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MORTON INTERNATIONAL (MORTON SALT) V. SOL (MSHA)  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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MORTON INTERNATIONAL, INC., : CONTEST PROCEEDINGS  
MORTON SALT, :  
Contestant : Docket No. CENT 93-237-RM  
v. : Citation No. 3897764; 6/15/93  
:  
SECRETARY OF LABOR, : Docket No. CENT 94-49-RM  
MINE SAFETY AND HEALTH : Citation No. 3897982; 6/15/93  
ADMINISTRATION (MSHA), :  
Respondent : Weeks Island Mine  
: I.D. No. 16-00970  
:  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 93-259-M  
Petitioner : A.C. No. 16-00970-05660  
v. :  
: Weeks Island Mine  
MORTON INTERNATIONAL, INC., :  
MORTON SALT, :  
Respondent :

DECISION

Appearances: Edward H. Fitch, Esquire, Office of the  
Solicitor, U.S. Department of Labor, Arlington,  
Virginia, for the Secretary of Labor;  
Henry Chajet, Esquire, Jackson and Kelly,  
Washington, D.C., for Morton International,  
Inc., Morton Salt.

Before: Judge Melick

These consolidated cases are before me pursuant to  
Section 105(d) of the Federal Mine Safety and Health Act  
of 1977, 30 U.S.C. 801 et seq., the "Act," to challenge  
two citations issued by the Secretary of Labor against  
Morton International, Inc., Morton Salt (Morton) at its  
Weeks Island domal salt mine. It is undisputed that this  
mine is a Subcategory II-A Mine under 30 C.F.R.

57.22003(a)(2)(i)

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Citation No. 3897764 alleges a violation of the mandatory standard at 30 C.F.R. 57.22235 and charges as follows:

Methane readings were taken on top of a berm which was positioned across the entrance to 10 EWN. The berm was about 9' high and readings at about 15' were 1 %. A extended pole was used to reach to heights of about 24 feet. As the pole with the methane detector was extended upward the readings continued to climb. The methane detector was shut off at 3.25 % but readings would've read higher. This is a II A mine that was a potential for outburst when methane reaches explosive limits.

The cited standard, applicable to Subcategory II-A mines, provides, in relevant part, as follows:

(a) If methane reaches 1.0 percent in the mine atmosphere, all persons other than competent persons necessary to make ventilation changes shall be withdrawn from affected areas until methane is reduced to less than 0.5 percent.

Citation No. 3897892 alleges a violation of the standard at 30 C.F.R. 57.22232 based upon the same methane readings. This citation charges as follows:

Ventilation changes had not been made to reduce the level of methane to below 0.5 % in the mine atmosphere on June 15, 1993. Methane was detected at the entrance to 10 EWN heading and upon advancement into the abandoned area where a large outburst cavity was located at the face, the detector readings began to rise. A reading was again taken while standing upon an approximate 9 feet high berm being used to close off the room and the detector was extended upwards while positioned in the right hand. It indicated a concentration of 1 % methane. The approximate distance from the floor would be 16 feet. A second reading was taken using an extension pole and it indicated 3.25 % methane.

30 C.F.R. 57.22232, also applicable to Subcategory II-A mines, provides as follows:

If methane reaches 0.5 percent in the mine atmosphere, ventilation changes shall be made to reduce the level of methane. Until methane is reduced to less than 0.5 percent, electrical power shall be deenergized in affected areas, except power to monitoring equipment determined by

MSHA to be intrinsically safe under 30 CFR part 18. Diesel equipment shall be shut off or immediately removed from the area and no other work shall be permitted in affected areas.

There is no dispute that the Mine Safety and Health Administration (MSHA) inspector in this case in fact obtained the cited one percent and 3.25 percent methane readings and that he obtained those readings within an abandoned area of the subject Weeks Island Mine.(Footnote 1) It is further undisputed that the berm noted in the citation properly identified a boundary of that abandoned area of the mine and that miners were prohibited in accordance with law from entering that abandoned area. It has been stipulated that the "affected area" in these cases was entirely within this abandoned area so that no withdrawal of miners or deenergization of equipment was required.

Morton denies both violations arguing that the cited standards were never intended to apply to abandoned areas of mines and that the Secretary's contrary interpretation is, in essence, inconsistent with the regulations and plainly erroneous. The Secretary argues, on the other hand, that the applicable definition of "mine atmosphere" referenced in the cited standards does not distinguish between active and abandoned areas, but rather sets forth the locations where methane readings are to be taken in both active and abandoned areas of a mine. The term "mine atmosphere" is defined, for purposes of this part of the regulations, as "any point at least 12 inches away from the back, face, rib, and floor in any mine ... ." 30 C.F.R. 57.22002.

It is well-settled that an agency's interpretation of its own regulations is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Udall v. Tallman*, 380 U.S. 1, 15 L.Ed. 2d 616, 85 S.Ct. 792 (1965); *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414, 65 S. Ct. 1215, 1217, 89 L.Ed. 1700 (1945); *Secretary v. Western Fuels-Utah*, 900 F.2d 318, 321 (D.C. Cir. 1990). For the reasons set forth herein, I find that the Secretary's present interpretation in these cases that the cited standards apply to "abandoned areas" of mines is indeed inconsistent with those standards and the applicable definition of "mine atmosphere" incorporated in those standards and is plainly erroneous.

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1 The term "abandoned areas" is defined as relevant hereto in 57.22002 as "areas in which work has been completed, no further work is planned, and travel is not permitted."

That the Secretary's proffered interpretation is both inconsistent with the regulations and plainly erroneous is apparent in the first instance from the use of the term "face" in the applicable definition of "mine atmosphere." Common usage in the mining industry clearly limits the term to only active workings of a mine. In A Dictionary of Mining, Mineral and Related Terms, U.S. Dept. of Interior, 1968, the term "face" is variously defined as "a working place from which coal or mineral is extracted," "the exposed surface of coal or other mineral deposit in the working place where mining, winning, or getting is proceeding," and "the point at which material is being mined."

The use of the term "face" in defining the "mine atmosphere" where specified levels of methane trigger withdrawal and remedial action under the cited standards is therefore clearly inconsistent with the application of the standards to abandoned areas (i.e., areas in which work has been completed, no further work is planned and travel is not permitted) and where there is accordingly no "face." The Secretary's attempt to extend application of these standards to abandoned areas is therefore both inconsistent with the regulations and plainly erroneous.

In addition, all of the actions required by the cited standards upon the specified levels of methane, except ventilation changes, i.e., deenergization of equipment, cessation of work and removal of personnel, are clearly relevant only to active workings where miners and functioning equipment are present. These actions are meaningless in abandoned areas where work and travel have already been prohibited. Moreover, in order to make ventilation changes, miners would no doubt, as in this case, be required to enter the dangerous environment of abandoned areas. For this additional reason the Secretary's present interpretation appears to be both inconsistent with the regulations and plainly erroneous.

That the Secretary never intended the cited standards to apply to abandoned areas is also supported by circumstantial evidence. For example, while the Secretary does in fact permit unsealed abandoned areas to exist in Subcategory II-A mines he does not in the regulations require that such unsealed, abandoned areas be tested for methane or specifically ventilated (Stipulation No. 40, Tr. 163). Indeed, the regulations governing the locations where methane testing must be performed in such mines specify only locations in active areas. See, e.g., 30 C.F.R. 57.22228 and 57.22230. In addition, the methane monitors required by 57.22301 to test the "mine atmosphere" are to be located only in active areas. See 30 C.F.R. 57.22301 (Tr. 67). Significantly, the Secretary's regulations do require the ventilation of unsealed abandoned areas but only in Subcategory III mines.

Furthermore, under the maxim *expressio unius est exclusio alterius*, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated in a regulation, there is an inference that all omissions should be understood as exclusions. See Sutherland Stat Const 47.23 (5th Ed.).(Footnote 2)

The Secretary's present interpretation of the cited standards is inconsistent with this rule of construction. The regulations specifically list areas where methane testing is required to determine methane action levels in the mine atmosphere. MSHA mandates preshift methane testing at all work places (30 C.F.R. 57.22229), as well as weekly methane testing at the following locations: (1) active mining faces and benches; (2) main returns; (3) returns from idle workings; (4) returns from abandoned workings; and (5) seals. 30 C.F.R. 57.22230. Only active working areas are tested to determine the methane content of the mine atmosphere by atmospheric monitoring systems under 30 C.F.R. 57.22301 (Tr. 67).

On the other hand, there are no testing requirements for the "mine atmosphere" in abandoned areas and MSHA acknowledges this fact (Stipulation No. 40). Accordingly, under the maxim *expressio unius est exclusio alterius*, since the Secretary has listed specific locations for methane testing in Subcategory II-A mines and concedes that abandoned areas are not required to be tested for methane, it is apparent the Secretary did not intend to apply the cited standards to abandoned areas and that his present interpretation is inconsistent with these standards and plainly erroneous.

The Secretary's attempted application of the cited standards to abandoned areas is also contrary to the regulatory history. As noted in Morton's Brief, from 1969 until 1987, the Secretary's regulations required abandoned areas of gassy mines to be sealed or ventilated. An MSHA proposed rule would have instituted this requirement for Subcategory II-A mines, but was rejected by the Secretary (Stipulation No. 39; 52 Fed. Reg. 24924, 24926 (1987)). In the case of Subcategory II-A mines, the Secretary expressly found that the proposed rule was unnecessary and duplicative of the protection provided by existing 30 C.F.R. 57.8528, which permits abandoned areas without ventilation. In contrast, MSHA did promulgate a rule, 57.22223, requiring the ventilation of unsealed, abandoned areas of Subcategory III mines under certain conditions. There is no such requirement applicable to Subcategory II-A mines.

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2 When a regulation is legislative in character, rules of interpretation applicable to statutes should be used in determining its meaning. *Id.* 31.06.

Significantly, MSHA acknowledges in essence that the result of enforcement of the citations in these cases is the imposition of the rejected regulatory requirement, i.e., the ventilation of unsealed abandoned areas in Subcategory II-A mines (Stipulation No. 38; Exh. C-4 at page 27). The Secretary's attempt to enforce a provision which he previously proposed but rejected is inconsistent with the principle that the consideration and rejection of a provision is clear evidence of the intent to exclude its requirement. Sutherland, supra, 48.04 at 325; 48.18 at 369. The adoption by the Secretary of a provision applicable only to one class of regulated entities, i.e., Subcategory III mines, also strongly suggests his intent not to apply such provisions to excluded classes, i.e., Subcategory II-A mines. Id. 31.06. Thus, for these additional reasons, it is apparent that the Secretary's present interpretation of the cited standards is inconsistent and plainly erroneous.

In this regard, it is also significant to note the history of non-enforcement of the Secretary's present interpretation both before and after the issuance of the citations at bar. It is undisputed that MSHA had never previously attempted to enforce the cited standards in the manner now taken. Since promulgation of the gassy mine standards in 1987, and prior to the issuance of Citation No. 3897764 on June 15, 1993, MSHA inspectors always tested for methane in the active areas of the mine. More particularly, the MSHA inspectors in this case acknowledged that they had inspected the mine at issue dozens of times and had never previously tested for methane in an abandoned area.

In addition, the instant citations were abated without requiring ventilation changes to reduce the amount of methane in the abandoned areas to below the prescribed 0.5 percent action level set forth in 57.22232. When the corresponding citation was terminated, MSHA Inspector Olivier found 0.6 percent methane in the cited abandoned area (Stipulation No. 12). Indeed, Olivier maintains that he expected he would find higher readings for methane as he traveled further into the abandoned area (Stipulation No. 12).

Finally, it should be reemphasized that, as a matter of safety, the Secretary himself has acknowledged that the ventilation of abandoned areas of Subcategory II-A mines is not necessary. See 52 Fed. Reg. at 24926 (1987). It is further acknowledged that methane emanating from those areas is subject to present regulatory controls.

For the above reasons, I find that the Secretary's present interpretation of the cited standards is both inconsistent with the regulations and plainly erroneous. In the alternative, if the language of the cited standards and the related regulatory

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definition of "mine atmosphere" should not be considered plain (and plainly inconsistent with the Secretary's present interpretation of that language), a Chevron II analysis demonstrates that the Secretary's interpretation is not reasonable. The preceding discussion applies as well for this demonstration. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984); Secretary v. Keystone Coal Mining Corp., 16 FMSHRC 6 (1994).

Accordingly, under either theory, since the methane readings cited as a basis for the instant charges were taken within an abandoned area of the Weeks Island Mine, an area I find to be outside the ambit of the cited standards, there could be no violation of the standards and the citations must accordingly be vacated.

ORDER

Citation Nos. 389764 and 3897982 are hereby vacated. Contest Proceedings Docket Nos. CENT 93-237-RM and CENT 94-49-RM are GRANTED and Civil Penalty Proceeding Docket No. CENT 93-259-M is DISMISSED.

Gary Melick  
Administrative Law Judge

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