T. Engineering, File No. PHS 2-2821-39-III.

Meanwhile, on June 7, 1985, OSM had concluded a settlement of Save Our Cumberland Mountains v. Hodel, CA No. 81-2238 (D.D.C.), which required OSM to determine whether some 3,000 surface mining operations in Virginia and Kentucky had been properly granted 2-acre exemptions by the State regulatory authorities. OSM created a Two-Acre Task Force to implement this settlement in Kentucky.

It was not until June 3, 1986, that an inspector from the task force, Russell Porter, reached appellant's site, long after the surface disturbances on both permits had been concluded. Porter was accompanied by Asher, who purportedly pointed out the area disturbed by RCT, but refused to assist Porter in surveying the area (Tr. 51). On June 13, Porter and another OSM employee returned to the site, and calculated the area identified by Asher as 2.28 acres, using a tape measure and Brunton compass (Tr. 55-56). Porter issued a notice to the State alleging violation of KRS 350.060 by disturbing in excess of 2 acres without a valid permit. DSMRE replied that it was not going to cite RCT because its previous citation had been dismissed. 5/

5/ Under section 521(a) of SMCRA, a 10-day notice to the State agency is required before a Federal inspection is taken. When a 10-day notice is given under subsec. (a)(1), an inspection is required "[i]f * * * the State regulatory authority fails * * * to take appropriate action to cause said violation to be corrected or to show good cause for such failure." 30 U.S.C. § 1271(a)(1) (1988). Under regulations in effect at the time these inspections occurred, the response by the State would not have

On July 17, 1986, John Tapp, a professional surveyor using state-of-the-art equipment, surveyed the area at the points indicated by Porter and determined that RCT had disturbed 2.59 acres. Porter issued CO No. 86-84-407-002 on August 19 (Exh. R-13; Tr. 73). This CO required RCT to apply for a SMCRA permanent program permit by September 20 or to reclaim the disturbed area to permanent program standards by that date. When Porter returned on September 22, he found that none of the required abatement had been undertaken and issued failure-to-abate CO No. 86-84-407-001 (Exh. R-15; Tr. 75-78). In the decision under appeal, Judge McGuire determined that these CO's were properly issued and denied RCT's applications for review.

Appellant contends Judge McGuire improperly relied on the settlement in Save Our Cumberland Mountains v. Hodel, *supra*, because appellant was not a party to that case and the order was entered subsequent to the mining and reclamation of the land subject to RCT's permit. Appellant misconstrues the legal significance of that settlement. The settlement gave OSM

fn. 5 (continued)

satisfied these criteria. See Thomas J. FitzGerald, 88 IBLA 24 (1985). During the pendency of this appeal, OSM amended its regulations to make it clear that the response by Kentucky would constitute good cause so that the requirement for a Federal inspection would be obviated, defining the circumstances constituting "good cause" to include, *inter alia*:

"[T]he State regulatory authority is precluded by an administrative or judicial order from an administrative body or a court of competent jurisdiction from acting on the possible violation, where that order is based

on the violation not existing or where the temporary relief standards of section 525(c) or 525(c) [sic] of the Act have been met."

30 CFR 842.11(b)(1)(ii)(B)(4)(iv). Despite OSM's continued adherence to the view that it is not collaterally estopped by the proceedings of state agencies (see discussion, *infra*), this amendment in many cases may have a similar effect in practice.

In this case, a Federal inspection had already been undertaken, so that the provisions of section 521(a)(2) applied and no 10-day notice was required. Furthermore, under 30 CFR 843.11(a)(1), OSM must immediately issue a CO if it finds "on the basis of any Federal inspection, any condition or practice, or any violation * * * which: * * * (ii) is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources." Despite appellant's assertion that its operation caused no environmental harm, mining more than 2 acres without

a valid permit constitutes such harm by regulatory definition. 30 CFR 843.11(a)(2); Slone v. OSM, 114 IBLA 353, 357 (1990); Firchau Mining, Inc. v. OSM, 101 IBLA 144 (1988). Subject to exceptions not relevant here, that regulation provides that "[s]urface coal mining and reclamation operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources." Although OSM issued a 10-day notice to the State, that procedure was not necessary before issuing the CO's. M & J Coal Co. v. OSM, 115 IBLA 8, 17 (1990); Fresa Construction Co. v. OSM, *supra* at 190-91, 95 I.D. at 300, and cases cited therein.

no new authority to inspect mines for violations of the Act; rather, it required OSM to exercise its existing statutory authority to inspect sites for violations.

