

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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February 1, 2011

ALLGEIER MARTIN & ASSOCIATES, : CONTEST PROCEEDING  
Petitioner, :  
 :  
 : Docket No. CENT 2009-531-RM  
 : Citation No. 6471439; 06/11/2009  
 :  
 : Mine: Carthage Crushed Limestone  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Respondent. :  
 :  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Petitioner, :  
 :  
 : CIVIL PENALTY PROCEEDING  
v. :  
 :  
 : Docket No. CENT 2010-50-M  
 : A.C. No. 23-00028-191940 CKP  
ALLGEIER MARTIN & ASSOCIATES, :  
Respondent. : Mine: Carthage Crushed Limestone

**DECISION**

Appearances: Sarah White, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for the Petitioner.  
Jack Slate , Safety Manager, Carthage Crushed Limestone, Allgeier Martin & Associates, Joplin, Missouri for Respondent.

Before: Judge Miller

These cases are before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Allgeier Martin & Associates, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The case involves one violation alleging a failure to provide appropriate training to three contractors, employed by Allgeier Martin and working at the Carthage Crushed Limestone mine. The citation was issued by MSHA under section 104(a) of the Mine Act. The parties presented testimony and documentary evidence at the hearing held on January 11, 2011 in Denver, Colorado. A number of witnesses appeared by telephone.

## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Allgeier Martin & Associates, (“Allgeier” or “Respondent”) is a contractor who conducts underground surveying activities at the Carthage Limestone mine (the “Mine”) located in Jasper County, Missouri. The Respondent agrees that it is subject to the jurisdiction of the Mine Safety and Health Administration and that the Administrative Law Judge has jurisdiction to issue this decision. (Tr. 9-10); Stip. 1- 4. On June 11, 2009, MSHA inspector Keith Markeson conducted a regular inspection of the Mine and its contractor, Allgeier. As a result of the inspection, the violation contested herein was issued. Following the testimony and presentation of evidence, a decision was issued on the record. The decision is set forth below and includes necessary edits.

### *A. Order No. 6471439*

On June 11, 2009, Inspector Markeson issued an order withdrawing three miners employed by Allgeier Martin, the contractor at the Carthage Crushed Limestone Mine, in Carthage, Missouri. The parties have stipulated that the mine and Allgeier Martin are subject to the provisions of the Mine Act and are miners as defined by the act and that the administrative law judge has jurisdiction in this matter.

Inspector Markeson cited a violation of 30 CFR 48.5, which requires miners to have new miner comprehensive miner training before working underground. The parties agree that the three miners listed in the citation had not received comprehensive training, instead they had received hazard training only. The question is then are they required to have the comprehensive training.

Inspector Markeson's citation, [number] 6471439 reads, "Three contractor miners working in the mine had not received the required MSHA 40-hour new miner training prior to performing surveying duties underground. The contractor was aware of the Part 48 training requirements but believed it was unnecessary for the type of work being done. All three miners had no previous mining experience. The operator is hereby ordered to withdraw Christopher Ackerson, Jeremy Stovall, and Shane Powell from the mine until they have received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and others." This was the citation -- the order, [ ] was issued under 48.5(a), a significant and substantial violation of [a] 104(g) order.

The [ ] issue in this case is whether or not these three men were miners as identified under the Part [4]8 training provisions of the Mine Act, and in particular, [whether they qualify as miners pursuant to the definition of a miner at 30 CFR 48.2. The transcript has various references to an (a)(1) miner [and to] an (a)(2) miner. [Those references stem from] 30 C.F.R 48.2(a)(1) [which explains when] a miner [ ] is required to have comprehensive training. 48.2(a)(2) [on the other hand, sets forth when] a miner is required to have hazard training [only]. So the question is which of these categories do these three miners fit into.

I will note that Allgeier has worked at Carthage for a minimum of 17 years, providing surveying services, and it was the understanding of Allgeier that the hazard training under [ ] 48.2(a)(2) is what was required, [not the comprehensive training provided by 48.2(a)(1)].

Inspector Markeson issued the citation based on his conversation with the three surveyors. Markeson [credibly] testified that he learned that the three surveyors traveled into the mine in their own pickup, that they used their own manlift to lift up to the roof in order to drill, place spads or dowels. They also told Markeson that if they saw loose material, they scaled it down. The miners had no previous mining experience. He did not observe the mining activities, but issued his order based upon what he learned from talking to the three men.

Mr. Stovall testified on behalf of the Respondent. He was on the survey crew, and he testified that as a surveyor he sets points for grid mapping, he stays out of the production areas,[and] that the surveyors are always escorted by a professional miner. He testified that the [surveyors] ask [for assistance] if they see hazards that may need to be removed. He drills, places spads, and in his view is not part of the mining process.

The key [to] Mr. Stovall's testimony is that he could not refute what Mr. Markeson testified to. He does not recall what was asked by

Markeson nor does he recall what he told Markeson. It is his recollection that Markeson talked only to him, not to the other [two surveyor] miners, but I credit the testimony of Inspector Markeson and find that he indeed credibly testified to [the facts he learned by speaking to] all three miners and did learn the facts as presented in this case.

[]. Stovall did confirm that there was a pickup truck driven underground by the surveyors, that they used the manlift underground, as Markeson indicated, and he did -- Stovall did testify that the surveyors, or at least one of them, received training in the operation of the manlift from the rental company.

