

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY  
OCCUPATIONAL SAFETY AND HEALTH DIVISION

Steve Sviggum, Commissioner,  
Department of Labor and Industry,  
State of Minnesota,

Complainant,

vs.

Duluth, Missabe & Iron Range  
Railway Company,

Respondent.

**FINDINGS OF FACT,  
CONCLUSIONS,  
AND ORDER**

Administrative Law Judge Bruce H. Johnson (the ALJ) conducted a hearing in this matter on November 2 through 4, 2009, at the Office of Administrative Hearings, 320 West Second Street, Suite 714, Duluth, Minnesota. The hearing record closed when the last post-hearing submissions were received on March 31, 2010.

Julie Leppink and Jackson Evans, Assistant Attorneys General, appeared on behalf of the Commissioner of Labor and Industry, Occupational Safety and Health Administration (the Commissioner or MN OSHA). Edward Cassidy and Lori-Ann Jones, Fredrickson and Byron, P.A., appeared on behalf of Duluth, Missabe & Iron Range Railway Company (the Respondent or the DM&IR).

**STATEMENT OF THE ISSUES**

1. Does the Federal Railway Safety Act, 49 U.S.C. § 20101, *et seq.* (FRSA) and its implementing regulations preempt application of the Occupational Safety and Health Act of 1973, Minn. Stat. §§ 182.65–182.676 (MN OSHA Act), under the circumstances of this proceeding and thereby deprive the Commissioner of jurisdiction over the DM&IR with respect to the violations charged in the Amended Complaint?

2. Did the DM&IR exercise a level of supervisory authority over the worksites of Northern Industrial Erectors (NIE) that created a reasonable expectation that the DM&IR would prevent or abate the hazards that resulted in the Citations issued in this matter

thereby establishing the DM&IR as a controlling employer liable for the violations set forth in the Amended Complaint?

3. If the DM&IR was a controlling employer, did it violate rules adopted under the MN OSHA Act as alleged in the Amended Complaint by failing to protect employees from exposure to various hazards?

The ALJ concludes that under the circumstance of this case, the FRSA does not preempt the MN OSHA Act and its implementing rules. However, the ALJ concludes that the DM&IR was not a controlling employer liable for the violations set forth in the Amended Complaint. The citations issued by MN OSHA are must therefore be vacated and the penalties dismissed.

## **FINDINGS OF FACT**

### **Prior Proceedings**

1. On December 6, 2006, Michael Rathjen, an employee of Northern Industrial Erectors (NIE), was working on the superstructure of Dock #2 at the DM&IR's Two Harbors facility when he fell to his death.

2. Between December 6, 2006 and May 29, 2007, MN OSHA conducted an investigation into the circumstances surrounding Mr. Rathjen's death. On December 12, 2007, MN OSHA issued a Citation and Notification of Penalty to the Canadian National Railway relating to workplace conditions on Dock #2 on December 6, 2006.

3. On July 13, 2007, MN OSHA received a Notice of Contest contesting all of the citations and the penalties imposed.

4. On December 11, 2007, MN OSHA issued a Complaint against the Canadian National Railway seeking to enforce the Citation and Notification of Penalty.<sup>1</sup> By agreement of the parties, an Amended Complaint naming the DM&IR as the respondent was substituted for the original Complaint. That Amended Complaint was filed on January 4, 2008, and this contested case proceeding ensued.

### **The DM&IR's Two Harbors Facility**

5. The DM&IR owns a railroad and, among other things, two dock facilities on Lake Superior in northeastern Minnesota—one in Duluth and another in Two Harbors. The DM&IR's primary business is transporting taconite pellets from mines and production facilities in Minnesota's Iron Range by rail to its two Minnesota dock facilities where the pellets are loaded onto vessels for shipment to steel mills.<sup>2</sup>

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<sup>1</sup> The original Summons and Complaint, a copy of which is attached to the Notice and Order for Motion Hearing, issued August 5, 2008.

<sup>2</sup> Transcript (Tr.) Vol. I, pp. 170-171; Vol. III, pp. 492-495; Vol. IV, pp. 651-652.

6. The DM&IR's Two Harbors facility consists of shore-based facilities and three docks—Dock #1, #2, and #3. The shoreline adjacent to the docks runs approximately along a west to east axis.<sup>3</sup> The three docks are perpendicular to the shoreline and extend into the lake approximately 1,800 feet.<sup>4</sup> Dock #3, the southeastern most dock, is no longer in service, and was not being used to load vessels in 2006.<sup>5</sup>

7. The DM&IR's shore-based facilities in Two Harbors consists of rail yards, a rail car dumping facility, areas for stockpiling pellets, and a belting and conveyor system which is used to move pellets from the stock piles to the docks.<sup>6</sup> Pellets can also be moved to the two active docks in rail cars on tracks located on the tops of the docks.<sup>7</sup>

8. Dock Number 2 was built in 1917 and is still used to load vessels.<sup>8</sup> The surface of Dock #2 is several feet above the surface of the water.<sup>9</sup> The dock has a large steel and concrete superstructure that extends the length of the dock. Located on both the northeastern and southwestern sides of that superstructure are a series of storage bins, or "pockets," which are filled with taconite pellets deposited either by dumping the contents of rail cars on the tracks on top of the dock or by a conveyor system which moves the pellets from the pellet stockpiles on land.<sup>10</sup> The outer sides of the pockets are 6,000-pound rectangular concrete panels; they comprise parts of Dock #2's north and south facings.<sup>11</sup>

9. Taconite pellets are deposited from the pockets onto adjacent vessels by either spouts or shuttles, which are located between Dock #2's pockets. Gravity spouts are used to load vessels on the north side of Dock #2. They are simple chutes that are lowered over an adjacent vessel's hatches allowing taconite pellets to flow into a vessel's holds by gravity.<sup>12</sup> The shuttles on the south side of Dock #2 incorporate a conveyor system to pour pellets into a vessel's holds (conveyor shuttles). When not in use, conveyor shuttles are in a vertical position between pockets. When loading a vessel, the conveyor shuttles are lowered into a horizontal position, and a conveyor system loads the pellets into the adjacent vessel. When a conveyor shuttle is in a horizontal position, there is a walkway with guard rails in its top. The sides of conveyor shuttles are structural steel members which are pierced at regular intervals with large

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<sup>3</sup> Tr. Vol. III, p. 495.

<sup>4</sup> Tr. Vol. IV, pp. 659-660.

<sup>5</sup> Tr. Vol. III, pp. 494-495.

<sup>6</sup> Tr. Vol. IV, p. 550.

<sup>7</sup> Ex. 204.

<sup>8</sup> Ex. 27.

<sup>9</sup> Ex.204.

<sup>10</sup> Tr. Vol III, p. 495; Ex. 204.

<sup>11</sup> Tr. Vol. III, pp. 503-504.

<sup>12</sup> Tr. Vol. III, p. 499.

holes. When a conveyor shuttle is in a vertical position, those sequences of holes resemble a ladder.<sup>13</sup>

10. About 50 feet above Dock #2's surface, a covered steel walkway with guard rails is attached to the south side of superstructure; it extends along the entire length of the dock's superstructure and is located between the dock face and the inside edge of the conveyor shuttles.<sup>14</sup> The walkway is covered by a corrugated steel roof with a 7/12 pitch (30 degree slope) located about 60 feet above the dock's surface.<sup>15</sup> In early December 2006, several 2" pipes, which also extended the length of the dock, were immediately underneath the walkway's roof.<sup>16</sup>

11. There are linear support beams running along the full length of both sides of Dock #2's outer edges. Those support beams are exposed along the entire length of the dock and can be used as tie-off points for fall protection equipment.<sup>17</sup> Attached to those support beams are metal dust screens supported by 4" by 4" metal tubing. Heavy metal stanchions for light fixtures are also bolted to the support beams at regular intervals.<sup>18</sup> Inside of the dust screens on both sides of the top Dock #2's are metal walkways. Inside of the walkways are sets of railroad tracks along which rail cars with taconite pellets can be pushed by a locomotive into position over the dock's pockets. The tracks on each side can accommodate between 40 and 44 rail cars.<sup>19</sup> Between the two sets of tracks is a large pellet conveyor system, which can also be used to load taconite pellets into the pockets.<sup>20</sup>

12. There is a locomotive track crane available at the DM&IR's Two Harbors facility, which operates on the railroad tracks on the top of Dock #2. That locomotive track crane can be used to provide access to areas of the dock structure that are otherwise difficult to reach. Because it is powered by a locomotive, the track crane must be operated by DM&IR's maintenance employees.<sup>21</sup>

### **Maintenance Resources at the DM&IR's Two Harbors Facility**

13. In 2006, Kevin Ehrenreich was the General Manager of the DM&IR's Two Harbors facility. In that capacity, he had overall responsibility for operations, fiscal management, and maintenance at the facility. At the same time, Mike Shannon served as Mr. Ehrenreich's Maintenance Supervisor. Mr. Shannon was responsible for

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<sup>13</sup> Tr. Vol. II, p. 416, Vol III p. 452; Exs. 9, 10, 20 (shuttle in vertical position, middle background of photograph), and 205 (showing shuttle in horizontal position).

<sup>14</sup> Exs. 5, 8, 10, and 17.

<sup>15</sup> Tr. Vol. III, p. 452; Ex. 17.

<sup>16</sup> *Id.*

<sup>17</sup> Tr. Vol. IV, pp. 624-634; Exs. 4, 20, 48-2, 85-1, 89, 90, 137, and 144.

<sup>18</sup> Tr. Vol. IV, p. 562

<sup>19</sup> Tr. Vol. III

<sup>20</sup> Ex. 204.