[1] Although appellant believes that OSM has no jurisdiction to cite it for violations because Kentucky was exercising regulatory primacy under SMCRA and had already issued notices to RCT, this perception is incorrect. In Slone v. OSM, *supra*, we quoted the statutory authority for Federal inspections, 30 U.S.C. § 1271(a)(2) (1988), and stated: "Congress has clearly directed the Secretary to proceed with corrective enforcement action whenever a violation is discovered by a Federal inspection." Slone v. OSM, *supra* at 357. See 30 CFR 843.11(a)(1) and (2). The very purpose of this provision is to enable the Federal Government to take effective enforcement action in an individual case to secure abatement of a violation when the State has failed to do so. Indeed, in cases such as this, the provision does not merely enable Federal enforcement action but mandates it. See M & J Coal Co. v. OSM, *supra* at 117. This mandate would be totally thwarted if the Federal Government were collaterally estopped by the very same proceedings that Congress intended for OSM to correct.

In Annaco, Inc. v. Hodel, 675 F. Supp. 1052, 1058 (E.D. Ky. 1987), the Court agreed with this analysis: "The plain language of these sections gives [OSM] jurisdiction to issue a CO to an operator in Kentucky, a state which has achieved primacy. Therefore, [OSM] had authority, pursuant to [30 U.S.C. §§] 1253, 1254, and 1271, [SMCRA sections] 503, 504, and 521, to issue CO's to Annaco."

The legislative history of SMCRA further refutes appellant's argument that Kentucky's primacy precludes OSM from exercising the "authority to preempt a State Hearing Officer's Determination" (Brief at 15 (emphasis in original)). As the final Senate report on SMCRA states:

The Federal enforcement system contained in this section, while predicated upon the States taking the lead with respect to program enforcement, at the same time provides sufficient Federal back-up to reinforce and strengthen State regulation as necessary. Federal standards are to be enforced by the Secretary on a mine- by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program.

S. Rep. No. 128, 95th Cong. 1st Sess. 88 (1977); H.R. Rep. No. 896, 94th Cong. 2d Sess. 119 (1976); see Turner Brothers, Inc. v. OSM, 92 IBLA 320, 324-25 (1986).

Thus, we conclude that while a primacy state has primary jurisdiction for enforcement of an approved state program, that jurisdiction is not exclusive, and OSM has the authority to enforce the state program on a mine-by-mine basis under proper circumstances. See, e.g., W. E. Carter, 116 IBLA 262, 266-67 (1990); Donaldson Creek Mining Co. v. OSM, 111 IBLA 289, 296 (1989).

[2] In Annaco, Inc. v. OSM, 119 IBLA 158 (1991), and Slone v. OSM, *supra*, we also rejected the argument that prior DSMRE proceedings could preclude OSM's enforcement actions due to the doctrines of res judicata and collateral estoppel. We adhered to our decision in Bernos Coal Co. v. OSM, 97 IBLA 285, 297, 94 I.D. 181, 188-89 (1987), *rev'd*, Bernos Coal Co. v. Lujan, Civ. No. 3-87-437 (E.D. Tenn. June 6, 1989), in which the Board concluded:

Our analysis of the applicability of res judicata/collateral estoppel principles in this case leads to the conclusion * * * that the unique Federal/State balance created under SMCRA manifests a "countervailing statutory policy" and renders those doctrines inapplicable to issues arising in the Federal/State context. That policy is placed into focus by examining OSM's responsibilities, as defined in key provisions of SMCRA and its legislative history, as well as the regulations promulgated to implement SMCRA. OSM, on behalf of the Secretary, is required to ensure compliance with the law regardless of the actions or inactions of the State regulatory authority. [Footnote omitted.]

