CCASE:
MSHA V. THOMAS CATES
MSHA V. STEPHEN WHITLEDGE
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 91-303
	:	A.C. No. 15-13469-03774 A
v.	:	
	:	No. 9 Mine
THOMAS CATES, Employed by GREEN RIVER COAL COMPANY, INCORPORATED, Respondent	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 91-352
	:	A.C. No. 15-13469-03776 A
v.	:	
	:	No. 9 Mine
STEPHEN WHITLEDGE, Employed by GREEN RIVER COAL COMPANY, INCORPORATED, Respondent	:	

DECISION

Appearances: Gretchen Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Teresa M. Arthur, Esq., Paxton & Kusch, P.S.C., Central City, Kentucky, for the Respondents.

Before: Judge Melick

These consolidated cases are before me upon the petitions for civil penalties filed by the Secretary of Labor, pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act" charging Thomas Cates and Steven Whitledge as agents of a corporate mine operator, Green River Coal Company, Incorporated, (Green River), with knowingly authorizing, ordering, or carrying out a violation by the named mine operator of the mandatory standard at 30 C.F.R. 75.518. (Footnote 1)

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1/ Section 110(c) of the Act reads as follows:
"Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order

Neither Cates nor Whitledge dispute that they were both agents of the cited corporate mine operator nor do they dispute that a violation of the cited standard did in fact occur as alleged in section 104(d)(1) Order No. 3421152. They both dispute however, that they "knowingly authorized, ordered, or carried out" the aforesaid violation of the mine operator. The issue before me then is whether either Cates or Whitledge, or both, acting as agents of the corporate mine operator "knowingly authorized, ordering, or carried out" the violation charged in Order No. 3421152. If it is determined that either Cates or Whitledge, or both, acted in such manner then a civil penalty must also correspondingly be assessed considering the appropriate criteria under section 110(i) of the Act.

Cates and Whitledge are charged with knowingly authorizing, ordering, or carrying out the violation charged in Order No. 3421152. That order reads as follows:

> The 1.6 hp 480 volt AC pump located in the return entry of 2C headings was not provided with proper overload or short-circuit protection in that the pump was receiving power from a 225 amp breaker with instantaneous setting of 300 amps, maximum for the pump overload is .6 amp and maximum for short-circuit protection is 18.2 amps. The No. 10 awg. 5 conductor cable on the pump was not protected either. The inspection of this pump (weekly) indicated no flight [sic] box which contains the protective [illegible word] on dates 1-12-90, 1-20-90 and 1-27-90 and was countersigned by Tommy Cates (mine foreman) on 1-12-90 and 1-20-90 and apparently little or no effort was made to correct this condition. (Footnote 2)/

fn. 1 (continued)
incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsection (a) and (d)."

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2/ Significant allegations in the order were admitted by the issuing inspector at hearing to be erroneous. According to the allegations, prior weekly inspections of the cited 480-volt AC pump in the return entry of the 2C heading, had been reported in previous weekly inspection reports on January 12, January 20, and January 27, 1990, as not having a "flight" [sic] box and concluded with the statement that "apparently little or no effort was made to correct this condition." As the undisputed evidence revealed at hearing and as the inspector admitted at hearing however, the particular pump at issue had never previously been reported in the

The cited standard provides as follows:

> Automatic circuit-breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electric equipment and circuits against short circuit and overloads. Three-phase motors on all electric equipment shall be provided with overload protection that will deenergize all three-phases in the event that any phase is overloaded.

Since section 110(c) of the Act predicates individual liability of a corporate agent upon the finding of a violation of a mandatory health or safety standard by the corporate operator, I am strictly limited in determining whether there was individual liability under section 110(c), to evaluation of only the precise allegations in the order itself and not to allegations of other violations that may have been made elsewhere in the petitions for civil penalty or at hearing.

The Commission defined the term "knowingly," in Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8 (1981), 689 F.2d 632 (6th Cir. 1982), cert denied, 461 U.S. 928 (1983) as follows:

> "Knowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence . . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute. 3 FMSHRC 16.

There is no direct evidence in this case that either Cates or Whitledge "knowingly authorized, ordered, or carried out" the specific violation alleged in the order at bar. Moreover, there is insufficient circumstantial evidence that either had any

fn. 2 (continued)
weekly inspection books as having no "flight" [sic] box, and it was acknowledged at hearing that MSHA did not inspect the mine to determine whether indeed those pumps that had previously been reported in the weekly inspection books as not having "flight" [sic] boxes had in fact been repaired.

knowledge or reason to know of the violative condition. While the condition was cited and presumably discovered at 10:00 a.m., on January 31, 1990, by Inspector Haile of the Federal Mine Safety and Health Administration (MSHA), there is no evidence as to how long that condition had existed, no evidence that either of the Respondent's had any obligation or duty to have inspected such equipment or to have read the reports of weekly electrical inspections or that they were even in a position in which such a condition would ordinarily have been reported to them. Moreover, at the time of the last required electrical inspection (prior to January 31, 1991), reported on January 27, 1991, not only was no defective condition reported on the cited pump it was noted in the examination book as being "OK." In contrast, several other pumps were reported to have no Flygt box on that date. Thus, even had Cates or Whitledge reviewed the most recent report of examination of electrical equipment on January 27, 1990, they would not have been placed on notice of any defective condition regarding the pump now cited.

