

RON DEATON/BARWICK COAL CO., INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 91-92

Decided June 19, 1993

Petition for discretionary review of a decision of Chief Administrative Law Judge Parlen L. McKenna denying a petition for review of Cessation Order No. 89-84-136-022 and the associated civil penalty. Hearings Division Docket No. NX 89-47-P.

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 the Surface Mining Control and Reclamation Act of 1977, 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. Where OSM determines during an inspection that the operator is mining without a valid surface coal mining permit, 30 CFR 843.11(a)(2) requires that OSM issue a cessation order because mining without such a permit itself constitutes a practice which causes or can reasonably be expected to cause significant imminent environmental harm.

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 a situation where a similar order for the same violation 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. Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre--
Surface Mining Control and Reclamation Act of 1977: Previously Mined Lands

Where a permittee operating pursuant to a state 2-acre permit receives authorization from a state inspector to reclaim an adjacent previously mined area, those two sites cannot be considered related under 30 CFR 700.11(b)(2), where there is no evidence that they were mined within 12 months of one another or that they were under common ownership and control.

4. Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre--
Surface Mining Control and Reclamation Act
of 1977: Previously Mined Lands

Where a permittee operating pursuant to a state 2-acre permit receives authorization from a state inspector to reclaim an adjacent previously mined area, that previously mined area will not be considered part of the "affected area," as defined in 30 CFR 701.5, where the reclamation undertaken thereon was not necessary or incidental to the permittee's surface coal mining operation.

5. Evidence: Hearsay--Surface Mining Control and Reclamation Act of
1977: Exemptions: 2-Acre

Hearsay evidence is admissible in an administrative proceeding reviewing issuance by OSM of a cessation order for exceeding the acreage limitations of a 2-acre permit, 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. However, where such evidence is the sole basis for issuance of the cessation order, a multifactor analysis is used to assure its reliability, and when such evidence fails to withstand such analysis, the cessation order can not be sustained.

APPEARANCES: Marcia A. Smith, Esq., Corbin, Kentucky, for petitioner; Margaret H. Poindexter, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Ron Deaton and Barwick Coal Co., Inc. (collectively referred to herein-after as Deaton or petitioner), has petitioned for discretionary review of the November 8, 1990, decision of Chief Administrative Law Judge Parlen L. McKenna sustaining issuance of Cessation Order (CO) 89-84-136-022 by the Office of Surface Mining Reclamation and Enforcement (OSM). OSM issued

the CO for conducting surface coal mining operations without a valid surface disturbance permit from the Commonwealth of Kentucky, in violation of Kentucky Revised Statutes (KRS) § 350.060 and section 506(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1256(a) (1988). OSM charged that the operation in question, although conducted pursuant to a 2-acre State permit, actually affected greater than 2 acres. When petitioner failed to abate the violation by securing a permanent program permit or by reclaiming the entire area by eliminating the highwall and returning the land to approximate original contour, OSM issued failure to abate CO 89-84-136-023.

Deaton filed a petition for review of the proposed civil penalty assessed in connection with CO 89-84-136-022, challenging the fact of violation. Petitioner did not request review of the failure to abate the CO. Following a hearing conducted in Berea, Kentucky, on January 5, 1990, Judge McKenna issued his decision sustaining the validity of the CO. We reverse.

Factual Background

In 1982, Deaton sought a permit from the Commonwealth of Kentucky to conduct a surface coal mining operation on land he owned in Chavies, Kentucky. Kentucky responded by issuing Surface Disturbance Mining Permit No. 097-0124 to Deaton on July 16, 1982. The permit covered 1.95 acres. Deaton apparently stopped mining the site sometime between March and August 1983 (Tr. 125-26). Kentucky Inspector Ed Asher had inspected the site prior to issuance of the permit in order to complete a Preliminary Inspection Report of the area to be mined, and he also inspected the site during mining operations (Tr. 53-56; Exh. G-3). Deaton was not cited during his mining operation for mining over 2 acres (Exh. G-6).

In August 1986, Kentucky Inspector Shelton Roberts conducted a survey of the minesite and determined that it encompassed 3.18 acres. He issued a notice of noncompliance to Deaton requiring that the land be returned to approximate original contour or that a permanent program permit be obtained. When no action was taken by Deaton, Roberts issued a failure to abate the CO (Tr. 59-60; Exhs. G-5 and G-6). Deaton sought review before the Kentucky Natural Resources and Environmental Cabinet (Cabinet).