<sup>21</sup> Tr. Vol. IV, p. 558.

maintaining all of the facility's physical assets and equipment associated with the belting systems, the car dumping area, and the dock structures.<sup>22</sup>

14. Among other employees, Mr. Shannon supervised a Building and Bridges Group which was responsible for maintaining all of the facility's physical structures, including the structural steel of the active docks, the steel structure's supporting the conveyor system, and maintenance of the conveyor system itself.<sup>23</sup> The belting system alone required considerable scheduled and remedial maintenance because it involved numerous electric motors, gear reducers, rollers, bearings and seven miles of belting.<sup>24</sup>

15. It was customary for the DM&IR to contract with outside contractors for "specialty" maintenance and repair work—that is, work requiring personnel resources or expertise that were beyond the capabilities of the DM&IR's maintenance employees at the Two Harbors facility.<sup>25</sup> The DM&IR considered work involving structural repairs at heights to be specialty work for which outside contractors were engaged.<sup>26</sup>

### **The DM&IR's Prior Dealings with NIE**

16. In 2006, Greg Thompson was a project manager employed by NIE. Prior to coming with NIE, Mr. Thompson was employed by Boldt Construction. In that capacity, he was project manager under a contract that Boldt had with the DM&IR in 2000 or 2001 to repair fire damage to Belt No. 3.<sup>27</sup> After Mr. Thompson left Boldt and became employed by NIE, the DM&IR began contracting with NIE as an outside contractor to perform specialty maintenance and repair work at the Two Harbors facility.<sup>28</sup>

17. Between April 15, 2003, and July 27, 2006, the DM&IR engaged NIE fifteen times as an outside contractor to perform specialty maintenance and repair work at the Two Harbors facility. Many of those jobs involved working at heights for which fall protection for employees was an OSHA requirement.<sup>29</sup> Some of those jobs were also in areas that were difficult to access. During that period, the DM&IR had no problems with the work that NIE performed and had no concerns about NIE's safety practices.<sup>30</sup>

### **The September 6, 2006, Incident and Plans for Repairs**

18. On September 6, 2006, while a vessel was loading at Dock #2, a 6,000 pound concrete panel on the northeast corner of Dock Number 2 came loose, rotated out, and became suspended partially outward over the dock and adjacent vessel.<sup>31</sup>

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<sup>22</sup> Tr. Vol. III, p. 492, Vol. IV, p. 551.

<sup>23</sup> Tr. Vol. III, p. 493; Vol. IV, p. 551.

<sup>24</sup> Tr. Vol. IV, pp. 551-2.

<sup>25</sup> Tr. Vol. I, p. 222.

<sup>26</sup> Tr. Vol. III, pp. 494-501.

<sup>27</sup> Tr. Vol. III, pp. 494-497.

<sup>28</sup> Tr. Vol. III, p. 497-501.

<sup>29</sup> Tr. Vol. III, pp. 497-498; Ex. 77.

<sup>30</sup> Tr. Vol. III, p. 501.

<sup>31</sup> Tr. Vol. III, pp. 502-504; Ex. 12.

One DM&IR employee suffered minor injuries from falling debris.<sup>32</sup> In that position, the panel represented a danger to employees, the dock, and the adjacent vessel.<sup>33</sup>

19. The next day, Mr. Ehrenreich contacted LHB Engineers and Architects (LHB), a structural engineering firm, to design long term repairs to that and other panels, to perform necessary calculations, and to produce drawings for an outside contractor to work from.<sup>34</sup>

20. LHB inspected the entirety of Dock #2 and thereafter recommended that Pocket 514, the pocket involved in the incident, and some other pockets on Dock #2, be reinforced with a structural steel system on the exterior face of each pocket to prevent the concrete panels from rotating out in the future. The DM&IR accepted LHB's recommendation and directed LHB to proceed with planning for the work that had to be done (the Project).<sup>35</sup>

21. Because installing the structural steel reinforcements on Dock #2 required iron work to be done at heights as high as 60 feet above the dock's surface,<sup>36</sup> the DM&IR considered work on the Project to be specialty maintenance and repair work. The DM&IR therefore decided to engage an outside contractor to perform the work on the Project rather than using the DM&IR's own employees.<sup>37</sup> Since NIE had satisfactorily performed other specialty repair work at the Two Harbors facility in the past, the DM&IR engaged NIE to install the structural steel reinforcements designed by LHB on Dock #2.<sup>38</sup>

22. LHB and NIE, through its Project Manager, Derek Bostyancic, were responsible for and conducted all planning for the Project. The DM&IR provided no planning assistance to LHB and NIE.<sup>39</sup> The DM&IR's only involvement in the planning process was sending Mr. Bostyancic's sketch of the rigging system necessary to accomplish the work to LHB for finished drawings.<sup>40</sup> LHB was directly responsible for inspecting NIE's work to ensure that the Project was being completed according to the plans LHB had drawn up.<sup>41</sup>

### **Project Safety Responsibilities**

23. On October 12, 2006, a workplace safety consultant for the Minnesota Department of Labor and Industry (MnDOLI) visited Dock #2 to discuss the existing safety hazard at Pocket 514 of Dock #2 and to determine how the DM&IR's was responding to the situation. By letter to MnDOLI dated November 3, 2006, the DM&IR

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<sup>32</sup> Ex. 27.

<sup>33</sup> *Id.*; Tr. Vol. III, at 502-503.

<sup>34</sup> Tr. Vol. III, pp. 504-505; Ex. 25.

<sup>35</sup> Tr. Vol. III, pp. 503-507.

<sup>36</sup> Tr. Vol. III, p. 453.

<sup>37</sup> Tr. Vol. III, pp. 503-507.

<sup>38</sup> *Id.*; Tr. Vol. IV, pp. 554-555.

<sup>39</sup> Tr. Vol. II, p. 270.

<sup>40</sup> Tr. Vol. II, p. 270.

<sup>41</sup> Tr. Vol. III, p. 505; Tr. Vol. IV, p. 573.

summarized the repair and renovation plans that LHB and NIE had developed. The DM&IR identified NEI as the contractor which would be performing the work on the Project. The DM&IR also indicated that it was holding informational meetings with its own employees to discuss repair plans and associated safety concerns while the Project was in progress.<sup>42</sup>

24. In the fall of 2006, the DM&IR's Safety Officer was Dan Becker. Mr. Becker was generally responsible for safety at four dock facilities—in Duluth and Two Harbors, Minnesota, Escanaba, Michigan, and another facility in Ohio. He was generally spending twenty-five percent (25%) of his time at the DM&IR's Two Harbors facility.<sup>43</sup>

25. Mr. Becker was made available to serve as a safety resource for NIE while the Project was in progress. His role included providing “review and on-site support to NIE.”<sup>44</sup> Mr. Becker had the authority to shut down the work of a contractor working on DM&IR's property if he found that the contractor was not complying with DM&IR's requirements.<sup>45</sup> However, neither the DM&IR nor NIE understood that Mr. Becker would be responsible for monitoring or inspecting the work being done by NIE while the Project was in progress. Mr. Becker never indicated to NIE that he would be inspecting its work nor did he ever do so. Mr. Becker would only have inspected the work site if DM&IR employees had been working there.<sup>46</sup>

26. Between September 2006 and December 6, 2006, Mr. Becker visited DM&IR's Two Harbor facility approximately six times. Not all of those visits were related to the Project. Mr. Becker was actually at a Project worksite for an extended period when NIE was stabilizing the concrete panel at the beginning of the Project. However, once the initial concrete panel was stabilized, Mr. Becker never visited or inspected any pocket on Dock #2 where NIE was working until after Mr. Rathjen's fall on December 6, 2006. Mr. Becker's only other direct involvement with NIE before the accident was conducting a general orientation session on worksite safety for three NIE employees on October 20, 2006.<sup>47</sup>

27. DM&IR decided to proceed with the repairs to Dock #2 during the shipping season, as opposed to waiting until the off-season when there is no vessel or train traffic.<sup>48</sup> Since there would be continuing train and vessel traffic and associated movement of taconite pellets, NIE's work on the Project had to be coordinated with the DM&IR's ongoing operations, the DM&IR designated Mr. Shannon to be the day-to-day contact person for NIE. In that capacity, Mr. Shannon was primarily responsible for coordinating the NIE's activities with DM&IR's ongoing operations.<sup>49</sup>

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<sup>42</sup> Exs. 26, 27.

<sup>43</sup> Tr. Vol. IV, pp. 651-652.

<sup>44</sup> Ex. 27;

<sup>45</sup> Tr. Vol. IV, p. 708.

<sup>46</sup> Tr. Vol. IV, pp. 657-659, 707-708.

<sup>47</sup> Tr. Vol. IV, pp. 705-706.

<sup>48</sup> Tr. Vol. III, p. 563.

<sup>49</sup> Tr. Vol. III, p. 509.

