

CCASE:

MSHA V. MABEN ENERGY

DDATE:

19811222

TTEXT:

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

December 22, 1981

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

Docket Nos. WEVA 79-447-R  
WEVA 79-448-R  
WEVA 79-449 R  
WEVA 79-450 R  
WEVA 79-451-R  
WEVA 79-452-R

v.

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). It involves citations issued for conditions relating to the same dam and retention pond that was the subject of the recent Commission decision in Maben Energy Corp., 3 FMSHRC 2280 (1981) (" Maben I"). In that case we decided Maben operated or controlled the dam and pond for purposes of the regulation in issue and the citation was affirmed. 1/

The instant citations remained pending before the administrative law judge during the resolution of Maben L 2/ Early in this proceeding, a letter was sent by counsel for Maben to the judge in which it was agreed that Maben would be bound by the final Commission decision in Maben I unless "the Commission's decision is adverse to [Maben's] interest ... and in such event [Maben] would be bound by the ultimate outcome of a final decision of the highest court hearing the same, not by the Commission's decision." In addition, a formal stipulation was filed on October 6, 1980, setting forth the agreement of the parties that the facts in the instant case are "identical" to those in Maben I, but with no reference to the outcome of Maben I. Those two documents comprise the entire evidentiary record before us.

1/ The regulation cited in Maben I was 30 CFR §77.216-3(a) which requires inspection of impoundments by persons owning, operating or controlling the structure.

2/ The citations at issue in the instant case, which were written about five months after the citation in Maben I, involve alleged violations of 30 CFR §§77.216 1 and 77.216(c) for failure to name an individual responsible for the impoundment and to develop a use plan for it.

~2777

The judge issued his decision in this proceeding shortly after

we issued our opinion in Maben I. He cited our decision in Maben I and stated that the parties had agreed to be "governed" by it.

Accordingly, he affirmed the instant citations and dismissed the notices of contest on the basis of that "agreement."

Maben petitioned for review of the judge's decision and we granted that petition on November 24, 1981. The petition argued that the judge's decision was "premature" and that Maben had not agreed to be bound by the Commission decision in Maben I until the question was resolved by the highest court to hear any appeal. 3/ Maben also raised questions as to the propriety of findings in Maben I as incorporated in the judge's decision in this case.

We do not agree with the operator that the judge's decision in this case is "premature." A decision issued by this Commission is binding on the parties unless and until stayed or overturned by a reviewing court of appeals. 30 U.S.C. §816(c). The parties may not stipulate to the contrary and Maben may not otherwise be relieved from the legal effect of that decision.

It appears, however, that the operator is correct that the parties did not, as the judge held, stipulate that they would necessarily be bound by the Commission decision in Maben I. Our reading of the August 1979 letter, which is the only "stipulation" that refers to the outcome of Maben I, persuades us that the judge misinterpreted the operator's language. Accordingly, we hold that the judge was in error in basing his disposition of the case solely on the parties' "agreement" to be bound by Maben I and we do not adopt that portion of his opinion.

Nevertheless, we affirm the judge as to result. The parties agreed in the stipulation dated October 6, 1980, that the facts in this case are identical to those in Maben I. Only the question of the legal effect of the facts remains at issue here. We decided in Maben I that under these facts, Maben maintained the requisite control to find a violation of the Act. Accordingly, that point is resolved against Maben in the present case as well. 4/

---

3/ In fact, Maben I has been appealed to the Fourth Circuit where it is now pending. *Maben Energy Corp. v. Secretary of Labor and Federal Mine Safety and Health Review Commission*, No. 81-2075. This Commission denied Maben's request for stay of Mab pending the outcome of the appeal and on December 9, 1981, the Fourth Circuit also declined to issue a stay.

4/ There being no dispute as to operative facts, no evidentiary controversy exists which would require us to return this case to the presiding judge for resolution. Rather, economy and efficiency of adjudication dictate that the Commission itself apply the previously established law to the stipulated facts. We anticipate

no prejudice to any party by our action. Cf. Knox County Stone Co., Inc., DENV 79-359-PM, November 6, 1981, slip. op. at 4 (approving disposition at review level in appropriate circumstances).

~2778

For the reasons set forth above, the citations are affirmed and the notices of contest are dismissed.

~2779

Distribution

James M. Brown, Esq.

File, Payne, Scherer & Brown

P.O. Drawer L

Beckley, West Virginia 25801

Michael McCord, Esq.

Office of the Solicitor

U.S. Department of Labor

4015 Wilson Blvd.

Arlington, Virginia 22203

Administrative Law Judge Gary Melick

FMSHRC

5203 Leesburg Pike, 10th Floor

Falls Church, Virginia 22041