On March 11, 1987, a Hearing Officer conducted a preliminary hearing on that request for review. His findings and recommendations, dated April 17, 1987, indicate that Inspector Asher testified that he had authorized Deaton to dress up an unreclaimed exploration pit on the site and that Inspector Roberts testified that he had not been on site during the mining operation and that he was not sure how much of the disturbed area resulted from mining or from dressing up the previously mined area (Exh. G-6). ^{1/} The Hearing Officer concluded that the Cabinet had failed to prove that Deaton had exceeded 2 acres in his mining operation on the site, and he recommended dismissal of the enforcement actions. Id.

^{1/} No transcript of the proceedings before the Cabinet exists (Tr. 23-24).

On September 1, 1988, Sharon Hall, an OSM reclamation specialist, and OSM Inspector Roger Baker, inspected the site as part of their "Two Acre Task Force" responsibilities.^{2/} They conducted a survey and determined that 3.0 acres had been disturbed (Tr. 48-49; Exhs. G-7 and G-10). As a result, Hall issued a Ten-Day Notice (TDN) to the Commonwealth of Kentucky, Department for Surface Mining Reclamation and Enforcement (DSMRE), informing it that the site was in excess of 2 acres (Tr. 58; Exh. G-4). DSMRE responded that it would not take any action because of the dismissal of the Kentucky enforcement actions (Exh. G-6).

On February 8, 1989, Hall returned to the site with OSM Inspector Doyle Boothroy and Kentucky Inspector Asher. Since Hall had been under the impression that the entire site had been disturbed by Deaton, the purpose of the February 1989 visit was to allow Asher, based on his recollection, to point out the areas that had been disturbed prior to Deaton's operation. Hall testified that Asher "pointed out that it was to go from the recessed area of the highwall to a fir tree and to the toe of the fill" (Tr. 66). Hall and Boothroy surveyed that described area and concluded that it was 0.56 acre. Subtracting that acreage from the original surveyed acreage (3.0 acres) left 2.44 acres disturbed by petitioner's operation (Tr. 64-66; Exh. G-12).

On March 1, 1989, Hall again returned to the site with three employees of Bocook Engineering, an independent surveying company. Those employees conducted a survey of an area described to them by Hall (Tr. 68-69). Based on the measurements taken by those employees, Dewey Bocook, Jr., prepared a survey which showed that an area of 2.74 acres had been disturbed by petitioner's operation (Tr. 108-09; Exh. G-14).

On July 5, 1989, Hall issued CO 89-84-136-022, and subsequently OSM issued a notice of proposed assessment of a civil penalty. Thereafter, Deaton filed a petition for review challenging the fact of violation.

Alfred Collins, Jr., testified on behalf of petitioner at the hearing conducted by Judge McKenna. He stated that he was first on the site in March or April 1983 after mining operations had commenced; that at that time he observed some preexisting disturbance; and that he was "on the job four or five times with Mr. Deaton" (Tr. 123-25). Collins testified that Deaton did not disturb all the permitted area because "the coal was getting bad on it" (Tr. 129). Collins testified regarding a survey map of the site, dated January 4, 1990, prepared by Douglas R. Baker, a registered land surveyor. Collins stated that he and Baker conducted the survey and that the survey map showed an area of 1.74 acres disturbed by Deaton's operation and 1.30 acres of previous disturbance (Tr. 125; Exh. R-1).

^{2/} On June 7, 1985, OSM reached a settlement in Save Our Cumberland Mountains v. Hodel, No. 81-2238 (D.D.C.), which required it to inventory surface mining operations in Virginia and Kentucky which claimed the 2-acre exemption and to conduct inspections and undertake enforcement in certain circumstances. To implement that settlement, OSM created a "Two-Acre Task Force."

Ron Deaton testified that he did not mine the entire permit area. However, he stated that he reclaimed the entire area, including the previously disturbed area, with Inspector Asher's permission. When questioned why he dressed up the entire area, rather than just the area he disturbed, he stated: "Because it was my property. Because it was my property and I wanted to improve it, and the inspector said I could. It was worthless the way it was" (Tr. 150).