28. Mr. Shannon conducted informational meetings with NIE's workers each morning to provide them with information regarding train traffic, vessel traffic, and other dock operations. The DM&IR customarily held meetings like this for every outside contract working on projects at the Two Harbors facility. During those meetings, which were referred to as "safe job briefings," Mr. Shannon provided NIE workers at the site with information about the operations that the DM&IR would be conducting during the day and discussed things like weather conditions, pellet spills, other such safety concerns.<sup>50</sup>

29. Mr. Shannon's regular duties were to supervise his own maintenance personnel. Other than in the morning informational meetings, NIE employees only saw Mr. Shannon about once or twice per week. On those occasions, Mr. Shannon familiarized himself with where NIE was working in order to estimate the time that it would take NIE to complete the various phases of its work. He also monitored NIE's progress in order to avoid any conflicts between NIE's work and ongoing DM&IR operations. However Mr. Shannon never supervised NIE's work crew, monitored NIE's work performance, inspected work in progress, or directed any of NIE's employees in how to do their work. Occasionally, Mr. Shannon provided NIE's foreman, Duane Godbout, with some small items, tools, or supplies.<sup>51</sup>

30. For its part, NIE understood that Mr. Shannon's authority was limited to issues relating to where on Dock #2 NIE would be working, and that Mr. Shannon would not be determining how NIE would be performing its work. NIE further understood that Mr. Shannon would only be inspecting its work after it was completed,<sup>52</sup> but that he would not be conducting inspections while the work was in progress or exercising daily oversight of the work.<sup>53</sup>

31. After walking out to wherever NIE was working to obtain information on NIE's progress, Mr. Shannon used that information to coordinate ore movements and shipments. On one occasion when Mr. Shannon was at NIE's worksite, he saw an NIE employee, Keith Smith, acting "rambunctious" while on the job site. Mr. Shannon told Mr. Godbout that such conduct was unacceptable, and Mr. Godbout relayed the information to Mr. Bostyancic. Mr. Godbout also told Mr. Smith that he needed to change his behavior. When Mr. Smith subsequently failed to change his behavior, Mr. Bostyancic made the decision to remove Mr. Smith from the worksite for failure to obey the instructions of his foreman. Mr. Shannon's comments did not enter into Mr. Bostyancic's decision.<sup>54</sup>

32. Before work on the Project began, the DM&IR concluded that it would be necessary to occasionally use its locomotive track crane to move some of NIE's equipment from one part of the job sites to others. Because the locomotive track crane is powered by a locomotive and moves on the railroad tracks, it was necessary for

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<sup>50</sup> Tr. Vol. IV, pp. 564, 653; Ex. 23.

<sup>51</sup> Tr. Vol. II, pp. 341-343; Tr. Vol. III, p. 510; Tr. Vol. IV, p. 573-574.

<sup>52</sup> Tr. Vol. II, p. 276.

<sup>53</sup> Tr. Vol. IV, p. 603.

<sup>54</sup> Trial Tr. Vol. II, at 286-288.

DM&IR maintenance employees to operate the crane. Mr. Shannon coordinated the use of the track crane for NIE operations and supervised the DM&IR employees during those operations. Before the crane was used on the Project, Mr. Shannon reviewed DM&IR's Safe Job Procedure with Mr. Godbout to ensure that NIE employees understood the signals for directing the crane.<sup>55</sup>

### **Applicable Safety Rules and Measures**

33. The DM&IR has safety rules that apply to contractors working on DM&IR property. Outside contractors and their employees are required to register, attend an orientation session, and to take a test before they are given credential to work on the DM&IR's Two Harbors facility.<sup>56</sup> Mr. Shannon normally conducted the orientation sessions and administered the tests to NIE's workers. However, on one occasion, Mr. Becker returned to the Two Harbors facility to conduct an orientation for NIE employees who were first brought in to work in middle of the job.<sup>57</sup>

34. Among other things, Mr. Becker informed NIE's workers that he expected them to employ 100 percent fall protection while they were working on Dock #2.<sup>58</sup> It was also NIE's work rule that when its iron workers were working six feet above the ground or higher, it was necessary for them to have fall protection equipment that was tied off.<sup>59</sup> While NIE employees were working on the Project, it was Mr. Godbout's responsibility, as NIE's foreman, to ensure that there was fall protection equipment at the Project job sites, and that NIE employees were using that fall protection 100 percent of the time.<sup>60</sup>

35. NIE employees agreed to meet the fall protection requirements by using a double lanyard personal fall arrest system (PFAS).<sup>61</sup> A double lanyard PFAS consists of a harness worn by a worker connected to a lanyard affixed to the structure. The "double lanyard" allows workers to move from place to place by tying off to a second lanyard before unfastening the first lanyard. This PFAS allows a worker to maintain fall protection for 100 percent of the time.<sup>62</sup>

36. The DM&IR had a rescue plan for accidents involving falls into the water. That plan included maintaining a barge available at the Two Harbors facility that was available for use as a life saving skiff.<sup>63</sup> Another part of the plan involved immediately contacting the City of Two Harbors Rescue Squad, which periodically trained at the

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<sup>55</sup> Tr. Vol. IV, pp. 558, 596 and 622.

<sup>56</sup> Exs. 33-35.

<sup>57</sup> Tr. Vol. II, p. 340, 402-03; Tr. Vol. III, p. 590; Tr. Vol. IV, p. 704-05; Ex. 23, entry for October 20, 2006; entry for Nov. 14, 2006; Exs. 24, 31-36.

<sup>58</sup> Tr. vol. IV, p. 688.

<sup>59</sup> Tr. Vol. II, p. 298, Vol. IV, p. 688.

<sup>60</sup> Tr. Vol. II, pp. 310-311.

<sup>61</sup> Tr. Vol. II, pp. 274, 310-311; Vol. IV, pp. 688-689.

<sup>62</sup> Tr. Vol. IV, p. 667.

<sup>63</sup> Tr. Vol. II, pp. 368; Tr. Vol. III, pp. 435, 463-464.

DM&IR facility. The Rescue Squad was therefore familiar with the facility and was able to conduct prompt rescue operations there.<sup>64</sup>

### **Use of the Swing Stage**

37. After NIE completed the first stage of repairs on the north side of Dock #2, it began working on that dock's south side. The absence of walkways on the south side raised questions of access. NIE's foreman, Mr. Godbout, suggested using a swing stage to provide access to NIE employees making repairs to Pocket 649 and other south side pockets. Thereafter, NIE decided that it would use a swing stage, and Mr. Godbout developed a swing stage design for NIE.<sup>65</sup>

38. During the morning informational meeting on September 25, 2006, Mr. Godbout told Mr. Shannon that NIE would be using a swing stage and twenty-foot retractable lanyards running from above the work area while working on the south side of Dock #2. In his notes of that day's morning meeting, Mr. Shannon recorded Mr. Godbout's decision.<sup>66</sup> Mr. Shannon did not discuss the design, use, or assembly of the swing stage with Mr. Godbout or anyone else on the NIE crew. The only discussions Mr. Shannon had regarding the swing stage occurred later when NIE needed DM&IR's track crane to move the swing stage.<sup>67</sup> Mr. Shannon knew nothing about swing stages prior to his discussion with Mr. Godbout on September 25, 2006.<sup>68</sup>

39. Kevin Ehrenreich, the General Manager of the DM&IR's Two Harbors facility, is a licensed professional engineer.<sup>69</sup> When NIE concluded that a swing stage was necessary to provide access for repairs to some pockets, Mr. Godbout asked Mr. Ehrenreich to calculate the size and strength of the beams that would be attached at the top of Dock #2 to support the swing stage when it was being used. Mr. Godbout gave Mr. Ehrenreich information about the load geometry, and Mr. Ehrenreich performed the necessary calculations and provided NIE with information about the size and strength of the required structural steel beams. Mr. Ehrenreich provided NIE with no other advice or information regarding the swing stage that NIE would be using.<sup>70</sup>

40. Thereafter, NIE rented the swing stage and associated components, and the NIE crew assembled the swing stage scaffold.<sup>71</sup>

41. While working on the swing stage, NIE employees routinely used PFAS harnesses, but NIE employees did not always tie off to lanyards running from the dock

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<sup>64</sup> Tr. Vol. IV, pp. 585-586, 693.

<sup>65</sup> Tr. Vol. II, pp. 300, 347; Tr. Vol. IV, p. 559.

<sup>66</sup> Tr. Vol. IV, pp. 557-559; Ex. 23.

<sup>67</sup> Tr. Vol. IV, pp. 559, 578 and 596; Ex. 23.

<sup>68</sup> Tr. Vol. IV, p. 578.

<sup>69</sup> Tr. Vol. II, pp. 407-408, 410 and 433.

<sup>70</sup> Tr. Vol. III, pp. 520-527, 538-539.

<sup>71</sup> Tr. Vol. II, p. 351; Ex. 62-65.

structure. Instead, NIE employees sometimes tied off to a point above the motor on the swing stage. NIE employees did not wear life jackets at any time during the project.<sup>72</sup>

### **NIE's Use of the Swing Stage at Pocket 649**

42. Before beginning work at Pocket 649, NIE secured two structural steel beams (outrigger beams), which met the specifications that Mr. Ehrenreich had recommended, to the top of Dock #2. The outrigger beams were positioned perpendicular to Dock #2's southern face. The inner ends of the outrigger beams rested on top of the steel walkway along the outer edge of Dock #2's top and were secured to that walkway with come-alongs.<sup>73</sup> The outer ends of the outrigger beams extended outward some distance from Dock #2's southern face, with the cables that supported the swing stage shackled to the ends of those beams.<sup>74</sup> NIE's foreman, Mr. Godbout, placed orange cones around the portions of the outrigger beams that lay on the walkway to alert persons of a possible tripping hazard.<sup>75</sup>

43. On at least one occasion, Mr. Shannon saw NIE employees using the swing stage while working on Pocket 649. He saw that the NIE employees were wearing PFAS harnesses, but from his vantage point, he could not determine whether or not the NIE employees were using lanyards or were tied off in the way that Mr. Godbout had described on September 25, 2006. While he was at Pocket 649, Mr. Shannon also did not see NIE employees moving to or from the swing stage or see them using the ore shuttle or moving along the roof of the steel walkway next to the shuttle.

44. Mr. Shannon did not see NIE employees wearing life jackets at any time while they were working on the Project.<sup>76</sup>

45. It would have been possible for NIE employees working at Pocket 649 to use the beam running along the edge of Dock #2's top as an anchor point for lanyards. That beam was capable of supporting loads in excess of 5,000 pounds.<sup>77</sup>

46. On December 5, 2006, the DM&IR had engaged Lakehead Piping, another outside contractor, to remove some piping on the south face of Dock #2 that included piping along Pocket 649. Both Lakehead Piping and NIE employees attended Mr. Shannon's morning meeting on December 5<sup>th</sup> to discuss coordination of the work that would be done that day. That meeting was focused on what the outside contractors intended to accomplish that day, and during the meeting, Mr. Shannon did not direct or supervise any of the actual work that the contractors would be performing. Lakehead Piping employees obtained permission from NIE to use the swing scaffold to access

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<sup>72</sup> Tr. Vol. IV, pp. 557-559; Ex. 23.

