FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2012-510-M
v.	:	
DRILLING AND BLASTING SYSTEMS, INC.	:	

Before: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). At issue are two citations the Department of Labor's Mine Safety and Health Administration ("MSHA") issued on consecutive days to Drilling and Blasting Systems, Inc. ("D&B"), alleging that the contractor violated 30 C.F.R. § 56.7012.

The regulation, which states that "[w]hile in operation, drills shall be attended at all times," is interpreted by the Secretary of Labor to require that a miner remain at the controls of an operating drill at all times, which was not the case in either of the cited instances here. The Administrative Law Judge refused to apply the Secretary's interpretation, found that he had failed to meet his burden of proving violations, and vacated both citations. 35 FMSHRC 1453 (May 2013) (ALJ).

The Commission granted the Secretary's petition for discretionary review. For the following reasons, we affirm in result the Judge's decision vacating the citations.

I.

Factual and Procedural Background

A. D&B Drilling Procedures at Issue

In its contract operations, D&B uses 22 drills, primarily throughout North Carolina, South Carolina, and Georgia. In March 2012, it was drilling blast holes at Lucky Stone Corporation's crushed and broken granite quarry in Pittsboro, North Carolina.

At the Lucky Stone Quarry, D&B was using an Ingersoll Rand DM30 drill, which is relatively large, is hydraulically operated, and trams on tracks similar to a bulldozer. The steel used in the drilling is contained in a mast structure, 30 to 40 feet in length, located in front of the cab. The controls to the drill are located in an enclosed cab at the rear of the drill. Gov't Ex. 4, at 2 (photograph of drill).

Prior to starting the drill each day, the D&B drill operator, who usually worked alone, would conduct a preshift examination of the drill, particularly the drill steel and safety switches. After starting to drill a hole, a D&B drill operator would not remain in the drill's cab the entire time. The operator had other assigned responsibilities that he could not accomplish from inside the cab of the drill. Those duties included checking the surrounding ground conditions, which can change rapidly and destabilize a drill, possibly to such an extent that the drill could go over the mine's high wall. The drill operator would also check the drill's engine and compressor for leaks and other malfunctions.

B. The Two Citations

MSHA Inspector Cecil Worrell was conducting a regular inspection of the Lucky Stone Quarry on the evening of March 14, 2012, when he observed the D&B drill operator outside of the drill cab while the drill was in operation. At the time, the operator was walking towards the drill from a distance of approximately 18 feet. Worrell issued the first citation, No. 8720235, alleging that the drill was not being "attended" in violation of section 56.7012. The citation states that "[a] miner may suffer fatal injuries in the event the steel and/or bit becomes hung in the hole causing the steel to fragment under pressure." Because of language barriers with the drill operator, Inspector Worrell spoke by telephone with the drill operator's foreman to have the foreman instruct the operator that he had to always remain inside the cab of the drill, so as to be within arm's reach of the controls in the event of such an occurrence. Gov't Ex. 1.

Nevertheless, when Worrell continued his inspection of the quarry the next morning, he again observed the drill operator outside the cab of the drill while it was operating. This time the operator was sitting in the cab of a pickup truck that was parked approximately 20 feet from the drill facing away, before he left the truck and returned to the drill. Consequently, Worrell issued another citation, No. 8720237, almost identical to the one he issued the previous day. Gov't Ex. 3, at 1, Gov't Ex. 4 (pictures of truck and drill).

MSHA later proposed total penalties of $1,080 for the two citations. D&B contested the assessment and the underlying citations on the ground that its operator was "attending" the drill from outside of the cab within the meaning of that term as it used in section 56.7012.

At the subsequent hearing, Inspector Worrell explained that he understood the purpose of section 56.7012 is "[t]o prevent accidents and situations from occurring." Tr. 31. He stated that he had never operated a drill, and was aware of no reason why a drill operator would need to leave the cab. He maintained that while MSHA had issued no written guidance interpreting "attended" with respect to a drill to mean within arms-reach of its controls, he recalled an MSHA Mine Academy instructor stating as much at a training class in 2008 or 2009.