Administrative Law Judge's Decision

In his decision, Judge McKenna recognized that all the record surveys showed that an area greater than 2 acres had been disturbed, but that the "principle [sic] difference in the surveys and testimony concerns the amount of previously disturbed area to be subtracted from the total" (Decision at 10). Nevertheless, Judge McKenna made no determination of the acreage of that previous disturbance. Instead, he stated:

Although I believe that Mr. Deaton has proceeded in good faith, I must nevertheless find that a violation occurred. Mr. Deaton seems to believe that the only area which must be included in the two acre calculation is that which he actually mined and which can be linked directly to mining, such as a road. The law does not define the two acre area so narrowly. Instead, 30 CFR 700.11(b) includes ..."the surface mining and reclamation operation, together with any related operations, [which] has or will have an affected area of two acres or less."

Id.

Referring to 30 CFR 700.11(b) and citing the definition of "affected area" in 30 CFR 701.5, Judge McKenna concluded:

These definitions are broad enough to include not only activity done in conjunction with mining, but also activity done in conjunction with reclamation and "any related operations." The total affected area is ultimately the entire area Mr. Deaton reclaimed and does not depend solely on the previous existing disturbance. Although Mr. Deaton received verbal permission to dress up the entire area, he did so without amending his permit application or his permit. In doing so, he exceeded the two acre limit and did so in such a way that it is difficult for anyone to prove the acreage of the pre-existing disturbance.

Id.

Issue

At the time of OSM's enforcement action in this case, section 528(2) of SMCRA, 30 U.S.C. § 1278(2) (1988), 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." By Act of May 7, 1987, P.L. 100-34, 100 Stat. 300, Congress eliminated that 2-acre exemption because it had

"turned out to be the most misused and abused provision of SMCRA" (H.R. Rep. No. 59, 100th Cong., 1st Sess. 3 (1987)). Had the area in question been mined pursuant to a permit for a mine exceeding 2 acres, Deaton would have been required by section 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1988), to reclaim the site by eliminating the highwall and restoring the site to its approximate original contour. ^{3/} Hence, the controversy which led to issuance of the CO and this proceeding is solely directed to whether petitioner's surface coal mining operation exceeded 2 acres and that is the principal issue presented to the Board.

Discussion

Before addressing that principal issue, we turn to certain other related issues raised by petitioner, which if decided in its favor would negate the necessity to proceed. Petitioner, however, realizes that these are issues that have routinely been decided against the operator by the Board. Accordingly, we address those issues only briefly.

First, petitioner claims that OSM lacks jurisdiction to take enforcement action in this case because during the permanent regulatory program OSM may only cite violations where there is an imminent danger or where significant environmental harm may occur and OSM failed to prove the existence of either in this case.

[1] When a state program is approved, the state assumes responsibility for issuing mining permits and enforcing its regulatory program.

In re Surface Mining Regulation Litigation, 627 F.2d 1346 (D.C. Cir. 1980). However, as the Board held in Annaco v. OSM, 119 IBLA 158, 163-64 (1991), 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. 119 IBLA at 163-64. There is no indication that OSM's enforcement authority is limited to instances involving imminent danger or significant imminent environmental harm.

In this case, OSM's inspection was a result of the Two-Acre Task Force program established to implement the Save Our Cumberland Mountains settlement. Following that inspection, OSM issued a TDN to DSMRE. 30 U.S.C. § 1271(a)(1) (1988); 30 CFR 834.12(a)(2).

The regulations in effect at the time the TDN was issued, 30 CFR 842.11(b)(1)(ii)(B)(4)(iv) (53 FR 26728, 26744 (July 14, 1988)), provided that a response by the State that it "is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing" constitutes "good cause" for not taking appropriate action. Arguably, since DSMRE's response to the TDN was that

^{3/} Deaton reclaimed the site to 2-acre standards, which allowed leaving a highwall. OSM estimated the total reclamation cost of returning the

the Cabinet had resolved a 2-acre violation for the same site in Deaton's favor by dismissing the enforcement actions, the requirement for a Federal inspection as a result of the State's response to the TDN was obviated.

