FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0129 A.C. No. 46-08932-568033
KINGSTON MINING, INC., Respondent	Mine: Kingston No. 2

DECISION

Before: Judge William B. Moran

Introduction:

This case is before the Court upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Respondent was charged with violating 30 C.F.R. §50.20(a), with its requirement that a mine operator is to file an *occupational injury* report within ten working after such event. A hearing was held on July 19, 2023, in Charleston, West Virginia. The underlying facts are simple and undisputed. As set forth in the Citation, on June 9, 2022, "an evening shift miner was walking across the parking area, to his personal vehicle after finishing his shift. Along the way, the miner was bitten by a copperhead snake and missed 9 days of work due to medical treatment." Citation No. 9550856. ("Citation"). There is also no dispute that the Respondent did not file an *occupational injury* report within ten days of the event. On the basis of that alleged failure to comply, the Citation was issued on June 27, 2022.

The Respondent challenged the alleged violation on two grounds: the assertion that the Secretary did not establish that the access road where the snake bite occurred was on mine property and its contention that the incident was not reportable under the cited provision. For the reasons which follow, the Court finds that the access road was part of the mine property, and further, because of clear precedent, the reporting provision applies to the snake bite incident. Accordingly, while the Court views this matter as on the fringes of legitimate jurisdiction and that the Secretary could've decided not to pursue this incident, and that the operator had a good faith basis to challenge it, in light of the clear precedent, the Court has no choice but to **AFFIRM** the Citation.

FINDINGS OF FACT

Beginning with the basics, involved is an alleged violation of 30 C.F.R. §50.20(a). The text of that provision, which is titled: "Preparation and submission of MSHA Report Form 7000–1—Mine Accident, Injury, and Illness Report," provides, in relevant part at subsection (a) that:

> Each operator shall report each accident, occupational injury, or occupational illness at the mine. … The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed. When an accident specified in § 50.10 occurs, which does not involve an occupational injury, sections A, B, and items 5 through 12 of section C of Form 7000–1 shall be completed and mailed to MSHA in accordance with the instructions in § 50.20–1 and criteria contained in §§ 50.20–4 through 50.20–6.

30 C.F.R. §50.20(a)

The alleged violation of 30 C.F.R. §50.20(a), Citation No. 955085, states:

> The operator has failed to within ten days report an *occupational injury* that occurred to a miner, on mine property, that resulted in medical treatment and lost days of work. On June 9th, an evening shift miner was walking across the parking error, to his personal vehicle after finishing his shift. Along the way, the miner was bitten by a copperhead snake, and missed 9 days of work due to medical treatment. Standard 50.20(a) was cited 1 time in two years at mine 4608932 (1 to the operator, 0 to a contractor).

Citation No. 9550856, issued June 27, 2022 (emphasis added).

The Inspector listed the Gravity of the injury or illness as "No Likelihood," and the injury or illness as reasonably expected to result in "No Lost Workdays. The number of persons affected was zero. Consequently, he marked it as non-significant and substantial. The negligence was marked as "moderate." *Id*.

The lone factual dispute: The Respondent's assertion that the Secretary did not establish that the access road where the snake bite occurred was on mine property.

It is fair to state that, *factually*, there was only one issue in dispute – whether the access road to the mine was part of the mine. For the reasons which follow, the Secretary established that the access road was part of the mine.

There is no legitimate factual dispute about the location of the miner's truck at the time of the snake bite. The miner's truck was parked along the side of the mine's access road at the time of the incident. The Respondent's contention that the Secretary failed to establish that the access road was part of the mine is rejected as it is meritless.

In this regard, both at the hearing and in its post-hearing brief, Respondent contended that part of MSHA's burden of proof required it to "consult property records." Tr. 68. The Court does not agree. On the contrary, once the Secretary has presented substantial evidence, as she did here, that the truck was parked on the mine's access road, it was then incumbent upon the operator to present evidence that the access road was not Kingston's road. Nothing of the kind occurred here. Had there been any genuine substance to the veiled suggestion that the road was not Kingston's, the mine operator could then have presented county records to substantiate such a claim. Given the evidence the Secretary presented on the issue, the burden shifted to the Respondent to show otherwise. The Court finds there was no good faith basis to support the assertion that the access road was not part of the Kingston No. 2 mine.

