CCASE:
MSHA V. NACCO MINING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 29, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. VINC 76X99-P

NACCO MINING COMPANY IBMA No. 77-15
DECISION
This penalty proceeding arises under section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $801 et seq. (1976) (amended 1977)(the 1969 Coal Act). 1/ The issues are whether the administrative law judge erred in determining that Nacco Mining Company violated 30 CFR $75.200 and in assessing a civil penalty of $500 for that violation.
Section 75.200, which is drawn from section 302(a) of the 1969 Coal Act, provides in pertinent part: "No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan...." The record discloses that a company section foreman, while supervising two miners cutting a roof belt trench, proceeded alone past the last row of permanent supports under loose, unsupported roof, where a large rock fell on him causing the injuries from which he later died. 30 CFR $75.200-13(a)(2) sets forth an exception to section 75.200 permitting "persons engaged in installing temporary support ... to proceed beyond the last permanent support [before] such temporary supports are installed." Nacco's approved roof control plan included an identical exception.
The judge upheld the notice of violation of section 75.200, finding that the foreman went beyond permanent supports into an area where there were no temporary supports and that he was not installing temporary supports or inspecting the roof prior to such installation while in this area. In assessing a civil penalty of $500, the judge determined inter alia that the gravity of the violation was very serious and that Nacco's 40 violations of section 75.200 within 2 years constituted a significant history of prior violations. The judge also concluded that Nacco was

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1/ Section 109(a)(1) provided in part:
The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act ... shall be assessed a civil penalty by the Secretary.... In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

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non-negligent. Cross-appeals were filed by Nacco early as to the judge's findings of liability and non-negligence respectively.

We affirm the judge's liability findings. A section foreman's act of violation is attributable to the operator under the agency concepts embodied in the 1969 Coal Act which imposes liability without regard to fault. Ace Drilling Coal Co. Inc., 2 FMSHRC 790 (1980), aff'd mem., (3d Cir., No. 80-1750, January 23, 1981); Peabody Coal Co., 1 FMSHRC 1494, 1495 (1979); United States Steel Corp., 1 FMSHRC 1306, 1307 (1979). See also Pocahontas Coal Co. v. Andrus, 590 F.2d 95 (4th Cir. 1979), aff'g 8 IBMA 136 (1977).

In this case, substantial evidence amply supports the judge's finding that the foreman violated section 75.200. One of the miners whom the foreman was supervising testified without contradiction that the foreman had traveled under unsupported roof 10 to 12 feet past the last permanent supports and was neither installing temporary support nor inspecting the roof prior to such installation. Tr. 36-37, 40-42, 46-47. This testimony was fully corroborated by MESA's accident investigation report (Exh. P 4). Under Nacco's roof control plan and mining practices, the proper distance between the last permanent supports and the next temporary supports was five feet. Tr. 41-42, 46. There was no need or justification for the foreman's proceeding so far past the five-foot limit if, in fact, he was engaged in installing temporary support. We therefore reject Nacco's argument that the foreman's conduct was permissible under the temporary support installation exception of section 75.200 13(a)(2) and the roof control plan. 2/ Given these facts and under the settled authority set forth above, the judge did not err in finding Nacco liable for its foreman's violation of section 75.200. 3/

2/ Nacco argues that the eyewitness' testimony on how far the foreman had proceeded past permanent support was unclear; however, the judge elicited a final clarification (Tr. 46-47) which we conclude removes

any doubt engendered by uncertainty in the witness' initial testimony. Moreover, Nacco's claim that "there [is no] reliable evidence to show exactly where [the foreman] was when the rock fell" (Br. 11 (emphasis in original)) is undercut by its own contemporaneous accident report which also placed the scene of the accident 12 feet past the permanent support. R. Exh. 1, accident sketch map following p. 4.