Nevertheless, there is independent authority for issuance of the CO in this case. Although petitioner claims a lack of imminent danger to the health or safety of the public and no significant imminent environmental harm, the regulations specifically provide that mining without a valid surface coal mining permit itself constitutes a practice which causes or can reasonably be expected to cause significant imminent environmental harm. 30 CFR 843.11(a)(2); R.C.T. Engineering, Inc. v. OSM, 121 IBLA 142, 146 n.5 (1991); Slone v. OSM, 114 IBLA 353, 357 (1990); Firchau Mining, Inc. v. OSM, 101 IBLA 144 (1988). ^{4/}

[2] Second, petitioner claims that Federal enforcement is otherwise barred by the results of the prior State regulatory proceeding which absolved Deaton of a violation. It argues the doctrines of res judicata and collateral estoppel in support of its position. It is well established that the doctrines of collateral estoppel and res judicata do not preclude the Department from pursuing its own enforcement of SMCRA despite prior dispositive decisions issued by DSMRE addressing the same issues. Accordingly, we reject this argument for the reasons stated in R.C.T. Engineering v. OSM, 121 IBLA at 148-149, Annaco, Inc. v. OSM, 119 IBLA at 164-67, and Slone v. OSM, 114 IBLA at 356-57. ^{5/}

We now direct our attention to the principal issue. The facts in the case show that petitioner reclaimed approximately 3.0 acres at the site in question. Judge McKenna made no allowance for previously mined areas on the site because he apparently concluded, based on 30 CFR 700.11(b) and 30 CFR 701.5, that petitioner's reclamation of the previously mined area constituted "related operations" or that by such activities the previously disturbed area became part of the affected area of petitioner's operation.

[3] Judge McKenna misapplied those regulations. Under 30 CFR 700.11(b), a surface coal mining and reclamation operation is not exempt from regulation under SMCRA where that operation, together with any "related" operation, has or will have an affected area of 2 or

fn. 3 (continued)

site to approximate original contour and eliminating the highwall to be \$53,739.99 (Tr. 49; Exh. G-22).

^{4/} Although we noted in R.C.T. Engineering, Inc. v. OSM, 121 IBLA at 146 n.5, that in such circumstances issuance of a TDN is not necessary, a TDN may have been required in this case as a result of the Save Our Cumberland Mountains settlement. See Save Our Cumberland Mountains v. Hodel, *supra* at 9.

^{5/} As we noted in R.C.T. Engineering, Inc. v. OSM, 121 IBLA at 146

n.5, the position that OSM is not collaterally estopped by state

agency proceedings is undercut by the regulatory language of 30 CFR 842.11(b)(1)(ii)(B)(4)(iv).

more acres. 6/ What Judge McKenna failed to recognize was that 30 CFR 700.11(b)(2) provided a test for determining if surface coal mining operations were related. Thus, operations were to be deemed "related" if (1) they occurred within 12 months of each other; (2) they were "physically related"; and (3) they were under "common ownership and control." J & M Coal Co. v. OSM, 122 IBLA 90, 99 (1992). The operations in this case were the preexisting one, evidence of which existed at the time Deaton purchased the land in question in 1982 (Tr. 148) and the one undertaken pursuant to the Kentucky 2-acre permit. There is no evidence in the record that these two operations were conducted within 12 months of one another. And although they were physically related within the meaning of the regulation, there is no evidence that they were conducted under common ownership and control. 7/ The preexisting operation on the land in question cannot be considered a "related" operation under 30 CFR 700.11(b) so as to require aggregation of that acreage, whatever it was, to petitioner's operation.

[4] Neither can that previously disturbed area which was reclaimed by petitioner be considered to be part of the "affected area" of petitioner's operation. "Affected area," as defined in 30 CFR 701.5, is "any land or water surface area which is used to facilitate, or is physically altered by, surface coal mining and reclamation operations." The term "surface coal mining and reclamation operations" is defined in 30 CFR 700.5 to mean "surface coal mining operations and all activities necessary or incidental to the reclamation of such operations." Also found in 30 CFR 700.5 is the following definition of "surface coal mining operations":

(a) Activities conducted on the surface of lands in connection with a surface coal mine * * *; and

(b) The areas upon which the activities described in paragraph (a) of this definition occur or where such activities disturb the natural land surface. These areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction [of roads and other listed areas] and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to those activities.

See also 30 U.S.C. § 1291(27), (28) (1988). Thus, the "affected area" is intended to encompass the surface coal mine, any incidental activities, and any necessary or incidental reclamation of those operations. The regulations also define "previously mined area" as "land previously mined on

6/ Following the elimination of the 2-acre exemption, 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 such operations conducted on or after Nov. 8, 1987 (52 FR 21229 (June 4, 1987)).