Snake bite victim Miller's testimony was consistent with the Court's finding that the access road was Kingston's. Miller affirmed that he usually parks at the mine parking lot and, if that is full, he parks down along the side of the road. Tr. 114. Recognizing the security shack in the photos of the access road, Miller stated he calls in on the radio to identify his arrival at the mine. Tr. 115. The road is the only means of access to the mine. Tr. 116. He agreed there is a mine security camera on the road. *Id.* It is a fair observation that security cameras would not be placed on property which is not the mine's.

Wayne Persinger, a Kingston safety director, informed that the road, where the snake bite incident occurred, was initially just a haul road and then became an access road. Tr 134. He agreed that employees park their cars on the road depicted in Ex. P 1, P 2, and P 1 A and the video. P 4. Tr. 144-145. Persinger affirmed that management is aware that its employees park on that road. Tr. 145. He admitted that Kingston has a security camera on the road where the miner's truck was parked on June 24th. Tr. 147. Thus, he agreed that the video (Ex. 4) is a security footage video taken from the mine property of that road. Tr. 148- 152. The video, made on the security camera, was a brief recording of the actual event when Miller was bitten.[1]

As the Secretary accurately notes:

> Persinger testified that: (1) Kingston Mining, Inc. paid for the gravel for the road where the injury occurred, (2) those entering the mine must check in at the security shack before accessing the road at issue in the present matter, and (3) the road is mine property. Bane's testimony also confirmed that prior to the opening of Mine No. 2 there was no road at the location of the incident. Additionally, both Persinger and Bane confirm that the mining materials on both sides of the road near where the incident occurred are mine property, and that Respondent authorized miners to park there.

[1] That a security camera was located on the access road and that the camera recorded the event of the miner being bite, is an amazing testament to the fact that nowadays so much is recorded in our daily lives, even on a remote access road.

Sec. PH Br. at 8.

The mine placed a security shack to limit who has access to the road, placed security cameras to film activities along the road, required its miners and mine employees to check in at the security shack, and required miners and other employees to park on the road. These facts were admitted consistently in the testimony of Bane, Persinger, and Miller. *Id*. at 9.

The legal dispute: Was Kingston obligated to file an MSHA Report Form 7000–1—Mine Accident, Injury, and Illness Report in this instance, and by such failure in violation of 30 C.F.R § 50.20(a)?

The undisputed factual circumstances of the *incident*.[2]

The MSHA inspector who issued Citation No. 9550856, William H. Bane II, was at the mine on June 27, 2022, performing an E01 inspection[3] Inspector Bane, while at the mine that day, was informed of a snake bite incident and the mine's safety representative took the inspector to the location where the event occurred. There is no dispute that the miner, Mr. Ronald Miller, the miner who incurred the bite, had completed his shift and was walking to his truck, his work day over. He was not wearing any mine equipment or mine clothing at that time. To the contrary, his shift completed, he was wearing shorts and casual shoes. Tr. 45. Miner Miller's testimony confirmed all of this. Tr. 106, 111-113.

The Inspector acknowledged that the miner was not engaged in mining activity at that time, stating "[t]o the best of my ability to investigate it, he was in the process of leaving the mine to go home." Tr. 73. He agreed about the non-work clothes that Miller was wearing at the time of the incident. Tr. 74. The truck was parked alongside the mine's access road, as clearly shown in Exs. P 1 and 2. Exhibit P 1 A, is a marked-up version of Ex. P 1. The inspector marked on that exhibit showing the access road portion of the road, and its demarcation from the county road. Tr. 61, 63-68. Miners park their vehicles along the access road when the mine's parking lot is full.

[2] The Court intentionally uses the term "incident" because the citation identifies the failure to report "an occupational injury." The MSHA inspector also described the matter as an "incident occurring on mine property." Tr. 58. If described as an occupational injury from the start, that would imply that there was a violation, ahead of any analysis.

[3] E01 inspections are referred to as "regular inspections" *See, for example*, *Alden Resources*, 37 FMSHRC 753, April 9, 2015 (ALJ) at n. 3 that "[a]n E01 is a regular, mandated quarterly inspection of an underground coal mine" and *Excel Mining*, 35 FMSHRC 2555, August 15, 2013, (ALJ) at n. 2, "an E01 inspection is performed four times a year [for underground mines] at a given mine and requires an inspection of everything in the mine, all the airways, all the equipment, all their records, everything at that mine."