<sup>73</sup> Tr. Vol. II, pp. 284-285; Ex. 6.

<sup>74</sup> Ex. 3.

<sup>75</sup> Tr. Vol. II, p 352.

<sup>76</sup> Tr. Vol. IV, at 604-607, 612, 616, 621 and 624-625.

<sup>77</sup> Tr. Vol. IV, pp. 624-634; Exs. 4, 20, 48-2, 85-1, 89, 90, 137, and 144.

some 2-inch pipe that needed to be removed that day but did not ask the DM&IR for permission to use the swing stage.<sup>78</sup>

47. Thereafter, Lakehead Piping's employees began removing 2-inch piping located near the covered walkway along Pocket 649. Some of that piping was accessible from the walkway.<sup>79</sup> Later in the day, Lakehead Piping employees gained access to other portions of the piping by climbing approximately ten feet up a support column and walking across the roof over the walkway to NIE's swing stage. The Lakehead Piping employees who used the swing stage wore body harnesses and were tied off while they were on the roof. Although there were no dedicated anchor points and no horizontal static line for tying off in that location, the support column and other structures had tie off points, and the 2-inch piping served as a horizontal static line.<sup>80</sup> However, after the Lakehead Piping employees removed the 2-inch pipe, that piping no longer served as a horizontal static line.<sup>81</sup>

### **The Events of December 6, 2006**

48. NIE had finished installing structural steel at Pocket 649 before December 6, 2006. The work NIE planned to perform that day was preparing the swing stage to be moved by the track crane to another pocket. During the morning meeting on December 6, 2006, Mr. Shannon specifically reminded Mr. Godbout and NIE employees Michael Rathjen and Michael Calaman to use fall protection equipment and to keep tied off.<sup>82</sup>

49. After the meeting with Mr. Shannon, the NIE employees proceeded to Dock #2. While Mr. Rathjen and Mr. Calaman began preparing the swing stage to be moved, Mr. Godbout went to another location to obtain oxygen equipment for work at the next pocket. Preparing the swing stage to be moved required Mr. Rathjen and Mr. Calaman to set the motors of the scaffold down, release the cables, and rig the stage so it could be picked up later by the crane. Mr. Rathjen and Mr. Calaman intended to lower the swing stage onto the corrugated roof and use straps to secure it to the face of the dock.<sup>83</sup>

50. Neither Mr. Rathjen nor Mr. Calaman put their safety harnesses that morning before accessing the swing stage and working on it. No one else working on Dock #2 saw Mr. Calaman or Mr. Rathjen access the stage and begin working on it without fall protection. Neither Mr. Rathjen nor Mr. Calaman informed anyone that they would not be wearing their safety harnesses that morning.<sup>84</sup>

51. The DM&IR had previously given NIE permission to remove panels on the walkway roof and move other structures to get direct access to the swing stage, and

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<sup>78</sup> Tr. Vol. II, p. 450; Ex. 23.

<sup>79</sup> See, e.g., Ex. 17.

<sup>80</sup> Tr. Vol. II, pp. 393-396.

<sup>81</sup> Tr. Vol. III, pp. 451-455.

<sup>82</sup> Tr. Vol. II, pp. 437, 450; Tr. Vol. IV, p. 582.

<sup>83</sup> Tr. Vol. II, pp. 368, 426, 428-429.

<sup>84</sup> Tr. Vol. II, pp. 312-313, 378-379, 426 and 439-440.

NIE had, in fact, done that to obtain access to the swing stage while repairing other panels on Dock #2.<sup>85</sup> However, on December 6, 2006, Mr. Rathjen and Mr. Calaman decided to use another method of accessing the swing stage. They walked along a catwalk to an ore shuttle adjacent to Pocket 649, which was locked in its vertical position. They then climbed up the ore shuttle for a distance of approximately 10 feet, and stepped out onto the canopy roof. Mr. Rathjen and Mr. Calaman then walked along the roof for about 20 feet to step into the swing stage. At no point was either of them using fall protection.<sup>86</sup>

52. While on the swing stage, Mr. Rathjen and Mr. Calaman raised it and placed straps under it for to allow it to be lifted by the track crane. While standing on the swing stage, Mr. Rathjen and Mr. Calaman then attempted to lower it. Mr. Rathjen successfully lowered his side of the swing stage onto the straps, leaving the cable slack on his side. Mr. Rathjen had positioned his motor down and was kneeling outside of the motor at the outer end of the swing stage. Because of a kink in the cable, Mr. Calaman was having difficulty lowering his end and was trying to straighten it out. The cable remained taut on Mr. Calaman's side of the swing stage, but the kink in the cable caused Mr. Rathjen's end of the swing stage to be lower than Mr. Calaman's end. Mr. Rathjen's side of the swing stage abruptly rotated out towards the lake, and Mr. Rathjen fell off of the platform. Mr. Rathjen fell 40-50 feet, striking the edge of the dock and then falling into the water alongside the dock.<sup>87</sup>

53. Mr. Calaman called for help, but no one could hear him because of the noise in the dock area. He got off the swing stage, crossed the roof, and climbed down from the walkway roof, and continued down to the dock surface. He did not use any fall protection while making his way from the swing stage to the dock surface. Along the way, Mr. Calaman grabbed an extension cord, tied a slip knot in it, wrapped it around Mr. Rathjen's hand, and pulled his head above water. Mr. Calaman then left the vicinity of the accident to find a DM&IR employee. Several minutes later, Mr. Calaman found a DM&IR employee, who called the Two Harbors Rescue Squad for help.<sup>88</sup> The Rescue Squad rescue squad arrived by boat in approximately 8-9 minutes from receiving that call.<sup>89</sup> However, by the time the Rescue Squad arrived at the scene of the accident, Mr. Rathjen had expired.

### **The Minnesota OSHA Investigation and Subsequent Administrative Action**

54. MN OSHA has delegated authority from the United States Department of Labor to enforce OSHA standards. Among its responsibilities is investigating worksite accidents. MN OSHA began its investigation in this matter after Mr. Becker reported Mr. Rathjen's death.<sup>90</sup> Niki Harriman, Principal Occupational Safety and Health

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<sup>85</sup> Tr. Vol. IV, pp. 609-612.

<sup>86</sup> Tr. Vol. II, pp. 414-417.

<sup>87</sup> Tr. Vol. II, pp. 429-440.

<sup>88</sup> Tr. Vol. II, pp. 433-435.

<sup>89</sup> Tr. Vol. IV, pp. 693-694.

<sup>90</sup> Tr. Vol. 1, pp. 48-49; Ex. 2 p. 6; Ex. 204.

Investigator (“OSHI”) for the Department, was assigned to investigate the incident.<sup>91</sup> Ryan Nosan, Principal Occupational Safety and Health Investigator for MN OSHA, was assigned as co-investigator.<sup>92</sup>

55. OSHI Harriman’s investigation began on December 6, 2006 and concluded on May 29, 2007. After completing her investigation, OSHI Harriman prepared a report and recommended that the citations at issue in this case be issued to the DM&IR.<sup>93</sup>

56. On December 12, 2007, MN OSHA issued at Citation and Notification of Penalty to the DM&IR relating to the workplace conditions on December 6, 2006. Citation 1, item 1 alleged a willful violation of 29 C.F.R. § 1926.501(b)(15) for:

Each employee on walking/working surface 6 feet or more above lower levels was not protected from falling by guardrail, safety net or personal fall arrest system, specifically, [t]he employer did not provide fall protection for employees when walking along the approximate[ly] three foot wide roof on the South side of ore dock number two, when accessing the swing stage, exposing them to a fifty foot fall hazard.<sup>94</sup>

57. Citation 1, item 2 alleged a willful violation by DM&IR of 29 C.F.R. § 1926.1051(a) for:

Stairways or ladders were not provided at all personnel points of access where there was a break in elevation of 19 inches (48 cm) or more, and no ramp, runway, sloped embankment, or personnel hoist was provided: The employer did not provide adequate access (stairway or ladder) for employees to use when accessing the swing stage scaffold on the south side of the ore dock at pocket #649.<sup>95</sup>

58. Citation 2, item 1 alleged a serious violation by DM&IR of 29 C.F.R. § 1926.20(b)(2) for failure to conduct frequent and regular safety inspections of the worksite. That citation was withdrawn at the hearing in this matter.

59. Citation 2, item 2 alleged a serious violation by DM&IR of 29 C.F.R. § 1926.106(a) for:

Employee(s) working over or near water where the danger of drowning existed, were not provided with U.S. Coast Guard approved life jacket(s) or buoyant work vests: The employer did not provide or ensure that Coast

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<sup>91</sup> Ex. 2.

<sup>92</sup> Tr. Vol. I, p. 47; Tr. Vol. IV, p. 715.

<sup>93</sup> Tr. Vol. I, p. 41; Exs. 1, 2.

<sup>94</sup> Tr. Vol. I, p. 41; Ex. 1, p. 5.

<sup>95</sup> Tr. Vol. I, p. 91, 138; Ex. 1, p. 6.