Although Bernos has been reversed by the district court, we continue to hold to the rationale set forth in that decision. *See* Slone v. OSM, *supra* at 356. ^{6/}

As we noted in Annaco, even if there were no countervailing statutory policy in SMCRA, res judicata and collateral estoppel would not apply here because the prerequisites for their application do not exist. The Supreme Court discussed these preclusion doctrines in Montana v. United States, 440 U.S. 147, 153 (1979):

A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction * * * cannot be disputed in a subsequent suit between the same parties or their privies * * *." Under res judicata, a final judgment on the merits bars further claims by parties or their privies based

^{6/} While recognizing that a district court ruling on judicial review reversing a Board decision is clearly the binding law of the case with respect to a particular appeal, we have noted that the precedent may not always be followed in appeals arising in other jurisdictions:

"The Board has declined to follow Federal court decisions primarily in those situations where the effect of the decision could be extremely disruptive to existing Departmental policies and programs and where, in addition, a reasonable prospect exists that other Federal courts might arrive at a differing conclusion. In our view, both conditions obtain." Oregon Portland Cement Co. (On Judicial Remand), 84 IBLA 186, 190 (1984). We believe that rationale is applicable in this case, especially given the well-reasoned opinion of Chief Judge Siler in Annaco, Inc. v. OSM, 119 IBLA at 165 n.8.

on the same cause of action. Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. [Citations omitted.]

See United States v. ITT Rayonier, Inc., 627 F.2d 996, 1000 (9th Cir. 1980).

As in Annaco, there is no privity between the State and OSM. Under the doctrine of privity, one who was not a party of record may be bound by a judgment if it had sufficient interest and participated in the prior action, or if its interests were represented by one with authority to do so. United States v. ITT Rayonier, Inc., *supra* at 1003. DSMRE did not act as OSM's representative during the State proceeding nor did OSM control the conduct of DSMRE in that proceeding. Thus, OSM did not have the sufficient "laboring oar" in the conduct of the earlier proceeding found to actuate the doctrine of collateral estoppel in Montana v. United States, *supra* at 155.

See also United States v. Mendoza, 464 U.S. 154, 164 n.9 (1984); Bernos Coal Co., *supra* at 302, 94 I.D. at 191-92.

Appellant contends that Judge McGuire based his decision on a "related-ness" theory linking the RCT and Thrasher operations. Although Porter testified about a relatedness investigation having been conducted (Tr. 89), neither OSM nor Judge McGuire relied upon it. Had the Judge done so, he would have concluded that the disturbed area was the combined area disturbed under both permits, *i.e.*, 3.05 acres, not 2.59 acres. See 30 CFR 700.11(b) (1984). Furthermore, OSM's witnesses identified the area disturbed by RCT and a separate area disturbed by Thrasher on Exhibit 7A, an aerial photograph of the site.

Nevertheless, appellant cites a number of details from the Judge's narration of the case that would have direct relevance only if the case were based on relatedness, such as McGraner's preparation of Thrasher's permit application and McGhee's notarization of her signature. Indeed, Judge McGuire found that RCT's equipment was used on this permit, a finding that appellant correctly contends has no support in the record. See Tr. 177-78. Appellant suggests that the detailed focus given by the Judge to these "relatedness" issues shows that his findings of fact were formed to justify his predisposed conclusions ^{7/} (Brief at 16).

^{7/} The brief submitted by counsel for appellant contains a number of strong characterizations of Judge McGuire and OSM's witnesses. Finding appellant's brief to be "thoroughly laced with unsubstantiated personal attacks," counsel for OSM has moved that we strike the pleading and dismiss the appeal. This squabble between counsel requires no acknowledgement beyond a ruling on OSM's motion which we deny. The Board is capable of discerning the arguments that have merit and those that do not, and our analysis must ultimately be based on the relevant facts and pertinent law rather than arguments advanced by counsel. Counsel should bear in mind, however, that intemperate characterizations often tend to diminish the credibility of the party making them rather than the party against whom they are directed.

Whatever inferences may be drawn from appellant's undeniably assiduous exploitation of the 2-acre loophole, 8/ our decision must be based on the evidence and it is on this basis that we are unable to affirm Judge McGuire. We find that the record does not establish that appellant disturbed an area greater than 2 acres.