The drill here had an automatic sensor to shut the drill down when it was under duress (Tr. 176-78, 210), and Worrell acknowledged that if drill steel gets hung up in a hole, the drill is

supposed to stop. His concern, however, was that if the drill did not automatically shut down, the drill steel could fragment under pressure, explode, and spray steel shrapnel that could prove fatal should it strike any miner in the vicinity of the drill. He discussed having viewed the aftermath of such a fragmenting incident where he was previously employed, at Ararat Rock Products in Mt. Airy, NC. There, according to Worrell, the drill operator had left the drill running while he left to use a portable restroom 300 yards away, across the pit (and thus was safely out of the range of the resulting shrapnel).

Worrell stated that a warning that fragmenting was occurring would "probably" be produced by the steel slowing down and then stopping, which would signal the miner at the drill's controls to immediately shut the drill down. Tr. 51, 67. He estimated that it would have taken "several seconds" for the drill operator here, when he was 18 feet away from the drill, to get to the controls and shut the drill down in such an event. Tr. 33.

Four witnesses testified for D&B – Foreman Solin Hernandez (drill operator for 8 years), Operations Director and Safety Manger, Kirt Murray (16 years' experience; drill operator and trainer), Brent Taylor (owner of D&B and drill operator from age 15), and Paul Earl, Jr. (expert witness on mechanical engineering and drilling). These witnesses testified, *inter alia*, that (1) drills are stable when in operation and are not designed for the operator to stay in the cab during operation; (2) they had never seen or heard of any fragmenting event as described by Inspector Worrell; (3) if a bit fragmented it would be contained underground; (4) MSHA had regularly inspected D&B's drilling operations for years and never applied Inspector Worrell's interpretation; (5) under "Best Practices," drillers are instructed to monitor ground conditions constantly; (6) Inspector Worrell's interpretation of the standard previously had been rejected by an MSHA Field Office Supervisor; (7) it is necessary for the drill operator to check and perform maintenance and carefully observe ground conditions while the drill is operating; and as a result, (8) the Inspector's interpretation would create significant hazards for drilling operations.

C. Judge's Decision

The Judge concluded that the term "attended," as used in section 56.7012 was ambiguous on its face, as "[e]ither of the interpretations proposed [by the parties] could be envisioned." 35 FMSHRC at 1460. She also found that the definition of "attended" in 30 C.F.R. § 56.2 (the definition section for Part 50) was ambiguous and dependent upon circumstances.[1] Nonetheless, she declined to defer to the Secretary's interpretation that the term requires that a drill operator remain within arms-length of the drill controls, holding that the Secretary's interpretation was erroneous in two respects and thus not worthy of deference. First, the Judge found the Secretary's interpretation to be erroneous because in 2010, after an MSHA inspector had cited D&B for a violation of section 56.7012 at another mine, the inspector's supervisor vacated the citation after speaking with D&B's owner, who persuaded him that the contractor's practice of having its operators leave the controls of drills was permissible under the regulation. *Id.* Second, the Judge found that the Secretary's interpretation was erroneous because it would lead to "extraordinarily dangerous results." *Id.* Considering the testimony provided by D&B's representatives and weighing it against Worrell's, the Judge concluded that a drill operator would

[1] 30 C.F.R. § 56.2 defines "attended" to mean the "presence of an individual or continuous monitoring to prevent unauthorized entry or access."

be better able to attend to critical safety matters, such as ground control, and to every aspect of the performance of the drill, from outside the cab of the drill than from within. *Id.* at 1460-61.

The Judge instead adopted D&B's interpretation of "attended" as permitting a drill operator to be anywhere within the blasting area where holes are being drilled. The Judge held that the Secretary had failed to carry his burden of proof, vacated both citations, and dismissed the case. *Id.*

II.