Guard approved life jackets were worn by employers working near/above water at the Two Harbors ore docks.<sup>96</sup>

60. Citation 2, item 3 alleged a serious violation by DM&IR of 29 C.F.R. § 1926.106(d) because:

A lifesaving skiff was not immediately available at locations where employees were working or adjacent to water. The employer did not provide or ensure that a lifesaving skiff was available/usable at the Two Harbors ore dock where employees were working near/above the water.<sup>97</sup>

61. Citation 2, item 4 is a group of allegations of serious violations by DM&IR of 29 C.F.R. § 1926.451(d), relating to the handling of the swing scaffold.<sup>98</sup>

62. Citation 2, item 5 alleged a serious violation by DM&IR of 29 C.F.R. § 1926.451(d)(3)(i) for:

Before the scaffold is used, direct connections shall be evaluated by a competent person who shall confirm, based on the evaluation, that the supporting surfaces are capable of supporting the loads to be imposed. The employer did not ensure that a competent person that evaluated connections and supporting surfaces for suspended scaffold, allowing the outriggers to be inadequately secured to the walkway.<sup>99</sup>

63. Citation 2, item 6 alleged a serious violation by DM&IR of 29 C.F.R. § 1926.502(d)(20) for:

The employer did not provide for prompt rescue of employees in the event of a fall or assure that employees were able to rescue themselves. The employer did not provide a rescue procedure for employees wearing a personal fall arrest system while working from the swing stage scaffold.<sup>100</sup>

64. The fine calculated for each willful violation was \$35,000. The fine calculated for each serious violation for which a fine was imposed was \$5,000. The fines imposed in the Notification of Penalty, less the one citation withdrawn, total \$95,000.<sup>101</sup>

## **Other Findings**

65. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

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<sup>96</sup> Tr. Vol. I, pp. 143-147; Ex. 1, p. 8; Ex. 2, pp. 25-27.

<sup>97</sup> Tr. Vol. I, pp. 147-148; Ex. 1, p. 9.

<sup>98</sup> Ex. 1, pp. 10-12.

<sup>99</sup> Tr. Vol. I, pp. 160-161; Ex. 1, p. 13; Ex. 2, p. 38.

<sup>100</sup> Tr. Vol. I, p. 164; Ex. 1, p. 14; Ex. 2, pp. 41-42.

<sup>101</sup> Ex. 1, p. 15 (labeled "Invoice").

66. To the extent that the Memorandum that follows explains the reasons for these Findings of Fact and contains additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

67. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### CONCLUSIONS

1. The Department of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 182.661, subd. 3 and 14.50.

2. The Commissioner of Labor and Industry gave the DM&IR proper notice of the hearing and fulfilled all relevant substantive and procedural requirements of statute and rule.

3. The DM&IR is an employer, as defined in Minn. Stat. § 182.651, subd. 7, but not a contractor or a controlling employer under *Bastian v. Carlton County Highway Department*, 555 N.W.2d 312 (Minn. App. 1996).

4. The Commissioner has the burden to establish by a preponderance of the evidence the occupational safety and health violations charged, that violations were properly categorized as willful or serious, and the appropriateness of the penalty proposed. The DM&IR has the burden of establishing the existence of any affirmative defenses by a preponderance of the evidence.<sup>102</sup>

5. The DM&IR failed to establish that, under the circumstances of this proceeding, the Federal Railway Safety Act, 49 U.S.C. § 20101, *et seq.* and its implementing regulations preempt application of the Occupational Safety and Health Act of 1973, Minn. Stat. §§ 182.65–182.676, and thereby deprive the Commissioner of jurisdiction over the subject matter and the DM&IR in this proceeding.<sup>103</sup>

6. The DM&IR also established by a preponderance of the evidence that none of its own employees were exposed to the workplace hazards identified in the Citations issued in this matter.

7. The Commissioner failed to establish by a preponderance of the evidence that the DM&IR exercised a level of supervisory authority over NIE's worksites that created a reasonable expectation that the DM&IR would prevent or abate the hazards that resulted in the Citations issued in this matter. The DM&IR was therefore not a

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<sup>102</sup> Minn. R. 1400.7300, subp. 5.

<sup>103</sup> See discussion in Part II of the Memorandum that follows.

controlling employer under *Bastian v. Carlton County Highway Department*,<sup>104</sup> and is not liable for the violations set forth in the Amended Complaint.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

**ORDER**

IT IS HEREBY ORDERED that:

(1) The citations issued by MN OSHA to the Respondent on December 12, 2007, for alleged violations of 29 C.F.R. Chapter 1926 are VACATED; and

(2) The penalties assessed by MN OSHA under those citations are DISMISSED.

Dated: April 2, 2010

s/Bruce H. Johnson  
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BRUCE H. JOHNSON  
Administrative Law Judge

Reported: Angela D. Sauro, R.P.R., Kirby Kennedy & Associates  
Transcripts Prepared (Four Volumes)

**NOTICE**

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat. §§ 182.661, subd. 3, and 182.664, subd. 5, the employer, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Order.

<sup>104</sup> 555 N.W.2d 312 (Minn. App. 1996).

## MEMORANDUM

### I. Burdens of Proof and Issues to Be Determined

MN OSHA has the burden to establish by a preponderance of the evidence that violations occurred, that the violations were properly categorized as willful or serious, as those terms are defined for OSHA enforcement, and that the Commissioner correctly calculated the appropriate penalty for all violations cited.<sup>105</sup> Under *Bastian v. Carlton County Highway Department*,<sup>106</sup> the Commissioner also has the burden to establish by a preponderance of the evidence that the DM&IR “exercised a level of supervisory authority over a worksite that created a reasonable expectation that it would prevent or abate the hazard resulting in the violation.”<sup>107</sup> However, before addressing whether MN OSHA has met its burden of proof and is entitled to prevail on the merits of its claims, it is first necessary to address the affirmative defense raised by the DM&IR, which bears the burden of establishing the existence of any affirmative defenses by a preponderance of the evidence.<sup>108</sup>

This contested case proceeding involves alleged violations of federal OSHA regulations and standards that have been incorporated into Minnesota law.<sup>109</sup> The DM&IR argues that it is not subject to those regulations and standards for two reasons. It first contends that the Federal Railway Safety Act, 49 U.S.C. § 20101, *et seq.* (FRSA) and its implementing regulations preempt application of the Occupational Safety and Health Act of 1973, Minn. Stat. §§ 182.65–182.676, (the MN OSHA Act) under the circumstances of this case, and that MN OSHA therefore lacks jurisdiction over the DM&IR in this proceeding. Second, the DM&IR argues that it was not the employer of the NIE employees who were allegedly exposed to workplace hazards in violation of applicable standards, and that it is also not vicariously liable, as a controlling employer, for their exposure to workplace hazards. In this contested case, the ALJ only has jurisdiction over whether the DM&IR has incurred liability under the MN OSHA Act by violating applicable workplace safety standards.<sup>110</sup> It lacks jurisdiction to consider whether the DM&IR has incurred liability under some other statutory scheme or body of law.

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<sup>105</sup> Minn. R. 1400.7300, subp. 5.

<sup>106</sup> 555 N.W.2d 312 (Minn. App. 1996) (*Carlton County*).

<sup>107</sup> *Id.* at 316.

<sup>108</sup> Minn. R. 1400.7300, subp. 5.

<sup>109</sup> Minn. R. 5205.0010.

<sup>110</sup> Minn. Stat. § 182.655 authorizes the Commissioner to establish workplace safety standard by adopting rules, and in Minn. R. 5205.0010, the Department incorporated federal OSHA workplace safety standards.

## II. The FRSA Does Not Preempt Application of OSHA Regulations in the Context of this Case.

DM&IR first contends that the FRSA preempts application of the MN OSHA regulations at issue in this case. The FSRA is enforced by the Federal Railroad Administration (“FRA”). That Act provides that:

A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation ... prescribes a regulation or issues an order *covering the subject matter* of the State requirement.<sup>111</sup> [Emphasis supplied.]

The U. S. Supreme Court has provided the following guidance for interpreting the meaning of “covering the subject matter”:

To prevail on the claim that the regulations have preemptive effect, petitioner must establish more than that they ‘touch upon’ or ‘relate to’ that subject matter, for ‘covering is a more restrictive term which indicates that preemption will lie only if the federal regulations *substantially subsume* the subject matter of the relevant state law.” [Emphasis supplied.]

Thus, as the DM&IR points out “the question becomes whether the FRA regulation ‘substantially subsumes’ the condition cited by OSHA.”<sup>112</sup> The DM&IR argues that it does, but for the reasons set forth below, the ALJ concludes otherwise.

Specifically, the DM&IR argues that the railroad safety standards set forth in 49 C.F.R., subp. B, entitled “Bridge Worker Safety Standards,” preempt any OSHA regulations and standards adopted into Minnesota law by Minn. R. 5205.0010 that cover the same subject matter. 49 C.F.R. § 214.101, defines the scope of 49 C.F.R., subp. B, and provides in pertinent part:

(a) The purpose of this subpart is to prevent accidents and casualties arising from the performance of work on *railroad bridges*.

(b) This subpart prescribes minimum railroad safety rules for railroad employees performing work on bridges. Each railroad and railroad contractor may prescribe additional or more stringent operating rules, safety rules, and other special instructions not inconsistent with this subpart.

(c) These provisions apply to all railroad employees, railroads, and railroad contractors performing work on railroad bridges. [Emphasis supplied.]

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<sup>111</sup> 49 U.S.C. § 20106, subd. 2; see also *State by Keefe v. Duluth, Winnipeg & Pacific Ry. Co.*, 408 N.W.2d 671, 674 (Minn. Ct. App. 1987) (MN OSHA regulations not preempted where the FRA did not specifically address the same subject matter); *State by Malone v. Burlington Northern, Inc.*, 311 Minn. 89, 247 N.W.2d 54, 55 (1976) (MN OSHA regulations as applied to a railroad maintenance shop not preempted by the FRSA).

<sup>112</sup> Respondent’s Post-Trial Brief, p.13.

Thus, the regulations in 49 C.F.R., subp. B, “substantially subsume” the OSHA on which the Commissioner relies in this proceeding only if the structure on which the NIE employees were working was a “railroad bridge.” 49 C.F.R. § 214.7 defines “railroad bridge” as:

[A] structure supporting one or more railroad tracks above land or water with a span length of 12 feet or more measured along the track centerline. This term applies to the entire structure between the faces of the backwalls of abutments or equivalent components, regardless of the number of spans, and includes all such structures, whether of timber, stone, concrete, metal or any combination thereof.