DISCUSSION AND ANALYSIS

Was the snake bite incident, under the circumstances here, a reportable occupational injury, pursuant to 30 C.F.R.§50.20(a)?

The Secretary's post-hearing brief.

The Secretary contends that "there was a clear violation of the standard in that the operator did not report an occupational injury; i.e., that a miner was bitten by a snake (an injury) at a mine (the parking lot) that resulted in medical treatment and lost workdays afterwards." Sec. Br. at 8.

Referring to the definition of "occupational injury,"[4] the Secretary notes that it provides:

> (e) Occupational injury means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

Id. at 9-10 and 30 C.F.R. 50.2 Definitions: Occupational injury.

As discussed below, the Court finds that the D.C. Circuit's decision in *Energy West Mining Co. v. Federal Mine Safety & Health Review Comm'n*, 40 F.3d 457 (D.C. Cir.1994), requires affirming the citation here. Although that decision is, in the Court's estimation, conclusive of the issue, for the sake of completeness, the parties' contentions are set forth here.

Beyond the case law to be discussed below, the Secretary points to MSHA's "Yellow Jacket" document in support of her position for the contention that "for the purposes of Part 50, what matters is *where* the injury occurs, not its cause." Sec. Br. at 11-12, Ex. R-6, and pages 26, 33 of that document. (emphasis added). The Secretary claims that the Respondent, through Mr. Persinger "was *purposefully misreading* 'work environment' to come to the outcome that best served the operator rather than what the code and law require." *Id*. at 12 (emphasis added). The Court does not buy into that claim at all. Rather, the Court views the Respondent's contention as a good faith argument that the incident was not reportable, a contention that was supported by reasoned arguments.

Although the Secretary contends that the meaning of 30 C.F.R. §50.20(a) and (e) is "clear and unambiguous," in the alternative, she asserts that even if the Court were to find that the provision was not clear and unambiguous, the Secretary's interpretation is entitled to deference. *Id.* The Court agrees with the deference argument to a point, but the "clear and unambiguous" argument can support respondents, not just the Secretary. Undercutting the Secretary's argument, at least in this matter, is her reference "that a regulation must be interpreted in a manner that furthers the safety purpose of the statute" and that "a regulation must be interpreted in a manner

[4] The Secretary spends some time noting that the definition of a mine is to be broadly interpreted. Sec. Br. at 10. Having found that the access road was part of the mine, the Court's focus is on whether the snake bite incident was reportable under the cited provision: 30 C.F.R. §50.20(a).

that furthers the purpose of the regulation." *Id*. at 13. It is difficult to conclude that requiring a snake bite incident occurring on a mine access road is something that furthers the safety purpose of the statute because it has absolutely nothing to do with the activity of mining.

The Secretary sums up her position, asserting that the "totality of the circumstances clearly indicated that Miller was injured on mine property, and that Miller's injury was "an occupational injury as defined by guidance that Respondents reviewed." *Id*. at 14. While the Secretary contends that "[b]oth the nature and location of the injury gave the Respondent more than sufficient information to put it on notice that Miller's injury was required to be reported to MSHA under Sections 50.20(a) [the cited provision] and [50.2](e) [with its definition of "occupational injury,"] as set forth *infra*, the Court does not agree that the Respondent's contention was outlandish.

In line with her view, the Secretary contends that the negligence involved was at least "moderate," meaning there were some mitigating circumstances. *Id.* To get there, the Secretary looks to MSHA's contention that Kingston was advised by MSHA that the injury suffered by Miller was reportable and, despite that advice, it knowingly ignored MSHA's view and warning. *Id.* As the Secretary put it "[g]iven that warning and Respondent's deliberate inaction, this Court would be justified in finding that Respondent was highly negligent."[5]

The Court also rejects the Secretary's characterization. Further, if the mine were to have accepted MSHA's argument and delivered the Form 7000-1 within the time allowed, it would have foregone the opportunity to challenge MSHA's claim, as no citation would have been issued.

Respondent Kingston Mining's post-hearing brief.

The Respondent asserts that the Citation should be vacated for three reasons:

1) the alleged "occupational injury" was not an "occupational injury";

2) the incident did not occur "at a mine;" (However, as discussed above, the contention that the incident did not occur at a mine is rejected.)

3) the alleged "occupational injury" did not occur to a "miner." R's Br. at 1.