Disposition

The Secretary contends the Judge erred when she failed to accept the Secretary's interpretation of section 56.7012 as requiring the drill operator to be within immediate reach of the drill's controls while the drill is in operation. According to the Secretary, this is his authoritative interpretation of the standard, and thus due deference, regardless of any earlier interpretation that may have been used by an MSHA field supervisor. The Secretary maintains that the Judge also erred in concluding that the Secretary's interpretation would lead to dangerous results, in that any safety and operational issues that can only be addressed away from the drill's controls need not be the responsibility of the drill operator, but instead can be accomplished by a second miner assigned to the drill. The Secretary submits that his interpretation of "attended" in the regulation is consistent with accepted definitions of the term, while the interpretation applied by the Judge is not. Finally, the Secretary asserts that even if the Judge did not err in failing to defer to the Secretary's interpretation, she incorrectly concluded that the Secretary did not meet the burden of proof for the second citation, given that the Judge did not address evidence that the drill operator was sitting in a truck that was parked facing away from the drill.

D&B responds that the Judge correctly ruled that the Secretary's interpretation was erroneous and therefore not entitled to deference, in that it was inconsistent with the language of the standard. D&B also contends that there is sufficient evidence in the record to support the Judge's ruling that the drill operator was attending the drill at the time of the second citation.

The Commission permitted the filing of an amicus brief by the National Stone, Sand and Gravel Association ("NSSGA"), a trade association for the crushed stone, sand, and gravel industry. NSSGA submitted a brief supporting the Judge's determination that the Secretary's interpretation of "attended" was plainly erroneous and not entitled to deference. It argues that to defer to the Secretary's interpretation would necessitate sweeping changes in the drilling industry that would be financially detrimental and extraordinarily dangerous.

A. The Secretary's Interpretation that "Attending" a Drill Requires Drill Operators to Remain Within Arms-Reach of Drill Controls Is Plainly Erroneous.

We agree with the Judge and the parties that the term "attended" as it appears in section 56.7012 and section 56.2 is ambiguous with respect to the issue presented here. The standard requires that "[w]hile in operation, drills shall be attended to at all times." But the regulation is silent with regard to where the drill operator must be located to be considered to be "attend[ing]" an operating drill.

Section 56.2 defines "attended." As stated earlier, it provides that "[a]ttended means presence of an individual or continuous monitoring to prevent unauthorized entry or access." Notably, however, the requirement in section 56.7012 that drills be "attended" was in section 56.7012 long before section 56.2 included a definition of "attended."

In 2004, MSHA moved numerous definitions previously appearing in six separate subparts of Part 56 to section 56.2, to make them applicable to Part 56 in its entirety as long as they were consistent with definitions set forth in specific subparts. The revision moved "attended" and nine other definitions without change from Subpart E - Explosives to section 56.2. 69 Fed. Reg. 38,837, 38,838 (June 29, 2004). The definition of attended in section 56.2, therefore, originated as specifically applicable only to Subpart E of Part 56, "Explosives,"[2] and does not consider or address where an operator must be located in relation to a drill in order to be "present" while it is in operation. Therefore, the issue before us is whether we agree with or must defer to the Secretary's interpretation that the regulation requires that an operator maintain a stationary presence in the cab of the drill when it is operating.

Ordinarily, we must defer to the agency's interpretation of its own ambiguous regulation. *See Auer v. Robbins*, 519 U.S. 452 (1997). However, deference is inappropriate if the agency's interpretation is not reasonable or when it is "plainly erroneous or inconsistent with the regulation" (*id.* at 461), or "when there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter." *Christopher v. SmithKline Beecham Corp.* __ U.S. __, __, 132 S. Ct. 2156, 2166 (2012) (internal quotations omitted) (citing *Auer*, 519 U.S at 462). Here, for the reasons set forth below, we find the Secretary's interpretation is plainly erroneous.