The DM&IR argues that Dock #2 at its Two Harbors facility meets the definition of “railroad bridge” because railroad “tracks span the length of the ore dock #2, which is approximately 1,800-2,000 feet.”<sup>113</sup> However, in the ALJ’s view, that argument relies on a strained and counter-intuitive definition of the word “bridge.”

In interpreting a statute, “words and phrases are construed according to rules of grammar and according to their common and approved usage.”<sup>114</sup> Dock #2 is a structure extending from a single terminus on the shore into Lake Superior for a distance of approximately 1,800-2,000 feet. The word “bridge” is not commonly understood to include a “dock.” A more exacting textual analysis bears this out. First, a bridge is defined as “a structure spanning and providing passage over a waterway, railroad, or other obstacle.”<sup>115</sup> As applied to bridges, “span” is defined as “[t]he extent or measure of space between two points or extremities, as of a bridge . . . .”<sup>116</sup> The waterway or “obstacle” into which Dock #2 projects is Lake Superior. But unlike a bridge, Dock #2 only has one terminus on the north shore of Lake Superior. It does not provide passage over Lake Superior to a second terminus on the Lake’s south shore. The ALJ notes that in framing its argument, the DM&IR relies on the verb form of the word “span,” rather than the noun form which 49 C.F.R. § 214.7 employs. As a verb, “span” is defined as “[t]o extend across.” However, Dock #2 does not “extend across” anything. Finally, the definition of railroad bridge in 49 C.F.R. § 214.7 incorporates the lexical concepts in the dictionary definitions of “bridge” and “span” when it requires a railroad bridge to have a structure running “between the faces of the backwalls of abutments or equivalent components.”<sup>117</sup> As discussed above, neither Dock #2 nor any other dock has two adjacent terminal structures, such as abutments; they are only attached to the adjacent shore and not to the water into which they extend.

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<sup>113</sup> *Id.*, p. 15.

<sup>114</sup> Minn. Stat. § 645.08(1).

<sup>115</sup> THE AMERICAN HERITAGE DICTIONARY 209 (2d Ed. 1985).

<sup>116</sup> *Id.*, p. 1170.

<sup>117</sup> Which is lexically broader and more ambiguous than the noun form, which appears in 49 C.F.R. §214.7.

In summary, the ALJ concludes that FRA's bridge worker safety standards do not preempt the work safety standards promulgated pursuant to the MN OSHA Act and thereby deprive MN OSHA of jurisdiction over the DM&IR in this proceeding.<sup>118</sup>

### **III. The DM&IR Is Not Vicariously Liable, as a Controlling Employer, for the Exposure of NIE Employees to the Workplace Hazards at Issue.**

At the time of the accident that initiated MN OSHA's investigation in this matter, Dock #2 was a multi-employer worksite. Employees of NIE and Lakehead Piping, two outside contractors, were working in the area of Dock #2 identified by MN OSHA as posing fall hazards to workers. There is no evidence that employees of the DM&IR were exposed to those hazards. Rather, MN OSHA argues that the DM&IR is vicariously liable for the workplace hazards to which NIE employees may have been exposed under the "controlling employer" doctrine, articulated by the Minnesota Court of Appeals in *Bastian v. Carlton County Highway Department*.<sup>119</sup>

In case law developed under the federal OSHA, the federal Occupational Safety and Health Review Commission and federal courts have recognized two situations in which an employer on a multi-employer construction site may be properly cited for occupational safety and health violations that do not result from the exposure of the employer's own workers to a hazard. In the first situation, an employer may be responsible for a federal OSHA violation if the employer creates or controls the hazard. *Red Lobster Inns*, 1980 O.S.H. Dec. (CCH) ¶ 24,636, at 30,220 (Rev. Comm'n July 18, 1980). Under the second scenario, an employer may be responsible for violations of other employers when it could reasonably be expected to have prevented or abated the violations due to its supervisory authority and control over the worksite. *Id.*

These exceptions for imposing federal OSHA liability on employers whose workers have not been exposed to a hazard have developed in cases that typically involve interactions between a general contractor and subcontractors who work on the same construction site. See Mark A. Rothstein, *Occupational Safety and Health Law* § 165 (3d ed. 1990). General contractors have been held liable for federal OSHA violations in such cases based on the presumption that they ordinarily have the responsibility and means to ensure that subcontractors on the same worksite comply with any occupational safety and health regulations that may apply to them. *Marshall v. Knutson*, 566 F.2d 596, 599 (8th Cir. 1977); *Gil Haugan*, 1979 O.S.H. Dec. (CCH) ¶ 24,105, at 29,290 (Rev. Comm'n Dec. 20, 1979).

But this presumption does not apply to principals, who by nature do not typically have the same kind of supervisory authority as general

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<sup>118</sup> As MN OSHA also noted, there is no evidence that DM&IR reported the death of Mr. Rathjen to the FRA or that any investigation was conducted by that agency. See MN OSHA Reply, p. 4.

<sup>119</sup> 555 N.W.2d at 316.

contractors over multi-employer worksites. See, e.g., *Arizona Pub. Serv. Co. v. Industrial Comm'n*, 873 P.2d 679, 682 (Ariz. Ct. App. 1994) ("Unlike the contractor/subcontractor relationship, the hiring employer does not always have control over the worksite in an independent contractor situation."). Consequently, while we agree with the Commissioner that a principal may be liable for Minnesota OSHA violations that do not involve the exposure of the principal's own employees to a hazard, we conclude that liability attaches only if (1) the principal created or controlled the hazard, or (2) the Commissioner presents evidence that the principal exercised a level of supervisory authority over a worksite that created a reasonable expectation that it would prevent or abate the hazard resulting in the violation. When using the latter basis for citing a principal, the Commissioner may not rely on a presumption of supervisory authority; the Commissioner must affirmatively prove that the principal had the kind of supervisory authority typically exercised by the general contractor or controlling employer on a worksite.<sup>120</sup>

The Commissioner is not claiming that the DM&IR created or controlled the workplace hazards to which NIE's employees were exposed. Even if that were being claimed, the evidence failed to establish that that was the case here. Rather, the Commissioner contends that a preponderance of the evidence established that the DM&IR exercised a level of supervisory authority over the worksite that created a reasonable expectation that it would prevent or abate the hazards that resulted in the violation. In effect, the Commissioner argues that the level of supervisory authority over the worksite that was exercised in the aggregate by Dan Becker, Kevin Ehrenreich, and Mike Shannon, along with DM&IR's ability to control its premises, was sufficient to create a reasonable expectation among NIE workers that the DM&IR would prevent or abate the hazards that resulted in the violations.<sup>121</sup>

As the owner of Dock #2, the DM&IR had general control over the dock areas in which NIE was working.<sup>122</sup> General control as owner, however, does not necessarily establish whether or not the DM&IR was the controlling employer. Rather, the *Carlton County* test focuses on who "controlled the hazards," and not who may have had more general control of the premises.<sup>123</sup> The evidence established that NIE assumed responsibility for and actually exercised direct control over the hazards at issue. For example, there was a clear understanding between the DM&IR and NIE that it was the responsibility of NIE's foreman, Duane Godbout, to ensure that there was adequate fall protection equipment at the jobsite, and that NIE employees were using that fall

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<sup>120</sup> *Bastian v. Carlton County Highway Department*, 555 N.W.2d 312, 316 (Minn. App. 1996) (*Carlton County*).

<sup>121</sup> MN OSHA Brief, at 2-6.

<sup>122</sup> This control does not constitute "control of the hazard" as set out in *Carlton County*. As shown in the foregoing Findings, the hazards arose by the means chosen to access areas of the worksite, and the evidence failed to establish that DM&IR was aware of how that was being done by employees of NIE and Lakehead Piping.

<sup>123</sup> See 555 N.W.2d at 316.

protection 100 percent of the time.<sup>124</sup> Additionally, Mr. Shannon gave NIE the option of removing part of covered walkway roof on which the swing stage was resting on December 6, 2006, in order to gain access to the swing stage directly by ladder, but NIE never requested or did that.<sup>125</sup>

The Commissioner also argues that DM&IR's orientation courses for outside contractors and their employees and associated tests establish that it had supervisory authority over NIE. First of all, those courses are neither contractor specific, trade specific, nor work site specific.<sup>126</sup> Nor were they even general safety courses. Those courses were designed to familiarize outside contractors and their employees with the types of hazards that they might encounter in an ore dock facility—primarily how to work safely around trains. Rather than tending to establish that the DM&IR exercised supervisory authority over outside contractor work sites, the orientation course and testing tend to establish the contrary by requiring outside contractors to provide the DM&IR with assurance that their employees, whom the DM&IR would not be directly supervising, would be able to work safely in what might be an unfamiliar workplace with unfamiliar hazards.

The evidence also failed to establish that DM&IR managers and supervisors actually exercised any supervisory control over NIE, its employees, or the side on Dock #2 where they were working. Dan Becker was the DM&IR's Safety Officer and in that capacity served as a safety resource for outside contractors, like NIE. He was responsible for ensuring that NIE was complying with the DM&IR's general safety requirements, and he had the authority to shut NIE's operations down if he found that NIE was not compliant. However, no information was ever brought to his attention indicating that NIE was not complying with the DM&IR's general safety requirements. Mr. Becker testified that between September 2006 and December 6, 2006, he only visited DM&IR's Two Harbor facility for any purpose approximately six times. He was only at NIE's work site once, when NIE was stabilizing the concrete panel at Pocket 514 on the north side of Dock #2. He was never again physically present at any of NIE's work sites on the south side of Dock #2 until after Mr. Rathjen fell on December 6, 2006, and never saw, much less inspected, the work in progress. Mr. Beckers direct involvement with NIE occurred on October 20, 2006, when he conducted one of the general safety orientation sessions for three NIE employees.<sup>127</sup> None of NIE's or the DM&IR's other employees understood that Mr. Becker would be inspecting NIE's various worksites on Dock #2 to supervise the work being done, to ensure there were no worksite hazards, or to ensure that NIE's employees were working safely. Mr. Becker testified that he only would have done something like that if DM&IR employees were actually working at the site.<sup>128</sup>

If anything, Kevin Ehrenreich's involvement with NIE's work on the Project was more peripheral than Mr. Becker's involvement. As General Manager of the DM&IR's

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<sup>124</sup> Tr. Vol. II, pp. 310-311.