The contention that the injury to the miner was not an "occupational injury."

Respondent first points to the Mine Safety and Health Administration's ("MSHA") publicly available Program Information Bulletin ("PIB") No. 88-05, dated September 28, 1988. It notes that "[t]his PIB was written to clarify the Report on 30 C.F.R. Part 50, PC-7014 ("Yellow Jacket") on the subject. In the PIB, MSHA defines "occupational injury" as "a work accident …. or from an exposure involving a single instantaneous incident in the *work environment*." In making

[5] To arrive at high negligence, the Secretary cites an obviously inapt decision, *Emerald Coal Resources, LP.*, 35 FMSHRC 1096, 1113. In that case, the administrative law judge determined that the operator ignored an obvious violation. The Court has determined that this matter was *not* an obvious violation. Beyond that, administrative law judges' decisions are not precedential.

this clarification, MSHA determined that this clarification "pos[es] no serious detriment to the integrity of our data collection system and would not seriously impact the current volume of incidents reported to us." *Id.* at 1-2 (emphasis in Respondent's brief).

Thus, Respondent literally places emphasis on the word "work" within the phrase "work environment" and, from that, its contention that, in no reasonable sense, was snake bite victim Mr. Miller, a miner at that moment. After all, there is no dispute that Miller's workday had ended; when the event occurred he was walking to his truck, parked on the access road, and about to head home. Therefore, he was not, Respondent contends, engaged in his occupation as a miner at that time.

The contention that the injury did not occur to a miner.

Augmenting its argument that Mr. Miller's injury was not an occupational one in any sense, Respondent asserts that "the Secretary has failed to establish that the injury occurred to a 'miner' as the word is defined when the event occurred. See 30 U.S.C. 802(g) ('miner' means any individual *working* in a coal or other mine"). … A "miner" is 'any individual *working* in a mine.'" *Id*. at 3 (emphasis in Respondent's Brief).

Respondent notes that:

> the word "working" is undefined and must be afforded its common meaning. Commission precedent, as well as public policy, mandates that a miner stops being a "miner" (in the regulatory context) at some point, despite continued employment status. Because the word "working" is critical to the definition of "miner," it naturally follows that an individual is not a "miner," as defined by the regulation, when he stops working on his shift. As noted, the PIB promulgated by the MSHA, that is designed for operators to rely upon, limits an "occupational injury" to only injuries occurring in a "working environment," thus supporting the interpretation that a miner is not a "miner" when he is not working.

Id.

Given that contention, Respondent asserts that the miner was not *working* at the time of the snake bite incident.

In further support of Respondent's conclusion that it did not have a duty to report the snake bite incident within ten working days of learning that Mr. Miller would be out of work beyond his next regularly scheduled shift because of his injury, Respondent asserts that the conclusion was based on several factors.

Revisiting PIB No.88-05, Respondent contends that "[a]lthough [MSHA Inspector] Bane was aware of PIB 88-05 when he issued the Citation, he did not rely on the 'work environment' language in (6)."[6] R's Br. at 5. That paragraph provides:

> (6) Injury vs Illness – The basic definition of an occupational injury includes those cases which result from a work accident or from an exposure involving a single instantaneous incident **in the work environment**. Contact with a hot surface or a caustic chemical which produces a burn in a single instantaneous moment of contact is an injury. Sunburn or welding flash burns which result from prolonged or repeated exposure to sunrays or welding flashes are considered illnesses. Similarly, a one-time blow which damages the tendons of the hand is considered an injury, while repeated trauma or repetitious movement which produces tenosynovitis is considered an illness.
>
> The basic determinant is the single-incident concept. If the case resulted from something that happened in one instant, it is classified as an injury. If the case resulted from something that was not instantaneous, such as prolonged exposure to hazardous substances or other environmental factors, it is considered an illness.

Program Information Bulletin No. 88-05. Review and Update of Program Circular (PC) 7014-Report on 30 CFR Part 50. R's Ex. 5 at page 2, paragraph 6. (emphasis added).

It is the Respondent's contention that the incident, occurring after the miner had completed his work shift that evening, and was returning to his vehicle, parked as it was on the side of the access road, to go home, he was no longer in the work environment. R's Br. at 5.