Inasmuch as OSM does not contend that the two operations are related, OSM was required to establish a prima facie case that the area disturbed by RCT under its permit consisted of more than 2 acres, and then the burden of establishing entitlement to the exemption fell to RCT. Although the determination of the extent of the area disturbed by the RCT operation would ordinarily be simply a question of an accurate survey, this finding of fact is complicated by several factors in the present case. First, more than 2 years had elapsed between the completion of the RCT operation and the initial Federal oversight inspection. More importantly, the significance of this time lapse is greatly increased by the intervening mining operation conducted by Thrasher. It is undisputed that this latter operation overlapped and disturbed some of the same area initially affected by the RCT operation for purposes of spoil storage and access road construction.

The key to the resolution of this issue would be the testimony of an individual who had visited the site before operations commenced on the Thrasher permit and could accurately identify the area disturbed by RCT. No Federal inspectors visited the site until operations on both permits were complete. Ed Asher, the inspector for DSMRE on whom the OSM inspectors primarily relied in developing this case, did not visit the site until after the disturbances on the Thrasher permit had started. Other than Robin McGhee, the only individual identified in this proceeding who would be able to provide such testimony was Anthony Charles, another inspector for DSMRE who inspected the site during mining operations under RCT's permit. Charles, however, did not testify.

The only surveys upon which OSM relies are those of Porter and Tapp. These surveys cannot be considered relevant if they do not replicate the boundaries of the area originally disturbed by RCT prior to the subsequent disturbance by Thrasher. Because neither Porter nor Tapp observed that situation, neither can provide competent testimony necessary to establish the relevance of their surveys. OSM sought to establish their relevance through Porter's testimony that Asher and Charles confirmed the boundaries of the area disturbed by RCT.

[3] At the hearing, appellant objected to OSM's reliance on such hearsay and now contends on appeal that Judge McGuire's reliance on it was improper. It is well established that hearsay evidence is admissible

8/ We decline to infer bad faith on the part of appellant, particularly in view of Porter's testimony that the State inspectors were aware of appellant's desire to keep the disturbed area to less than 2 acres (Tr. 124). There was nothing unlawful about the operator of a 2-acre or less mine trying to keep his operation at that level.

in an administrative proceeding if it is relevant and material. Richardson v. Perales, 402 U.S. 389 (1971); Myers v. Secretary of Health & Human Services, 893 F.2d 840 (6th Cir. 1990); Williams v. United States Department of Transportation, 781 F.2d 1573 (11th Cir. 1986); Calhoun v. Bailar, 626 F.2d 145 (9th Cir. 1980), cert. denied, 452 U.S. 906 (1981). Further, hearsay evidence may constitute substantial evidence to support a hearing examiner's decision notwithstanding the existence of contrary direct testimony at least where the party objecting has failed to subpoena the absent declarants in order to preserve his right to cross-examination. Richardson v. Perales, *supra* at 402. ^{9/}

In Calhoun v. Bailar, *supra* at 149, the court held that:

To constitute substantial evidence, hearsay declarations, like any other evidence, must meet minimum criteria for admissibility--it must have probative value and bear indicia of reliability. Although no bright line test can be established, cases isolate a number of factors that may be helpful in such an analysis. First, as Richardson teaches, the independence or possible bias of the declarant must be considered as well as the type of hearsay material submitted. In Richardson, the Court laid great stress on the fact that the reports were independent medical reports routinely prepared and submitted in disability cases. *Id.*, 402 U.S. at 402-407, 91 S.Ct. at 1427-1430. Other factors that should be considered are whether the statements are signed and sworn to as opposed to anonymous, oral, or unsworn (See, e.g. Martin-Mendoza v. Immigration and Naturalization Service, [499 F.2d 918 (9th Cir. 1974), cert. denied, 419 U.S. 1113, rehearing denied, 420 U.S. 984]; McKee v. U.S., [500 F.2d 525 (Ct. Cl. 1974)]), whether or not the statements are contradicted by direct testimony (School Board of Broward City v. HEW, [525 F.2d 900 (5th Cir. 1976)]; Jacobowitz v. U.S., (1970) 424 F.2d 555, 191 Ct.Cl. 444), whether the declarant is available to testify and, if so, whether or not the party objecting to the hearsay