<sup>125</sup> Tr. Vol. IV, p. 612.

<sup>126</sup> See Exs. 31 through 35.

<sup>127</sup> Tr. Vol. IV, pp. 705-706; see Ex. 32.

<sup>128</sup> Tr. Vol. IV, pp. 657-659, 707-708.

Two Harbors facility, it was Mr. Ehrenreich who engaged NIE to install the structural reinforcements designed by LHB for Dock #2. Beyond that, Mr. Ehrenreich's only direct involvement with the Project was in his personal capacity as a Professional Engineer and not as the facility's General Manager. In late September 2006, NIE decided that it needed a swing stage to access some pockets on the south side of Dock #2. As a convenience, NIE asked Mr. Ehrenreich if he would perform the calculations to size the outrigger beams. Thereafter, Mr. Ehrenreich made those calculations and ordered the outrigger beams for NIE. The DM&IR was under no contractual obligation to perform those functions for NIE; in fact, the parties were unaware that a swing stage might be needed when the job began. On the other hand, NIE designed the swing stage,<sup>129</sup> leased the swing stage and associated components,<sup>130</sup> decided how to attach the outrigger beams to the dock structure,<sup>131</sup> rigged it,<sup>132</sup> and used it—all without any supervision or involvement by Mr. Ehrenreich or any other DM&IR employee. There was also no evidence that Mr. Ehrenreich visited any of NIE's worksites on Dock #2, other than immediately after the panel on Pocket 14 came loose in early September and after the accident occurred on December 6<sup>th</sup>. In summary, Mr. Ehrenreich's sizing and ordering of the swing stage outrigger beams were clearly done as a convenience for NIE and not an exercise of supervisory authority over NIE's worksites, and there is no evidence that he ever exercised supervisory authority over any of NIE's worksites

The DM&IR employee most directly involved with NIE's work on the Project was Mike Shannon, the Maintenance Supervisor at the DM&IR's Two Harbors facility. Although Mr. Shannon's regular duties were supervising his own DM&IR maintenance staff, Mr. Shannon also met every morning about 7:30 a.m. with the employees of any outside contractor who would be working at the Two Harbors facility that day. The primary purpose of those meetings, which were referred to as "safe job briefings," was to determine where contractors planned to work that day and to coordinate their work with the various operations that the DM&IR would be conducting that day in order to avoid mutual interference. For example, Mr. Shannon advised contractors of any planned rail and vessel movements, conveyor movement of taconite pellets, and loading and unloading operations that had the potential to create hazardous conditions for contractors' employees.<sup>133</sup> Mr. Shannon also addressed the potential for adverse weather conditions that could affect the work of contractors. In other words, Mr. Shannon's responsibility was coordination, and not supervision, of activities in a multi-employer workplace.

Mr. Shannon only visited the site where NIE employees were working about once or twice a week. Moreover, those visits were neither regular nor scheduled. Rather, he only visited NIE's work sites when changes in DM&IR operations might interfere with NIE's work. There is no evidence that Mr. Shannon supervised NIE's work crew, monitored NIE's work performance, inspected work in progress, or directed any of NIE's employees in how to do their work. In short, a preponderance of the evidence

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<sup>129</sup> Tr. Vol. II, pp. 348-349.

<sup>130</sup> Exs. 62-66.

<sup>131</sup> Tr. Vol. II, p. 348.

<sup>132</sup> Tr. Vol. II, p. 351.

<sup>133</sup> Tr. Vol. IV, pp. 563-572.

established that Mr. Shannon's relationship with NIE was as a coordinator and not as a supervisor.

With regard to the swing stage that NIE was using, Mr. Shannon testified that he had no knowledge, or experience with swing stages before Mr. Godbout proposed using one in September. Although Mr. Shannon saw the swing stage in question from time to time when he visited NIE's work site, he did not inspect the swing stage to ensure that it was rigged and being operated properly, since he lacked the technical knowledge to do that.<sup>134</sup> Although Mr. Shannon frequently ended his morning meeting with NIE employees by reminding them to make sure that they were tied off when they were working, that simply as a reminder to exercise safety awareness<sup>135</sup> and not to supervise how they did their work. On at least one occasion when Mr. Shannon visited NIE's work site at Pocket 649, he saw that that the NIE employee working there had harnesses on, but from his vantage point, he was unable to determine whether they had vertical independent lifelines or whether they were tied off.<sup>136</sup>

MN OSHA cites a Commission holding that

[i]n determining whether the construction standards are applicable to an employer performing non-trade or professional services at a construction worksite, we look to two factors: the extent to which the employer is involved in the multitude of different sorts of activities that are necessary for the completion of the typical construction project and the degree to which it is empowered to direct or control the actions of the trade contractors.<sup>137</sup>

The factors that demonstrate such empowerment were identified as:

Involvement in the design of the project and the bidding process, administration and coordination of the construction work, inspection for conformity to contract specifications, certification of work for payment, processing of change orders, and monitoring the schedule and maintaining job progress are all indicia of what the Commission termed in that decision 'far-reaching or global responsibility for diverse activities at the site.'<sup>138</sup>

The evidence establishes that the Project was designed not by the DM&IR but by LHB, an independent engineering and architectural firm. The responsibility for inspecting NIE's work to determine conformity to contract specifications rested with LHB and not with the DM&IR. The only major assistance that NIE received from DM&IR was the use

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<sup>134</sup> Tr. Vol. IV, p. 578.

<sup>135</sup> See Ex. 23.

<sup>136</sup> Tr. Vol. IV, pp. 603-605.

<sup>137</sup> *Secretary of Labor v. CH2M Hill Central, Inc.*, 17 O.S.H. Cas. (BNA) 1961, 1997 WL 197011 (O.S.H.R.C. April 21, 1997); see also *C112M Hill Central, Inc. v. Herman*, 131 F.3d 1244, 1245 (7th Cir. 1997).

<sup>138</sup> *Secretary of Labor v. Fleming Construction, Inc.*, 18 O.S.H. Cas. (BNA) 1708, 1999 WI. 236048 (O.S.H.R.C. April 16, 1999) (citing *CH2M*, 1997 WI. 197011).

of DM&IR's rail-based crane to position the swing stage at locations selected by NIE. That was necessary because NIE's iron workers lacked the training and experience to operate a locomotive on railroad tracks. Otherwise, any "tools and supplies" provided to NIE consisted of small items that NIE ran out of, not the panoply of tools and equipment that would suggest DM&IR was, in fact, the employer of the workers on the project. There is no evidence that the DM&IR established the schedule for completing the Project other than deciding that the Project would be done during, and not after, the shipping season. In other words, the DM&IR's involvement with the Project consisted of coordinating NIE's work activities with facility operations actions and supplying conveniences to NIE; it did not represent an assertion of control by DM&IR over the work being performed by NIE.

Considering the totality of the DM&IR's relationship and interactions with NIE and its employees, the ALJ finds nothing that differs materially from the normal relationship between a principal and an independent contractor. The ALJ concludes that the DM&IR, through its managerial and supervisory employees, did not exercise a level of supervisory authority over NIE's worksites that created a reasonable expectation that the DM&IR would prevent or abate the hazards that resulted in the violations. The DM&IR was therefore not a controlling employer under *Carlton County* and was therefore not vicariously liable for the violations set forth in the Amended Complaint.

#### **IV. Disposition of the Citations at Issue**

##### **A. Citation 1, Item 1.**

The employer's obligation under the OSHA standard forming the basis for this citation is to ensure that each employee working or walking on an unguarded elevated surface six or more feet above the dock level be protected from falling by the use of either a guardrail system, a safety net, or personal fall arrest equipment.<sup>139</sup> It is undisputed that there was no horizontal lifeline, guardrail or safety net at Pocket 649 at the time of the accident, and that the NIE employees working there were not wearing personal fall arrest equipment. In other words, those workers were exposed to a fall hazard on December 6, 2006, and, in fact, that exposure resulted in Mr. Rathjen's death. The issue, however, is who had a duty under OSHA to provide adequate fall protection equipment. None of DM&IR's employees were exposed to that hazard, but MN OSHA argues that the "DM&IR knew, or should have known, that the workers from Northern and Lakehead were not using appropriate fall protection at Pocket 649, and that Citation 1, Item 1, should be affirmed as issued because DM&IR had the power to prevent or abate the hazard and failed to do so."<sup>140</sup> However, the evidence failed to establish that the DM&IR either knew of the hazard, or exercised a level of supervisory authority over the worksite that created a reasonable expectation that the DM&IR would prevent or abate the hazard resulting in the violation. Since DM&IR had no employees

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<sup>139</sup> 29 CFR § 1926.501(b)(15).

<sup>140</sup> MN OSHA Reply Brief, at 10.

exposed to the hazard and since the DM&IR cannot be vicariously liable under the controlling employer doctrine, Citation 1, Item 1, must be dismissed.<sup>141</sup>

## **B. Citation 1, Item 2.**

MN OSHA issued Citation 2, Item 2, to DM&IR for failure to provide safe access to the canopy area and thereby exposing NIE and Lakehead Piping employees to a fall hazard. The DM&IR asserts that this citation should be vacated because the DM&IR was not responsible for providing safe access to the canopy roof at Pocket 649. Again, since the DM&IR was not a controlling employer, NIE and Lakehead Piping were each responsible for ensuring the safety of their respective employees access to their respective worksites at Pocket 649.