The Secretary, relying on the testimony of Inspector Worrell, argues that mine safety is furthered when the drill operator has constant "control" over the drill, which the Secretary contends can only be accomplished by having the drill operator physically at the controls in the cab of the drill. According to the Secretary, the drill operator should remain there in order to be able to immediately shut down the drill in the event of an emergency. PDR at 7 & n.3.[3]

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[2] Thus, the portion of section 56.2 allowing attendance through "continuous monitoring" appears to have specific applicability to standards involving the storage of explosives (for which it was originally intended) and to be essentially irrelevant to this case. *See, e.g.*, 30 C.F.R. § 56.6133(a)(3) (powder chests must be "[l]ocked or attended when containing explosive material"); 30 C.F.R § 56.6202(a)(7) ("[v]ehicles containing explosive material" must be "[a]ttended or the cargo compartment locked, except when parked at the blast site and loading is in progress").

[3] The Secretary also argues that, "[t]o prevent unauthorized entry of or access to the drill, a person must be within immediate reach of the cabin of the drill." S. Reply Br. at 6. The Secretary points to no evidence in the record to support this assertion. On the other hand, D&B witnesses consistently testified that a drill operator would have a better view of the area immediately around the drill from outside of its cab than from within the cab at the controls. Tr. 105, 123, 162, 209. Further, the Secretary contends that the evidence of the drill operator being in the cab of the truck parked facing away from the drill demonstrates that the Judge erred

The evidentiary record in this case, however, is replete with testimony, credited by the Judge, that a drill operator must accomplish a number of other safety-related tasks away from and outside of the cab of the drill. Foreman Hernandez testified that it is only from outside of the cab of the drill that ground conditions can be completely observed, and those ground conditions can change rapidly due to drilling and weather, affecting the drill's jacks and ultimately leading to a loss of drill stability. Tr. 110-11, 113-14, 144-45. Clearly this is information the drill operator needs to be aware of in order to head off emergency situations.

The Judge also credited Safety Manager Murray's testimony that a drill operator can best learn of and respond to problems arising with the drill, such as its oil and hydraulic lines leaking and those involving its compressor, by examining the drill from outside of the cab. 35 FMSHRC at 1456, 1460; Tr. 180-81. Murray also testified that leaving the drill cab permits the drill operator to hear any unusual noises from the belts and pumps that might indicate a potential problem. Tr. 174-75. In addition, the Judge credited Brent Taylor, D&B's long-time owner and chief executive officer, who testified that it is industry practice for drill operators in this country to remain outside of the cab of the drill much of the time the drill is in operation. 35 FMSHRC at 1458, 1460, Tr. 254-55.

In stark contrast, the Judge entirely refused to credit Inspector Worrell on the subject of safe drilling practices, taking into account Worrell's lack of experience in drilling. 35 FMSHRC at 1455 n.2, 1458, 1460 (citing Tr. 14, 32, 34). The Commission has recognized that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

We see no reason to disturb the Judge's credibility determinations here. Whereas, as noted by the Judge, D&B's witnesses all had many years of experience in drilling operations or the physics of drilling (35 FMSHRC at 1460), Worrell stated that he had never operated a drill and had passed on the opportunity to do so. Tr. 45. Even more importantly, Worrell testified that he was not aware of any reason a drill operator would need to leave the controls of the drill. Tr. 31. As explained at the hearing, however, there are a number of reasons why a drill operator would need to leave the cab to ensure a drill's safe operation. *See* 35 FMSHRC at 1455-59.[4]

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in concluding that the operator was "attending" the drill. PDR at 11-12. Inspector Worrell, however, could not state how long the operator was facing away from the drill, and the drill operator departed the truck and walked towards the drill upon Worrell's arrival. Tr. 80-82. Without evidence of how long the drill operator turned away from the operating drill, it is impossible to determine whether that would contradict the evidence establishing that the operator was otherwise present at the drill to prevent unauthorized access to it.