^{9/} One of the vices of admitting hearsay evidence is the lack of opportunity for cross-examination of the declarant. The Administrative Procedure Act provides: "A party is entitled * * * to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d) (1988). The three dissenting Justices in Richardson based their objection to the use of written reports on the absence of cross-examination. The majority, however, pointed out that the complaining party could have requested a subpoena for the declarants but failed to do so. The Court held that this failure to request a subpoena precluded a challenge on the ground complainant was denied the rights of confrontation and cross-examination. 402 U.S. at 405. Likewise, when RCT objected to Porter's use of hearsay and contended that OSM should have brought Charles and Asher as witnesses, Judge McGuire asked why appellant did not subpoena them. Although appellant asserted that OSM ought to have that burden (Tr. 53), the decision of the majority in Richardson does not support that conclusion.

statements subpoenaes the declarant (See Richardson v. Perales, *supra*), or whether the declarant is unavailable and no other evidence is available (Martin-Mendoza v. Immigration and Naturalization Service, *supra*; McKee v. U.S., *supra*), the credibility of the declarant if a witness, or of the witness testifying to the hearsay (Reil v. U.S., [456 F.2d 777 (Ct. Cl. 1972)]), and finally, whether or not the hearsay is corroborated. Although not controlling, the Federal Rules of Evidence 803(24) standards for the admission of hearsay not specifically covered by any exception but bearing "circumstantial guarantees of trustworthiness" may be of assistance.

During the pendency of this appeal, the United States Court of Appeals for the Sixth Circuit (which includes Kentucky) stated that the foregoing "multifactor analysis is used to assure reliability when the hearsay evidence is the sole basis for agency action," but declined to apply the analysis when "the case is not one in which hearsay evidence alone must constitute substantial evidence in order to support the Secretary's decision." Myers v. Secretary of Health & Human Services, *supra* at 846.

The issue in this appeal is whether RCT disturbed more than 2 acres. Because Charles is the only person other than appellant's president who witnessed the disturbed area, Porter's testimony that Charles confirmed the boundaries is absolutely vital to OSM's case. Because the resolution of this issue is based solely on hearsay, the multifactor analysis applies. See Myers v. Secretary of Health & Human Services, *supra*. Although Judge McGuire cited Calhoun in support of his reliance on Porter's testimony, he failed to make the analysis required by that decision. When this analysis is made, the evidence fails to sustain the decision.

Unlike the detailed, written, routine, and remarkably consistent medical reports which constituted the hearsay evidence in Richardson, the unsworn oral statements attributed to Charles are conclusory in the extreme and are not consistent with other evidence introduced by OSM in this proceeding. The vague confirmation of boundaries by Charles is contradicted by the sworn testimony of McGhee, the only person testifying who had direct knowledge of the disturbed area. Although Judge McGuire during the hearing referred to RCT's failure to call upon Charles to testify, such failure does not increase the probative force of his alleged confirmation of the boundary because it does nothing to rectify the basic flaws of that evidence.

In the DSMRE proceeding, the hearing officer noted that the area of disturbance was measured by Asher on April 16, 1985, as including 2.11 acres. We note that Asher was not on the site until after the overlapping Thrasher disturbance had commenced (Tr. 111; Exh. F). The hearing officer further stated that the site was surveyed by Jessie Gilpin, an engineer, as embracing 2.08 acres. Porter testified that the OSM survey of the area disturbed by RCT was based on his observation and on what the DSMRE inspectors indicated to him was disturbed by RCT (Tr. 89). Porter, in turn, pointed out to Tapp (a professional engineer and surveyor retained

by OSM) the perimeter of the RCT disturbed area (Tr. 102, 132-33). Tapp's survey (Exh. R-11) measured the area of disturbance allegedly confirmed by Charles (Tr. 52) as embracing 2.59 acres, a difference of about 25 percent. Either there was a gross error in the measurement of the acreage or a gross error in the delineation of the boundaries. ^{10/} Porter testified that he "requested the State Inspector assigned to the permit during the time period to go to the site with me, and at that time he very closely pointed out the perimeters of disturbance for that mine site" (Tr. 51). Porter testified that the State inspector did not assist in the survey of the minesite (Tr. 51). This inspector was identified as Asher, not Charles (Tr. 52). Porter testified: "I also visited the site with Anthony Charles, who was the original inspector during the actual mining of the permit. He confirmed the exact area that Ed Asher had pointed out to me earlier" (Tr. 52).