The DM&IR never exercised supervision over the fall hazards presented at Pocket 649. It also did not ignore them. The DM&IR had made clear to both Lakehead Piping and NIE that the worksite was a “100% tie-off” zone. The DM&IR empowered the contractors to address the access issues they faced by allowing them to make alterations to the dock structure to establish safe and adequate access to work sites. Both were authorized to cut through barriers or move structures if they could not work around them. For example, the DM&IR had given NIE the option of removing panels of the covered walkway’s roof on the south side of Dock #2 to gain access to worksites, and NIE actually did that while making a previous repair. But on December 6, 2006, NIE’s employees did not do that.<sup>142</sup> NIE and Lakehead Piping employers could also have provided their employees with personal fall arrest systems with long lanyards tied off at the top of the dock or with double lanyard personal fall arrest systems that would have enabled them to climb up the shuttle safely. There were ample locations to fasten lanyards for use of personal fall arrest systems. In other words, even if Mr. Shannon had actually known that the workers from NIE and Lakehead Piping were accessing the canopy roof at Pocket 649 by climbing the iron ore shuttle, there was no evidence that he knew they were climbing the ore shuttle without using adequate fall protection.

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<sup>141</sup> The DM&IR also argued that this citation should be dismissed because DM&IR required fall protection and reasonably believed that the workers for NIE and Lakehead Piping would be using PFAS protection. The DM&IR further argued that there should have been no citation because DM&IR was unaware that those workers were not using fall protection while crossing the roof. On the other hand, MN OSHA argues that DM&IR cannot avoid liability for OSHA violations by making an agreement with another employer, citing *Secretary of Labor v. Schuler-Hass Electric Corp.*, 21 O.S.H. Cas. (BNA) 1489, 2006 WL 1355469, \*4 (O.S.H.R.C. May 8, 2006). There the O.S.H.R.C. rejected the employer’s argument that it should not be cited because it had engaged in “reasonable efforts to prevent employee exposure to airborne asbestos” when another company assumed responsibility to remove asbestos. MN OSHA’s argument would well taken if the DM&IR met the test of a controlling employer. The holding in *Schuler-Hass Electric Corp.* applies where the standards for subcontracting or the status as a controlling employer are met. In those cases, the general contractor or controlling employer cannot delegate compliance with OSHA standards. *Central of Ga. R. R. Co. v. O.S.H.R.C.*, 576 F.2d 620, 625 (5th Cir. 1978) (citing *Frohlick Crane Serv., Inc. v. O.S.H.R.C.*, 521 F.2d 628, 631 (10th Cir. 1975)). However, here the controlling employer standard has not been met.

<sup>142</sup> See Finding 45.

In any event, since DM&IR had no employees who were exposed to the hazard at issue and since the DM&IR cannot be vicariously liable under the controlling employer doctrine, Citation 1, Item 1, must be dismissed.

**C. Citation 2, Item 2.**

Relying on a Federal OSHA interpretation letter dated August 23, 2004, the DM&IR argues that life jackets were not required because the employees were required to use fall protection. The federal interpretation letter, which is instructive but not necessarily binding on MN OSHA, states that life jackets are not required “if the workers were to use 100% fall protection (without exception) while over or near water . . . .”<sup>143</sup> However, as MN OSHA correctly points out, the Federal OSHA interpretation letters do not make life jackets optional whenever an employer has a fall protection policy. Fall protection must actually be used without fail before life jackets are not required. It is undisputed that the DM&IR knew that NIE’s and Lakehead Piping’s workers were not wearing life jackets while working at Pocket 649, and there is no dispute that NIE’s workers were not wearing fall protection when Mr. Rathjen fell.

However, since the DM&IR was not a controlling employer, NIE and Lakehead Piping were each responsible for meeting the OSHA requirement for their employees to wear life jackets while working near the water. For that reason, Citation 2, Item 2, must be dismissed.

**D. Citation 2, Item 3.**

DM&IR also argued that Citation 2, Item 3, should be vacated because the evidence established that it had a life saving skiff available at Dock #2. On the other hand, MN OSHA argued that testimony about the life saving skiff was contradicted by the DM&IR’s Response to Commissioner’s Request for Admission No. 4 that it had no life saving skiff at the worksite.<sup>144</sup> A fact admitted in response to a request for admission is conclusively established until the court permits withdrawal or amendment.<sup>145</sup> However, even if the ALJ were to conclude that the DM&IR is bound by its response to the Request for Admission, evidence was introduced without objection that the DM&IR had a barge available, as well as an arrangement with the City of Two Harbors for its Rescue Squad to respond to accidents on the DM&IR’s facility that involve falls into the water.

MN OSHA argues that the fact that Mr. Rathjen was in the frigid Lake Superior water for almost thirty minutes before his body was recovered by the Two Harbors Rescue Squad establishes the unavailability of a rescue skiff. However, that misses the point. The life saving skiff operated by the Two Harbors Rescue Squad promptly

<sup>143</sup> DM&IR Brief, at 34-35, Ex. C; see also MN OSHA Brief Ex. A, Federal OSHA interpretation letter dated 12/05/2003 (workers are required to wear life jackets or buoyant work vests when working over or near water even when they are wearing personal fall arrest systems unless fall protection is used without exception).

<sup>144</sup> Ex. 38.

<sup>145</sup> Minn. R. Civ. P. 36.02; see also *Security State Bank of Aitkin v. Morlock*, 355 N.W.2d 441, 445 (Minn. Ct. App. 1984).

responded to the scene about eight minutes after it was called. The delay between the times when Mr. Rathjen actually fell and when he was recovered occurred because Mr. Calaman was the only person near Pocket 649 when Mr. Rathjen fell, and it took several minutes for Mr. Calaman to find someone who was able to contact the Rescue Squad. In other words, the delay was not caused by the unavailability of a life saving skiff.

DM&IR had measures available to rescue anyone falling into the water.<sup>146</sup> But even if the DM&IR is foreclosed from relying on evidence of those measures, what DM&IR did not have was any of its own employees working over the water on December 6, 2006. As discussed above, since DM&IR is not a controlling employer, it was NIE's obligation to ensure that a life saving skiff was available for its employees. Whether or not it was reasonable for NIE to rely on the measures which the DM&IR had taken might be an issue in some other proceeding, but not in this one. In short, Citation 2, Item 3, must also be dismissed.

#### **E. Citation 2, Item 4a-e.**

In Citation 2, Items 4a-4c, MN OSHA contends that DM&IR failed to ensure that the outrigger beams were adequately secured to Dock #2 with either direct connections or tie-backs plus counterweights. MN OSHA asserts that the lack of secure connections posed a hazard to the workers of NIE and Lakehead Piping because the beam, which held the swing stage scaffold, could have shifted or fallen. MN OSHA relied solely on the *Carlton County* controlling employer doctrine to support its contention that DM&IR had an obligation to design the swing stage in an appropriate manner. However, because DM&IR established by a preponderance of the evidence that it was not a controlling employer with respect to either NIE or Lakehead Piping, Citation 2, Items 4a-4e must also be dismissed.

#### **F. Citation 2, Item 5.**

In Citation 2, Item 5, MN OSHA maintains that DM&IR did not have a competent person on site to inspect how the outrigger beams were attached to the top of the dock. Both Mr. Becker and Mr. Ehrenreich, an engineer, meet the OSHA standard for persons "capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who [have] authorization to take prompt corrective measures to eliminate them."<sup>147</sup> However, because DM&IR did not meet the test of a "controlling employer," neither of those individuals were obliged to inspect the installation of the outrigger beams before they were used or to ensure that NIE conducted such an inspection. Citation 2, Item 5, must therefore be dismissed.

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<sup>146</sup> Tr. Vol. II, p. 368; Tr. Vol. III, pp. 435, 463-464.

<sup>147</sup> 29 C.F.R. § 1926.450(b).

## **G. Citation 2, Item 6**

Citation 2, Item 6, alleges that the DM&IR failed to have a procedure for rescuing employees who fell but were restrained by a personal fall arrest system. The DM&IR argues that Citation 2, Item 6, should be vacated because it did have a rescue procedure that involved the use of a 65 foot “retractable retrievable” located in a building at the landward end of Dock #2.<sup>148</sup> A retractable retrievable is a portable device used to rescue a worker suspended by a PFAS.<sup>149</sup> MN OSHA asserts that DM&IR lacked a viable plan and means for rescuing a suspended worker. The Commissioner argues that the rescue measure that the DM&IR relies on was insufficient because Dock #2 extended more than 1,600 feet out into the lake, and that the retractable retrievable was too far away to effect a timely rescue. The Commissioner also contends that its citation is supported by the fact that NIE’s employee did not use the retractable retrievable to keep Mr. Rathjen’s head out of the water, but rather fashioned a makeshift lasso out of an extension cord.

As with the other citations at issue in this proceeding, the ALJ concluded that DM&IR is not a controlling employer and therefore was not liable for the violation. Moreover, with respect to the accident that prompted the investigation, it is undisputed that Mr. Rathjen was not using a PFAS and therefore was never suspended from a height on Dock #2. Rather, when Mr. Rathjen was in the water, Mr. Calaman reasonably decided to use the nearest substitute that he could find for rope to secure Mr. Rathjen while obtaining assistance. In addition, DM&IR established by a preponderance of the evidence that appropriate equipment was available to retrieve a worker hanging from a PFAS. Citation 2, Item 6 must therefore be dismissed.

## **V. Conclusion**

For the reasons set forth above, the ALJ concludes that under the circumstances of this case, the FRSA does not preempt the MN OSHA Act and its implementing rules. However, the ALJ concludes that the Commissioner failed to establish by a preponderance of the evidence that the DM&IR was a controlling employer and therefore liable for the violations set forth in the Amended Complaint. The citations issued by MN OSHA must therefore be vacated and the penalties dismissed.

**B. H. J.**

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<sup>148</sup> DM&IR Brief at 39-40.

<sup>149</sup> Tr. Vol. IV, pp. 692-693.