[4] The Secretary's fallback position is that mines and drilling companies can assign a second miner to the tasks outside of the cab, in order that the operator can remain at the controls in the event of an emergency. PDR at 8. As we explain herein though, the Secretary failed to put on sufficient evidence to demonstrate why this is necessary. Moreover, NSSGA contends that if this were required, "mine operators and contractors would be forced to change decades of previously accepted safety, management, and personnel practices." NSSGA Br. at 17-18.

According to the citations, and expounded upon at some length by Inspector Worrell in his testimony, the drill operator needs to be able to instantaneously respond in the event drill steel begins to fragment. The Secretary contends that his interpretation of the regulation as contained in the inspector's citations and testimony in the hearing below, and as litigated by the Secretary in this case, is due deference as a reasonable interpretation. The Judge, however, entirely refused to credit Inspector Worrell regarding the prospect of drill steel fragmenting. 35 FMSHRC at 1455 n.2, 1460. We again see no error, given the inspector's lack of background in drilling.

The Judge specifically refused to give weight to Worrell's claim to have witnessed the aftermath of a drill fragmenting and the pieces exploding outward at the Ararat Rock mine, and we see no reason to disturb that finding either. The Judge concluded that Worrell was being evasive regarding the extent to which he was familiar with the details of the incident. *Id.* at 1455 n.2, 1460. Because the Judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (*quoting Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

A review of even the few details of the incident on which Worrell was clear further supports the Judge's decision to refuse to give weight to Worrell's testimony regarding the Ararat Rock incident. Worrell described the drill steel there as "worn pretty bad." Tr. 63. In contrast, he stated that the D&B "drill and the steel were both in good condition," that he "had no issue with the integrity of the drill or the steel," and thus an incident such as the one described having occurred at Ararat Rock was unlikely to occur. Tr. 39.[5]

The Secretary attempted to justify Worrell's concern about the prospect of fragmenting steel by having him discuss an MSHA Fatalgram about an accident involving drill steel. Tr. 35-38; Gov't Ex. 7. The Judge rightly discounted the Fatalgram because it was based on a miner suffering fatal injuries while working to change drill steel. 35 FMSHRC at 1460. There is no evidence here that D&B ever intended to change the drill steel while the drill was operating without someone at the controls of the drill.[6]

In addition to refusing to credit any part of Worrell's account that drill steel can fragment, the Judge credited the contrary testimony of each of D&B's four witnesses, none of whom had ever heard of drill steel fragmenting as the result of the steel getting hung up in the ground as Worrell described. 35 FMSHRC at 1460; Tr. 120, 197, 258. One of those was D&B's expert

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[5] In addition, Worrell explained that the miner at Ararat Rock had left the drill running while he went some 900 feet away. Tr. 89. D&B's Hernandez testified that if a D&B drill operator had to travel 100 feet or more from the drill, he would shut the drill down. Tr. 153-54.

[6] Nevertheless, at the hearing the Secretary argued that the accident was relevant because it shows the general need for a miner to be at the drill controls to stop the drill in the event of an emergency. The Fatalgram itself, however, does not go that far. It states only that while drill steel is being changed, mine operators should ensure that drill controls are in "easily accessible locations." Gov't Ex. 7.

witness in mechanical engineering and drilling, Paul Earl, Jr., who testified that never in his 50 years in the industry had he heard of drill steel fragmenting, and that the citations written by Worrell were based on a "completely erroneous" theory. Tr. 239, 248.

The Judge was justified in crediting the testimony of the operator's witnesses experienced with drilling activities, and the testimony of the operator's expert witness, as against the testimony of one inspector who had neither training nor experience with drilling operations. The Judge relied on testimony regarding the safety advantages of not requiring fixed stationing in the cab, the absence of any history of the type of incident described by the inspector, the lack of any enforcement history, and the different positions taken by MSHA in prior matters.[7] When we put those factors together with the fact that the Secretary's interpretation, based on the opinion of a single, inexperienced inspector, is not the most natural reading of the safety standard, there plainly is no basis for deference.