However, other testimony by Porter shows that Charles did not take the action necessary to confirm "the exact area." When asked whether Asher and Charles actually walked the perimeters with him and showed him the sites in terms of where to calculate, Porter testified that they did not (Tr. 105). Nevertheless, the diagram that is part of Porter's June 1986 inspection report (Exh. R-4) shows no less than 12 angle points, the misplacement of any one of which would have an effect on the total acreage. Although the Judge states that Porter utilized the "reckoning points" identified by Asher and Charles, there is no evidence in the record we can use to verify this determination by comparing the reckoning points identified by the State's inspectors with those identified by OSM's. Instead, the parties focus almost exclusively on the conditions of the highwall and vegetation which would identify only one corner or one side of the disturbed area.

One result of OSM's failure to obtain specific evidence confirming each point in the boundary is that OSM's evidence fails to show how much of the area identified as an access road was originally disturbed by RCT and how much was later disturbed by Thrasher. Harry Fields, a professional engineer licensed to prepare mine maps and calculate acreage in connection therewith (Tr. 196), was retained by appellant to measure the disturbed acreage and first visited the site on September 30, 1985 (Tr. 199). Fields testified that Robin McGhee showed him where he started and stopped mining (Tr. 202-03) and that his determination of who had mined various disturbed areas was also guided by the difference in color of the highwall since RCT had mined a year earlier (Tr. 203, 205). The discoloration was caused by oxidation from

^{10/} The discrepancy between the surveys did not trouble Judge McGuire. Because appellant was relying on the decision issued by Combs in support of its arguments concerning collateral estoppel and res judicata, Judge McGuire felt he could rely on the recitals in that opinion concerning the DSMRE surveys in support of his conclusion that more than 2 acres were mined. These other surveys were not introduced in this proceeding, however, and their competence cannot be verified. Appellant points out that Combs himself did not predicate his decision on them, so his decision cannot be cited as giving those surveys the indicia of reliability necessary for them to provide a basis for a decision in the instant case.

exposure to the weather (Tr. 213). Fields also found the boundary between the two operations delineated by permit markers at the top of the highwall at the time of his survey (Tr. 275). Fields prepared a survey of the area disturbed by the two operations including an area adjacent to the RCT disturbance which Thrasher disturbed in the course of reconstructing the access road to provide access to her permit (Tr. 236, 239-40, 277-78; Exh. AA). Fields found that an area of 0.11 acre adjacent to or below the RCT disturbance was affected by Thrasher's construction of the road to access her mine operation (Tr. 236; Exh. AA). He further testified that the extent of the RCT disturbance was 1.52 acres (Tr. 249; Exh. AA). Although Porter was aware Thrasher had made some changes in the road, he measured all of the spoil below the RCT permit without regard to the Thrasher overlap (Tr. 56). OSM has offered no specific evidence to counter the testimony that the road was widened when operations began on the Thrasher permit, so that this additional acreage should not be included in RCT's disturbed area. If the original boundaries allegedly confirmed by Charles as covering 2.08 acres failed to make this distinction, the difference would bring the total disturbed area to less than 2 acres.

A combination of factors cause us to find that the evidence fails to support the decision of the Administrative Law Judge affirming the CO's in this case. The initial Federal inspection and subsequent survey occurred more than 2 years after the RCT operation was completed and after the subsequent completion of the Thrasher operation which the testimony revealed not only overlapped the RCT operation in part but enlarged the disturbance associated with the access road which crossed the RCT permit. The survey of the extent of the RCT disturbance as reportedly identified in the hearsay evidence was grossly inconsistent with prior surveys. The direct testimony established that the OSM survey prepared at Porter's direction included areas disturbed by the subsequent Thrasher operation which were not affected by the RCT operations. Further, we note that Fields' survey of the area disturbed by the RCT operation relied not only upon the statements of Robin McGhee but also upon permit markers and a difference in highwall coloration resulting from the time lapse between the different exposures.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

John H. Kelly
Administrative Judge