No. 21-

IN THE

Supreme Court of the United States

ESTATE OF ANTHONY J. ZDROIK,
DECEASED, BY TRISHANN W. ZDROIK,
PERSONAL REPRESENTATIVE,

Petitioner,

v.

IOWA SOUTHERN RAILWAY COMPANY, BRIAN
OSTROWSKI, JOHN OSTROWSKI, STEVEN
RUNSTROM AND PHIL GLINIECKI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF IOWA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal Railroad Administration ("FRA") regulations found at 49 C.F.R. §§ 214.303(a)-(b) and 214.307 (App. G, *infra*, 55a-57a) require railroads to adopt and implement a program affording on-track safety ["OTS"] to "all roadway workers" (defined at § 214.7, *id*, *infra*, 51a-53a) performing duties on each such railroad's tracks, and to monitor effectiveness of and compliance with such programs. Despite this mandatory duty to afford OTS to "all" roadway workers, the FRA's Federal Register preamble to part 214 (App. G, *infra*, 68a-70a) suggests railroads have no OTS duties to their contractors' roadway-worker employees.

Under 49 U.S.C. § 20106(b)(1)(B) (App. G, *infra*, 47a-48a), a state-law action for personal injury or death based on a party's failure to comply with its own plan created pursuant to a regulation or order issued by the Secretary of Transportation is not preempted.

The questions presented are whether, despite the unambiguous duties §§ 214.303(a)-(b) and 214.307 impose on railroads for the safety of "all" roadway-workers, including their contractors' roadway-worker employees, the FRA's Federal Register preamble may eviscerate the plain language of these regulations; and whether a railroad's OTS program, adopted under § 214.303(a) as its "own plan, rule, or standard" under 49 U.S.C. § 20106(b)(1)(B), imposes duties to its contractor's roadway-worker employees, actionable for breach.

PARTIES TO THE PROCEEDING

Pursuant to Rules 14.1 and 29.6, Petitioner states the following:

The parties to the proceeding are listed in the caption.

Petitioner, Estate of Anthony J. Zdroik, deceased, is an estate opened and pending in the State of Wisconsin in accordance with the laws of the State of Wisconsin. Trishann W. Zdroik is the duly-appointed, qualified and acting personal representative of the Estate. Trishann W. Zdroik is a citizen and resident of the State of Wisconsin.

RELATED CASES

Estate of Zdroik, et al. v. Iowa Southern Railway, No. LAL002509, Iowa District Court of and for Appanoose County. Orders denying motions for summary judgment entered on November 21, 2019. Orders denying motions to reconsider entered on January 10, 2020.

Estate of Zdroik v. Iowa Southern Railway Company, No. 20-0233, Court of Appeals of Iowa. Judgment entered on October 6, 2021.

Estate of Zdroik v. Iowa Southern Railway Company, No. 20-0233, Supreme Court of Iowa. Order denying application for further review entered on January 31, 2022.

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PETITION FOR A WRIT OF CERTIORARI

The Estate of Anthony J. Zdroik, deceased, by Trishann W. Zdroik, personal representative, respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Iowa.

OPINIONS BELOW

The order of the Supreme Court of Iowa (App. A, *infra*, 1a) denying Petitioner's application for further review of the decision of the Court of Appeals of Iowa is unreported. The opinion of the Court of Appeals of Iowa (App. B, *infra*, 2a-18a) is unreported but appears at 2021 WL 4593177. The orders of the District Court of Iowa, Appanoose County (App. C-E, *infra*, 19a-46a) are unreported.

JURISDICTION

The court of appeals issued its decision on October 6, 2021. App. B, *infra*, 2a-18a. The Estate's timely application for further review in the Supreme Court of Iowa was denied on January 31, 2022. App. A, *infra*, 1a. Although the underlying case is not fully adjudicated because purely state-law claims against two unrelated defendants/respondents have been remanded for further summary judgment proceedings, the purely federal issue as to defendant/respondent Iowa Southern Railway Company has been fully adjudicated with judgment ordered in Iowa Southern Railway Company's favor. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of 49 U.S.C. 20106, regulations found at 49 C.F.R. part 214, and Iowa Code §85.20, are reproduced in the appendix to this petition. App. G, *infra*, 47a-72a.

INTRODUCTION

This petition seeks review of a decision of the Court of Appeals of Iowa (App. B, *infra*, 2a-18a), reversing the trial court's denials of Respondent Iowa Southern Railway Company's ("ISRY") motion for summary judgment (App. C and E, *infra*, 19a-23a, 28a-38a), and ordering judgment in favor of ISRY.