The Secretary nevertheless argues that it may be inferred from the existence of prior reports in the examination book of defects in other electrical equipment, most notably in those reports dated January 12, January 13, and January 20, -- those on which Mr. Cates' signature appears at the bottom of the page, that at least Cates should have known on January 31, 1990, of the violative condition of the pump in the return of the 2C headings. The Secretary also seems to be arguing that Mr. Cates should also have known of the violative condition of the pump in the return of the 2C heading on January 31, 1990, for the reason that there was no indication in the reports of examination of electrical equipment for prior dates, that any of the violative conditions on other pumps were corrected.

The Secretary acknowledges, however, that no statute or regulation requires that such corrections be noted in the examination books and that there is no requirement that any of the entries be countersigned. Mr. Cates also testified without contradiction that he reviewed the examination books only for the purpose of verifying that each of the pumps had been examined at least weekly and that as a non-electrician he did not then understand the significance of the wording "no flight box" [sic] periodically reported in the examination books. (Footnote 3)/ It is also noted that those conditions were ordinarily made in the column designated as "equipment examined and/or tested" and not under the column marked "dangerous conditions."

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3/ The referenced junction box is correctly designated as a Flygt box -- a brand name apparently taken from the name of its manufacturer, Flygt Corporation. (See Exhibit G-3).

Moreover, the Secretary concedes that she does not know in fact whether the conditions cited in the examination books i.e., the absence of Flygt boxes on several pumps, had in fact been corrected or merely had not been noted in the record books as having been corrected. The Secretary also acknowledged that even though she was aware of these purportedly dangerous conditions (characterized by the issuing inspector as "significant and substantial" and serious violations), she did not verify whether indeed such conditions continued to exist in the mine, even though the inspector was at that time on the mine premises.

The evidence against Mr. Whitledge is even more tenuous. The Secretary argues that it would be reasonable to infer that Whitledge knew or had reason to know of the cited violation on the basis that he was the maintenance supervisor for the No. 9 Mine. According to Whitledge's undisputed testimony, however, it is clear that not only did he not have the responsibility of reviewing the weekly reports of examinations of electrical equipment regarding the cited pump (which the Secretary concedes was not required to be done by anyone), but that the pumpmen who were all electricians themselves and who performed the weekly examinations of electrical equipment, were responsible for the repairs and that those pumpmen reported directly to the respective mine foreman for their particular shift.

Clearly, there is insufficient connection between the evidentiary facts and the ultimate facts sought by the Secretary to be inferred. See Secretary v. Garden Creek Pocahontas Co., 11 FMSHRC 2148 (1989); Secretary v. Mid-Continent Resources, 6 FMSHRC 1132 (1984). Under the circumstances, the Secretary has failed to sustain her burden of proving by a preponderance of the evidence that either Cates or Whitledge knew or had reason to know of the violation charged in Order No. 3421152. In reaching this conclusion, I have not disregarded the out-of-court statements by pumpmen Richard Walker and Michael Cates, suggesting that they had themselves operated pumps without Flygt boxes. I have also considered Walker's statement that he had reported on or about January 13, 1990, to Steve Whitledge that the "manual disconnects and/or Flygt box had been removed from the pump" which was in reference to another pump and not the one cited herein. I also note that Whitledge denied at hearing that Walker had ever informed him of the alleged absent Flygt box. This testimony directly contradicts Walker's out-of-court statement. I give Whitledge's testimony (under oath and subject to cross-examination) the greater weight. I can give but little weight to such purported out-of-court statements as those given by Walker and Cates where the witness is unavailable to explain his alleged statements under oath and under the scrutiny of cross-examination.

ORDER

The captioned cases are hereby dismissed.

Gary Melick
Administrative Law Judge

Distribution:

Gretchen Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Room 403, Arlington, VA 22203 (Certified Mail)

B. R. Paxton, Esq., Paxton & Kusch, P.S.C., 213 E. Broad Street, P.O. Box 655, Central City, KY 42330 (Certified Mail)

Mr. Thomas Cates, Green River Coal Company, P.O. Box 1249, Henderson, KY 42420 (Certified Mail)

Mr. Stephen Whitledge, Green River Coal Company, P.O. Box 1249, Henderson, KY 42420 (Certified Mail)

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