Mr. McKay, who testified, works for Carthage as a laborer. He testified that the mine areas are examined once each shift, that Carthage Mine examines the areas prior to surveyors doing their work, and, in fact, it is required by the Mine Safety and Health Act that these areas be examined at the beginning or during each shift. Mr. McKay also testified that Allgeier employees are escorted throughout the mine and are not allowed into certain areas underground. The mine has a policy for identifying and dealing with hazards at the mine. McKay was not present when Markeson spoke with [the three Allgeier] surveyors and could not testify about any escort at the time of the citation. He could not refute Markeson's remarks or be specific about the incidents that occurred at the time the citation was issued. He did testify that the examination of the roof is done visually each shift.

Finally, Mr. Sears testified on behalf of [Allgeier Martin]. He explained that he lines out the work for the surveyors at Allgeier Martin, that Allgeier has been surveying and producing maps for Carthage for 17 years, and that the policy is that Allgeier employees are told to stay with the miners' representative and in the area as the mine directs. Allgeier does not direct mining.

Based upon all of the testimony and taking into consideration that the mapping is done infrequently, once a year, with some other updates, and that the workplace is examined each shift by the mine, also that

the surveyors are mapping and using hand or hammer drills and then hammer or pound in spads or dowels, and that [ ] they are at the mine for no longer than five days at a time based on Respondent's Exhibit A; taking all of this into consideration, I find that the Secretary has shown a violation of the mandatory standard, primarily because the workers have stepped outside of the limited role of a surveyor.

Mr. Weaver, the education and training supervisor, [for MSHA] agrees that the activities of the miners, [and not the title given to their job], is what subjects them to comprehensive training provisions. Markeson and Weaver credibly testified, and I agree, that the basis for requiring the comprehensive training is not based upon the job title but on the activities done.

The activities that place these men within the meaning of a miner who is required to have comprehensive training are that they operate mobile equipment underground, they drive their own pickup underground into the mining environment, they use a manlift; according to what they told Mr. Markeson, they find loose roof when they're drilling, they scale it down, and the guides that they place are used in the normal mining activity, not just for mine mapping. These men fit the definition of a miner under [30] CFR 48.2(a)(1). They are engaged -- 48.2(a)(1) [further explains] that a miner means [ ] any person working in underground mines who is engaged in the extraction and production process. I find that the activities of these miners do, indeed, cause them to be engaged in the production process.

The definition [of miner] continues on to [include in the definition] that it also applies to anyone who is regularly exposed to mine hazards, and I understand that the program policy manual says regularly exposed means more than five days. However, someone who is exposed every day for five days, I find to be regularly exposed to the hazards of the roof in the underground mine and the hazards of using this heavy equipment -- associated with using the heavy equipment. Therefore, the miners fit the definition of 48.2(a)(1). They are engaged in production or regularly exposed to mining

hazards. Once they fit under the definition, they must have the comprehensive training.

Inspector Markeson also designated this citation as a significant and substantial violation. As he says in his citation and as the commission has often noted, the Mine Act [ ] acknowledges that an untrained miner is a hazard or a danger to himself and to others. A training violation is a very serious violation. Untrained miners who are operating a manlift to the top of the roof and then drilling and hammering are being exposed to the hazards of falling roof. They are also exposed to the hazards of operating equipment underground in a mine. Exposure to those hazards will result, as Inspector Markeson explained, [in an accident causing event that will result in] lost workday injuries or worse.

I [find that] an untrained person is a hazard to others as well as to himself. Markeson also testified that an injury would occur due to the lack of training. Injury would be, as I noted, lost work injuries or it could be worse. The surveyors are exposed to loose rock, bad air quality, even to the ability to escape in the event of an accident. All would result in an accident-causing event, and that accident-causing event would result in a serious injury to the miner.

As Inspector Markeson indicated, the mine demonstrated moderate negligence in this circumstance. [I agree with that designation.] [It is] the commission judges who [determine the appropriate] penalty, [in a case such as this based upon the criteria delineated in section 110 of the Act]. The Secretary has proposed a penalty of \$112. I find that the Allgeier Martin is [ ] a small contractor working at a medium-sized mine. The ability -- the payment of a penalty would not hinder its ability to continue in business.

I have reviewed the history of the mine, which is Government Exhibit 1. I find that there are really no -- there's really no history of this particular contractor receiving citations -- there are

two on there, both in contest -- that [ ] terminating the citation was removing the men from the mine, and all of those are considered in assessing a low penalty. The gravity of this violation is serious, and as I noted, the negligence is moderate.

Normally, I would assess a penalty of at least a thousand dollars in a training violation, probably more. However, given the fact that this mine, I believe Allgeier Martin had a good-faith belief that they were doing the right thing, that they had policies in place, and that they were following what they thought to be the law, and that is that their surveyors were required only to have hazard training and not comprehensive training [and therefore the negligence is less for purposes of the penalty]. The mine [did not understand] that [it is the] activities of the miners, not their designation as a surveyor, but their activities, [that] subjected them to a higher standard of training in this instance.

So based upon all of those factors, I assess a \$200 penalty in this case.

(Tr. 122-129).

## **II. ORDER**

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I assess a penalty of \$200.00 for the violation as discussed above. Allgeier Martin & Associates, is hereby ORDERED to pay the Secretary of Labor the sum of \$200.00 within 30 days of the date of this decision.

Margaret A. Miller  
Administrative Law Judge

Distribution: (Certified U.S. First Class Mail)

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