Petitioner sued ISRY under Iowa common law[1] alleging ISRY, among other defendants, negligently caused the death of Petitioner's twenty-three year old son ("AJ"), *inter alia*, by failing to provide On Track Safety (OTS) training—required under 49 C.F.R. §§ 214.303(a)-(b) and 214.307—to AJ and his co-workers, who were performing tie removal and replacement on an ISRY railroad bridge as roadway-worker employees of Sheet Piling Services, LLC ("SPS"), a contractor to ISRY.[2] These regulations

1. Petitioner also sued ISRY under the FELA. App. E (order denying ISRY's motion for summary judgment), *infra*, 32a. The district court granted ISRY's motion for summary judgment based upon its finding that Petitioner's decedent ("AJ") was not an employee of ISRY and, therefore, his claim was not properly brought under the FELA. *Id*. at 36a.

2. App. E (order denying ISRY's motion to reconsider denial of motion for summary judgment), *infra*, 32a ("Count II

require "[e]ach railroad" to "implement and afford" OTS to "all roadway workers" performing work on its tracks. App. G, *infra*, 55a-57a. Other part 214 regulations also impose OTS duties on "employers" of roadway workers (*i.e.*, the person compensating them for their work). App. G, *infra*, 59a-60a, 61a-63a, and 66a-67a. AJ and his co-workers were "roadway workers" (App. C (order denying ISRY's motion to reconsider denial of motion for summary judgment), *infra*, 22a (noting agreement of parties that AJ "falls under this definition"), but neither ISRY nor SPS provided them OTS training. Such training likely would have avoided the incident that resulted in AJ's death (*i.e.*, being struck in the chest by a hi-rail crane boom moving ties).

The court of appeals held, as a matter of law, ISRY owed no duty to provide OTS training to AJ and his co-workers or to ensure they received such training, and therefore, ISRY could not be held liable for OTS training failures. App. B (court of appeals' opinion), *infra*, 17a ("[T]he employer, not the railroad, is responsible for implementing the [part 214 OTS] regulations"). To reach this conclusion, the court, relying in part on the FRA's Federal Register preamble to 49 C.F.R. part 214, read the word "all" out of 49 C.F.R. § 214.303(a)—which requires railroads to "adopt and implement a program that will afford [OTS] to <u>all</u> roadway workers whose duties are performed on that railroad," *id.* (emphasis added)—and

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alleges common law claims of negligence"); *id.* at 37a ("Plaintiff cites numerous regulations promulgated by the [FRA] designed to increase safety, including 49 C.F.R. § 214.303…"); App. E (order denying ISRY's motion for summary judgment), *infra*, 21a (noting "other regulations specifically place burdens on railroads, including 49 C.F.R. §214.303 and 214.307").

instead held the railroad duties set forth in §§ 214.303(a)-(b) and 214.307 are owed only to a railroad's own roadway-worker employees. App. B (court of appeals' decision), *infra*, 16a (concluding railroad-duty regulations must be "read in tandem" with employer-duty regulations, which "defin[e] who is responsible for carrying them out," holding "the 'who' is the employer, [SPS], not the railroad," and stating the FRA's part 214 preamble "clinch[es]" that construction of the regulations").

Petitioner also sought to hold ISRY liable for breach of the duty to ensure OTS training of its contractors' roadway-worker employees that ISRY imposed upon itself in its own OTS program, a program it was required to implement under 49 C.F.R. § 214.303(a). Such liability was predicated upon 49 U.S.C. § 20106(b)(1)(B), which provides that state-law actions alleging liability based on a party's failure to comply with its own plan adopted in compliance with a federal regulatory requirement are not preempted. In concluding ISRY owed no duty to provide OTS training to AJ and his crew, the court of appeals did not address this independent theory of liability.

Separately, the court of appeals held two SPS manager defendants could not be held liable under Iowa Code § 85.20 because their failure to provide AJ and his crew the OTS training required under multiple regulations in 49 C.F.R. part 214, did not rise to the requisite level of "gross negligence" required to make a submissible case under that statute. App. B, *infra*, 9a-13a. The court of appeals held the district court had applied erroneous reasoning in determining the submissibility of the claims against the other two SPS owner-manager defendants, and reversed and remanded as to those claims for further

summary judgment proceedings, which will turn solely on determinations under Iowa law. App. B, *infra*, 4a-8a.

The court of appeals' decision as to ISRY conflicts with federal interpretive rules governing construction of federal regulations, and federal precedents applying same, *see, e.g., Kisor v. Wilkie*, __ U.S. __, 139 S. Ct. 2400 (2019), allows an agency preamble in the Federal Register to change the meaning of unambiguous regulatory language, and effectively rewrites 49 C.F.R. §§ 214.303(a)-(b) and 214.307 to only require railroads to implement and afford OTS training to their own roadway-worker employees. The decision raises serious concerns for the safety and well-being of railroad contractors' roadway-worker employees in the State of Iowa because, under the decision, contractor-employers cannot be held liable for breaching their OTS duties to their own roadway-worker employees (a purely state-law issue as to which Petitioner does not seek review), and railroads have no OTS duties to such contractors' employees (the purely federal issue, fully adjudicated below, as to which Petitioner now seeks review). Under the court's decision, a vast Iowa workforce has lost the roadway-worker protections, embodied in 49 C.F.R. part 214, that Congress and the Federal Railroad Administration ("FRA") intended for them.