3/ Nacco's reliance on North American Coal Corp., 3 IBMA 93 (1974), and Eastern Associated Coal Corp., 4 IBMA 184 (1975), is misplaced. In North American, the Board stated in footnoted dicta that an operator might escape derivative liability if apparently violative conduct stemmed from a miner's negligent failure to comply with the operator's safety requirements. 3 IBMA at 108-109 n. 10. To the extent that these dicta suggest an exception to the liability without fault structure of the 1969 Coal Act, they are out of line with, and do not survive, the well established precedent cited above. The Board itself substantially rejected the North American footnote in Webster County Coal Corp., 7 IBMA 264, 266-268 (1977), issued after the parties filed their briefs on appeal herein. We note that this case does not require us to express a view on North American's precise holding interpreting the duty imposed on operators by 30 CFR $75.1720. See United States Steel Corp., 1 FMSHRC at 1307 & n. 3; Kaiser Steel Corp., 1 FMSHRC 343, 345 & n. 6 (1979). Eastern Associated Coal Corp. dealt only with a narrow question of whether the presence of a person under ""supported roof constituted a single or double violation of section 75.200 on the facts of the case, and did not address the larger questions of liability and what duty of care section 75.200 imposes on operators. 7 IBMA at 192-195.

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As to the judge's penalty findings, his determination that Nacco was not negligent raises two issues: the appropriateness in general of considering a foreman's negligence in assessing a penalty against the operator, and whether the judge properly declined to do so in this case. Concerning the first question, the judge held that it is appropriate to "hold the operator accountable for the negligence of one of its supervisors in failing to perform the regular duties required of him by the position in which the operator has placed him, especially where the failure to perform could affect miners who are working under him by virtue of the supervisory position in which the operator has placed him." J.D. 5-6. Since operators typically act in the mines only through such supervisory agents, we agree that consideration of a foreman's actions is proper in evaluation of negligence for penalty assessment purposes. In Ace Drilling, supra, we also affirmed a judge's 1969 Coal Act penalty assessment which included consideration of a foreman's negligence. 2 FMSHRC at 791. Regarding the specific negligence issue, the judge refused to

consider the foreman's "misconduct" because he found that Nacco was not "remiss" in selecting and adequately training the foreman, who "had always exercised good judgment in discharging his responsibilities"; "the testimony [made] clear that the operator could not have been expected to have anyone else from management on the scene, and that prior to the cut being taken there was no way to tell that [the] roof was bad"; management's overall safety program was adequate; and not withstanding all the foregoing factors, the foreman acted aberrantly, engaging in "wholly unforeseeable misconduct, resulting in his own death but not in harm or a risk of a harm to anyone else." J.D. 5. 4/ The Secretary does not dispute these factual conclusions. In such circumstances, the judge found that penalizing the company for the foreman's misconduct would not fairly or sensibly promote the 1969 Coal Act's safety purposes. On the unusual and undisputed facts present here, we agree. Where as here, an operator has taken reasonable steps to avoid a particular class of accident and the erring supervisor unforseeably exposes only himself to risk, it makes little enforcement sense to penalize the operator for "negligence." Such an approach might well discourage pursuit of a high standard of care because regardless of what the operator did to insure safety, a negligence finding would automatically result. We therefore approve the judge's finding of no negligence. 5/

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4/ We note that before proceeding past the permanent support, the foreman warned the two miners under his supervision not to follow him and they remained behind the permanent support. Tr. 16, 37. The foreman's rescue was effected safely.

5/ In reaching this result, we do not rely on the cases arising under the Occupational Health and Safety Act of 1970, 29 U.S.C. $651 et seq. (the OSHAct), cited by the judge. The OSHAct has not been interpreted to be a liability without fault statute, and decisions dealing with liability thereunder are not useful for analysis under the 1969 Coal Act.

We emphasize, however, that even an agent's unexpected, unpredictable misconduct may result in a negligence finding where his lack of care exposed others to risk or harm and may not absolve an operator who was otherwise blameworthy in hire, training, general safety procedures, or the accident or dangerous condition in question. 6/

We also agree with the judge that Nacco's history of violations of section 75.200 is significant and note that Nacco did not object to the authenticity of MESA's violation printout. Nacco does not contest the judge's other penalty criteria findings. In sum, we approve the judge's penalty of $500.

Accordingly, the judge's decision is affirmed.

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6/ As Prosser has pertinently observed in explaining the standard of care imposed by the common law of negligence:

[T]he standard [of care] imposed must be an external one, based upon what society demands of the individual, rather than upon his own notions of what is proper. An honest blunder, or a mistaken belief that no damage will result, may absolve him from moral blame, but the harm to others is still as great, and the actor's individual standards must give way to those of the public. In other words, society may require of him not to be a fool [Prosser, Handbook of the Law of Torts 146 (4th ed. 1971).]

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