Kingston also "determined this injury was not an 'occupational injury' based upon a review of a 2017 Chargeability Decision. Ex. R-7." *Id*. Kingston accurately relates that "[t]he Chargeability Decision dealt with the chargeability committee's determination in a fatal vehicle accident on a mine access road. In that accident, a shuttle car operator was fatally injured in a car accident after the conclusion of his shift, changed clothes and exited the parking lot. Based upon a review of these facts, the chargeability committee found that the death was accidental and 'unrelated to mine related work activities, mining activities or mining equipment.' [Kingston notes that] [t]his is consistent with the fatality matrix, which Kingston consulted as well." *Id.* at 6, citing Ex. R-6; and testimony of Mr. Persinger, pg. 135:19-24; 136:1-20. Kingston continues that "[b]ased upon th[ose] [additional] factors, [it] determined, along with the information contained in the PIB, that this was not an 'occupational injury' … [and therefore] [b]ecause it was not an 'occupational injury,' it did not need to be reported to MSHA." *Id.*

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[6] The Court asked for clarification, via an email to the Respondent on September 18, 2023, about the reference in its brief to, "the 'work environment' language in (6)." The Secretary was copied when the Court made the inquiry about the requested clarification. The Respondent informed that it was referring solely to "enumerated paragraph (6) ("Injury vs Illness") of the PIB (Ex. R-5)." The Court's clarification request and the Respondent's response was included in eCMS via a motion from the Secretary. The Motion was granted.

The Court does not consider these references to be outlandish. After all, the Chargeability Decision regarding the fatality accident on a mine access road concluded that it was unrelated to mine work activities, mining activities or mining equipment. The same is true writ large for this snake bite matter. Similarly, the "Fatal Injury Guideline Matrix," a flowchart, ultimately asks whether "the deceased [was] performing mine related work activities or [whether] death was caused by mining activities or equipment." R's Ex. 6. If the answer is "No," the Matrix directs it is "Not Chargeable." *Id.* The Court finds that these were reasonable considerations in the Respondent's deliberations as to whether it had a duty to report the snake bite as an *occupational* injury.

Analysis

As alluded to at the start of this decision, the Court finds that clear precedent is determinative of the outcome in this matter. In particular, the Court looks to *Energy West Mining*, 40 F.3d 457 (D.C. Cir. 1994). Involved was a

> failure to report an employee's injury suffered when his vehicle rolled into a ditch near a mine parking lot. An MSHA inspector cited Energy West for violating MSHA regulations which require mine operators to report all "occupational injur[ies]" at the mine site. 30 C.F.R. § 50.20 (1993). Both an FMSHRC Administrative Law Judge ("ALJ") and the full Commission affirmed the citation.

Id. at 459.

There, as in this matter, the mine contended that

> MSHA's definition of "occupational injury" in 30 C.F.R. § 50.2(e) is unreasonable and inconsistent with the statute's purpose because it does not require a causal nexus between reportable injuries and work activity at the mine. In support, petitioner notes that both the Mine Act and related Part 50 regulations define "miner" as "any individual working in a coal or other mine."

Id. at 461.

The D.C. Circuit related Energy West's contention that "that reportable events are limited to those which the mine operator or the Secretary of Labor are capable of preventing," but it responded that

> the statute expresses no such limitation. The Mine Act grants a broad delegation to the Secretary to require mine operators to provide information necessary to enable the Secretary "to perform his functions under this chapter." 30 U.S.C. § 813(h). [and] [t]hat section contains little limitation on the type of information to be provided. The statute's statement of purpose is not to be read as the strict limiting principle petitioner asserts. In fact, the Mine Act is silent as to the type of occupational injury information which should be reported in order to assist the Secretary in carrying out his duties under the Act. Obedient to *Chevron*, when "the

> statute before us is 'silent or ambiguous with respect to the specific issue,' before us, we proceed to the second step" of the *Chevron* analysis.

Id.

Finding the Secretary's definition of "occupational injury" in 30 C.F.R. § 50.2(e) reasonable, the Court observed that the

> provision focuses on the location of the injury, not the cause. Similarly, the regulation challenged here defines reportable injuries with an emphasis on *situs of the injury*[7] rather than the causal nexus, requiring reporting of 'any injury to a miner which *occurs at a mine*'... [i]t is not unreasonable for the Secretary to require reporting of all non-trivial injuries to miners which occur at the mine site in order to gather information necessary to carry out his rulemaking function under the Act [and the Court] therefore find[s] that 30 C.F.R. § 50.2(e) is a permissible construction of the Secretary's authority under the Mine Act.