In light of the foregoing, based on the record in this case we decline to defer to the Secretary's interpretation that "attended" in section 56.7012 means that a miner must be constantly at the controls of an operating drill. Such a reading is contrary to credited, competent testimony that exiting a cab advances safety, and that it is common practice within the industry for drill operators to do so. This leads us to conclude that this is an instance in which the agency's interpretation of that standard, as supported by the evidence it presented at the hearing, is plainly erroneous.

B. Substantial Evidence Supports the Judge's Determination that the Drill Operator was Attending the Drill.

In concluding that the Secretary's interpretation of the standard is unreasonable, we agree with the Judge that the "operator's interpretation of 'attended' [is] logical" (35 FMSHRC at 1461), and accordingly, we adopt it for purposes of this case. *See Twentymile Coal Co.*, 36 FMSHRC 2009, 2013 (Aug. 2014) (rejecting the Secretary's interpretation of an insulation standard as unreasonable and adopting the operator's interpretation). The operator defines "attended" here as "being within the area where the drilling is being done so that the drill operator can monitor the area for changing ground conditions destabilizing the drill jacks, malfunctioning of the pressured hoses, overheating, leaking, or other complications." 35 FMSHRC at 1459.

Applying this standard to the facts presented here, the Judge concluded:

> The Secretary has presented no evidence that the driller was not attending to his drill on either occasion cited here within the meaning of the standard as I have found. In the first instance the evidence is solely that he was 18 feet away from the drill

[7] MSHA's position as to this regulation has not been consistent. As the Judge noted, in 2010 an inspector issued a citation at another D&B quarry within the same MSHA region based on D&B's practice of having the drill operator outside the cab when the drill was in operation. After D&B discussed its practice with the Field Office Supervisor, MSHA vacated the citation, finding that D&B was not in violation of the standard. 35 FMSHRC at 1457, 1460.

> walking towards it. There is nothing that can be gleaned from that information indicating he was not observing the positioning of the drill or monitoring the ground conditions. Likewise, there was an adequate explanation provided by the Respondent as to why he would be in the pickup truck located within the blasting zone during drilling operations. By contrast the Secretary offered no evidence that he was not doing so.

Id. at 1461.

Substantial evidence[8] supports the Judge's conclusion that the drill was attended on March 15.[9] The Secretary did not meet his burden of showing that the operator failed to attend the drill (under the interpretation of "attend" that we adopt herein).[10]

Applying this interpretation, record evidence reflects that it would only have taken the drill operator a few seconds to get from the pickup truck (parked 20 feet away) to the cab of the drill, in case of an emergency. Tr. 33 (when drill operator stood 18 feet from the drill, in the event of an emergency it would take several seconds for him to get to the controls of the drill). In addition, one of the operator's witnesses, Murray (who had worked as a drill operator, director of operations, and safety manager), testified that the driller operator might have been sitting in the pickup truck to fill out the drill log, which must be completed for every hole drilled (Tr. 195, 214-15), or that he might have been getting ready to put water in the drill (which is why the truck was backed up to the drill). Tr. 143, 149-50 (testimony of supervisor that the drill operator was pumping water from his truck to the drill in order to reduce the dust), 215.

Accordingly, we affirm in result the Judge's conclusion that the Secretary did not meet his burden of proof that the operator violated section 56.7012 on March 15, 2012.

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[8] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[9] Because the Secretary did not include an appeal of the Judge's evidentiary finding regarding the first citation issued on March 14, we do not address that issue.

[10] This is somewhat understandable, given that the focus of the Secretary's case had been his insistence that to "attend" the drill, the drill operator must remain in reach of the drill's controls. Thus the inspector merely testified that the drill operator would not have been able to shut down the drill from the nearby pickup truck. Tr. 71-72.

III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision to vacate Citation Nos. 8720235 and 8720237.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

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