7/ At page 2 of his findings and recommendations the Cabinet Hearing Officer stated that "Mr. Deaton testified that before he bought the land it had been disturbed by some Sigmond's or Lewis' and that some of it had been logged also" (Exh. G-6).

which there were no surface coal mining operations subject to the standards of [SMCRA]." 30 CFR 701.5. Thus, the question presented is whether reclamation of the previously mined area in this instance was "necessary or incidental" to petitioner's surface coal mining operation.

The record shows that reclamation of the previously disturbed area was not "necessary" to petitioner's operation. Rather, Deaton testified that he was motivated to "dress up" all disturbed land in the area because it "was worthless the way it was" (Tr. 150). Nor was such reclamation "incidental" to petitioner's operation. "Incidental" is defined as "[d]epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal; something incidental to the main purpose." Black's Law Dictionary 686 (5th Ed. 1979). Thus, an incidental activity would be one depending upon or appertaining to something else as the primary activity. In this case, the reclamation of the previously mined area cannot be considered an incidental activity to petitioner's surface coal mining operation. The record shows that Deaton specifically requested authorization to undertake this separate reclamation activity. It was not part of Deaton's operation, and while it took place at the same time as Deaton's mining, its purpose was to improve an abandoned mining area.

As noted, Judge McKenna made no finding on the extent of Deaton's operation. Although both the Hall and Bocook surveys presented by OSM showed a disturbance of more than 2 acres, they were based upon the statements of Kentucky Inspector Asher to Hall on February 8, 1989, and the subsequent utilization of those statements to prepare those surveys. Asher was unavailable for cross-examination, having died prior to the time of the January 5, 1990, hearing. Also, there is no indication that Asher reviewed and approved of the Hall or Bocook surveys. No Kentucky or OSM inspector testified at the January 1990 hearing who was on the site at the time Deaton conducted his operation. More than 5 years had elapsed since the completion of mining and OSM's first inspection. The only witnesses who testified at the hearing who were present at that time were Collins and Ron Deaton, both of whom stated that petitioner did not mine the entire permitted area. Thus, to sustain the CO in this case, we would be required to rely entirely on the hearsay statements of Asher.

In this regard this case is similar to R.C.T. Engineering, Inc. v. OSM, *supra*, in which the Board overturned a decision of an Administrative Law Judge relying on hearsay evidence to sustain two CO's for mining in excess of 2 acres in Kentucky.

While the Board did not consider OSM's reliance on hearsay to be improper, it stated:

It is well established that hearsay evidence is admissible 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.

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 statements subpoenas 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 [Kentucky inspector] Charles is the only person other than appellant's president who witnessed the disturbed area, [OSM inspector] 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*.

121 IBLA at 150-52. After comparing the "hearsay evidence" with other evidence presented at the hearing, the Board in RCT held that it was defective under the "multifactor analysis" and reversed the Administrative Law Judge's decision to affirm the CO's. *Id.* at 152, 154. The Board particularly noted the lack of actual involvement by the Kentucky inspectors in preparing the OSM surveys and the lapse of time between mining and survey, both factors that are involved in this case.

In rebuttal to OSM's assertion that Asher correctly delineated the disturbance caused by Deaton's operation, petitioner points out that at the time Hall, Boothroy, and Asher visited the site in February 1989, approximately 6 years had elapsed since mining and reclamation had been completed. Although Boothroy testified that he "accepted [Asher's] statement at face value as to what was previously disturbed" because the areas delineated by Asher appeared to him to have been previously disturbed, noting that he could see "a noticeable difference on the highwall" and that "[y]ou could tell the appearance of the rock had weathered more. It wasn't near as new looking" (Tr. 100-01), he admitted that he had no direct knowledge of the boundaries of the previously disturbed area (Tr. 105-06). Hall, who also heard Asher's statements, testified that she was unable to distinguish any differences in the highwall (Tr. 74, 91). Further, Collins, who observed the operation, testified that Deaton did not mine to the identified break in the highwall (Tr. 135). Further, while Hall purports to have used the landmarks identified by Asher, there is no evidence in the record we can use to verify that the resulting survey accurately corresponds with Asher's oral recollection of the minesite. Asher did not assist in the survey nor review the survey results upon completion.

We find many of the same defects in the RCT case to exist in the present case. The oral unsworn statements attributed to Inspector Asher by OSM are not corroborated by record evidence. The boundaries purportedly confirmed by Asher are contradicted by the sworn testimony of others testifying who had first-hand knowledge of the operation and the disturbed area. We find that the evidence does not support upholding the cited violation.

Accordingly, 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.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge