

CCASE:

MSHA V. MABEN ENERGY

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

October 16, 1981

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

Docket No. WEVA 79-123-R

MABEN ENERGY CORPORATION

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. (Supp. III 1979). The administrative law judge vacated a citation issued to the Maben Energy Corporation (Maben) for failure to conduct an inspection of a dam. 1 FMSHRC 1942 (1979). For the reasons that follow, we reverse.

Maben was cited for a violation of 30 C.F.R. §77.216-3(a) which states:

All water, sediment, or slurry impoundments which meet the requirements of §77.216(a) shall be examined by a qualified person designated by the person owning, operating or controlling the impounding structure at intervals not exceeding seven days for appearances of structural weakness and other hazardous conditions.

All instruments shall be monitored at intervals not exceeding seven days by a qualified person designated by the person owning, operating, or controlling the impounding structure. (Emphasis added). 1/

The relevant inquiry in this case is whether Maben was "operating or controlling" the dam, within the meaning of the cited standard.

The record reveals that Maben contracted with the Westmoreland Coal Corporation to mine coal on a designated tract of land. The coal mined by Maben was for delivery to Westmoreland. Under the contract Maben operated a drift mine, formerly mined by Westmoreland. In proximity to the drift mine, but not on the contract property, is the dam at issue. The dam was constructed in the early 1970's by the Whitesville A & S Coal Company in connection with a strip-mining operation. It consists of a cross-valley earth and rock fill structure about 400 feet long, 20 feet high, 300 feet wide at the base and 40 feet wide at the crest. The impoundment upstream of the dam covers an area of about 2 acres.

1/ It is undisputed that the impoundment structure at issue falls within the purview of 30 CFR §§77.216(a) and 77.216-3(a).

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When the drift mine operated by Maben was being mined by Westmoreland, the impoundment was used by Westmoreland as a source of water for its mining equipment, for firefighting, and for its bathhouse.

At the time that Maben was issued the involved citation, Maben was using water from the pond for its bathhouse. A haulage access road ran from the portal of the drift mine, across a portion of the dam, continued behind the dam, crossed the dam's spillway, and continued to the main mine access road. Maben maintained a gate with a lock at the entrance to the main road. This gate controls access to the dam, the mine portal and the mine's other facilities. Maben's miners, coal haulers and suppliers use this road to reach the mine. The primary function of the spillway that the road crossed was to control the water level in the pond by bypassing flood water down the spillway. Maben raised the road 2-1/2 to 3 feet above the spillway floor at its outlet, potentially affecting the water level behind the dam. That is, the road could act as a barrier possibly causing the water coming down the spillway to backup to some degree during a storm.

We find that these facts, considered together, provide a sufficient basis upon which to conclude that Maben operated or controlled the dam within the meaning of the standard. Maben controlled access to the impoundment, used water from the impoundment, affected the impoundment through modification of the spillway, and conducted active mining operations in the immediate area requiring travel over or near portions of the structure and the surrounding area.

Accordingly, the decision of the administrative law judge is reversed and the citation is reinstated.

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