Id. (emphasis added).

The Court added that

> [o]n the question of regulatory interpretation, [it] accord[s] great deference to interpretations such as this one advanced by the Secretary and accepted by the Commission. … [The Court's] task is not to determine whether the Secretary's interpretation of the regulation charged to his administration is the one we would reach if deciding the question as a matter of first impression. Rather, we will defer to the Secretary's interpretation of his regulations unless it is clearly erroneous.

Id. at 462.

Accordingly, the D.C. Circuit held that "[b]ecause [it] find[s] these reporting requirements to be a reasonable interpretation of Mine Act provisions, [it] affirm[s] under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Id.* at 459.[8]

The same result is required here. Consequently, the snake bite incident was reportable; Kingston violated 30 C.F.R. §50.20(a).

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[7] The Court of Appeals determination that the *situs* of the injury is the key factor explains the Respondent's extended effort to show that the Secretary failed to demonstrate that the access road was Kingston's. As noted, that effort failed.

[8] The Court finds that *National Cement*, 573 F.3d 788, 795 (D.C. Cir. 2009), does not aid Kingston, concluding as it does that the Secretary provided a reasonable interpretation of subsection (B) of the Mine Act's definition of a mine as it pertains to "private ways and roads appurtenant to such area" and therefore that it is entitled to *Chevron* deference.

Civil Penalty Determination

Per 30 U.S. Code § 820(i),

> t]he Commission shall have authority to assess all civil penalties provided in this chapter. In assessing civil monetary penalties, the Commission 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 person charged in attempting to achieve rapid compliance after notification of a violation**.**

The Court here considers each of the statutory penalty criteria.

From the parties' stipulations, the following is noted. Payment of the total proposed penalty of $133.00 in this matter will not affect the Respondent's ability to continue in business; Exhibit "A" attached to the Acting Secretary's Petition in Docket No. WEVA 2023-0129 contains true and authentic copies of Citation No. 9550856 with all modifications or abatements, if any; the R-17 Certified Assessed Violation History Report is an authentic copy and may be admitted as a certified business record of the Mine Safety and Health Administration.

From Exhibit "A" the mine tonnage is 485,171 and the controller tonnage is 37,719,872; the mine size points is 11 and the controller size points is 10.[9] Negligence points were listed as 20 and the 10% good faith amount was applied.

Given the information above, with but one prior violation of the cited standard in the past two years, the operator's history of violations is negligible. The size of the mine is on the high side. Regarding negligence, as Kingston notes, "even the issuing Inspector consulted with his supervisor, before issuing the citation. As a result, because it cannot be negligent to rely upon valid guidance from MSHA, the negligence of this purported violation must be reduced to none." R's Br. at 4. The Court takes issue in particular with the Secretary's idea that the negligence was at least moderately negligent. Sec. Br. at 14. To the contrary, the Court finds, based on the entire record, the operator was not negligent under these circumstances. Kingston had a good faith basis to believe that the snake bite incident under the particular undisputed circumstances here was not reportable, and therefore was not negligent. The parties have stipulated that MSHA's proposed penalty of $133.00 will not have an adverse effect on Kingston's ability to continue in business; the gravity, per the issuing inspector's evaluation was marked at the lowest category possible: no likelihood and no lost workdays with the number of persons affected as zero. As noted, good faith was applied.

Upon consideration of each of the statutory criteria, the Court assesses a civil penalty in the sum of $66.00.

[9] The Court is not engaging in analyzing the penalty based on points, à la 30 C.F.R. Part 100; it is merely referencing points in determining the mine's size.

ORDER

For the reasons set forth above, Citation No. 9550856 is **AFFIRMED**, with a finding of no negligence. Kingston Mining is **ORDERED TO PAY** the Secretary of Labor the sum of $66.00 (sixty-six dollars) for the violation within 40 days of the date of this decision.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

Distribution:

Isabella C. Demougeot, U.S. Department of Labor Office of the Regional Solicitor, 201 12th Street South, Suite 401 Arlington, VA 22202 (Demougeot.isabella.c@dol.gov)

James P. McHugh, Hardy Pence PLLC, 10 Hale Street, 4th Floor, Charleston, West Virginia 25301 (jmchugh@hardypence.com)