This case presents another example of a court unwarrantedly deferring to its understanding of an agency's interpretation of regulations in disregard of the unambiguous language of those regulations, with a result that disserves the fundamental purpose of the regulations. This Court can prevent that outcome—and ensure faithful application of the OTS railroad-duty regulations' unambiguous terms—by granting this petition and reversing.

STATEMENT

A. Federal Roadway Worker Protections.

On December 16, 1996, the FRA promulgated 49 C.F.R. part 214, mandating rules for the protection of railroad employees and employees of contractors to railroads working on or near railroad tracks ("roadway workers"). *Id*. Two of the part 214 regulations—§§ 214.303(a)-(b) and 214.307 (App. G, *infra*, 55a-57a)—expressly impose OTS duties on railroads ("the railroad-duty regulations"). § 214.303(a) requires railroads to "adopt and implement a program that will afford on-track safety to all roadway workers whose duties are performed on that railroad." § 214.303(b) requires railroads to monitor effectiveness of and compliance with such programs. § 214.307(a) requires railroads to maintain and have in effect compliant OTS programs. § 214.7 (App. G, *supra*, 51a-53a) defines "roadway worker," as pertinent here, to mean "any employee of a railroad, or of a contractor to a railroad, whose duties [fall under OTS regulations, including] … construction, maintenance or repair of railroad track [and] bridges [and] … roadway maintenance machinery on or near track[.]"

Part 214 also contains regulations specific to the duties of "employers" of roadway workers, defined in § 214.7 as the persons engaging or compensating the employee. Together, §§ 214.311, 214.341, 214.343, 214.357 (App. G, *infra*, 59a, 61a-63a, and 66a-67a)—hereinafter collectively referred to as "the employer-duty regulations"—require employers, *inter alia*: to ensure their employees' understanding and compliance with the employers' rules and part 214's requirements; to adopt an OTS program

with specific provisions for the safety of roadway workers operating or working near roadway maintenance machines; to train and test their employees on OTS; and to train and test their employees who are operators of roadway maintenance machines equipped with a crane.

The question here is whether a railroad's OTS duties to "all roadway workers" under §§ 214.303(a)-(b) and 214.307 extends, per those regulations' plain language, to all roadway workers including contractors' roadway-worker employees performing work on that railroad's track, and if so, what are the nature and scope of those duties.

Beyond duties imposed under the OTS regulations, 49 U.S.C. 20106(b)(1)(B) recognizes that a railroad, in adopting an OTS program in compliance with 49 C.F.R. § 214.303(a), creates additional duties to roadway workers deriving from the requirements of the program itself. App. G, *infra*, 47a-48a. The statute provides that a state-law action based on a railroad's violation of the duties created in its "own plan, rule, or standard that it created pursuant to a regulation" is not preempted. *Id.* Therefore, if the railroad-duty regulations do not themselves impose on railroads OTS duties owed to their contractors' roadway-worker employees, the corollary question is whether a railroad's OTS program—adopted in compliance with § 214.303(a)'s mandate—that specifically obligates the railroad to provide OTS training to, or ensure OTS training of, its contractors' roadway-worker employees, provides an alternative basis for a state-law action for breach of that self-imposed duty.

B. AJ's Death and Petitioner Suit.

On October 12, 2017, AJ and two co-workers—foreman Frazier and machine operator Yenter—were removing and replacing rail ties on an ISRY bridge in Iowa, in the course and scope of their employment with SPS. Frazier was cutting ties in half and placing them in a sling attached to the grapple of an articulated boom-crane ("loader"). App. E, *infra*, 29a-30a. Yenter was operating the loader's boom to deposit the half-ties into the loader bed. AJ was standing in the loader bed unslinging the half-ties. At one point, the grapple (or a tie in it) lunged in AJ's direction, crushing him against the loader's bulkhead and killing him. *Id.*

AJ and his co-workers were "roadway workers," and the loader they were using was a "roadway maintenance machine," within the meaning of 49 C.F.R. § 214.7. App. C, *infra*, 22a (district court noting stipulation). As such, various requirements under part 214 applied to them and their work, including but not limited to training specific to the loader that they were using, and in particular, training on the manufacturer's user's manual, which prohibited anyone from being in the loader bed when the loader boom was in operation. But the record is undisputed that AJ and his crew had not received OTS training required under part 214, from ISRY or SPS owners/managers.

Petitioner sued ISRY and four owners/ managers of SPS for AJ's death. The claim against ISRY sounded in negligence under Iowa common law and alleged, *inter alia*, that ISRY breached its duties owed to AJ under 49 C.F.R. §§ 214.303(a)-(b) and 214.307, by failing to "afford" him "on-track safety," failing to monitor its OTS

program for effectiveness and compliance as to AJ and his crew, and failing to have and maintain a compliant OTS program as to AJ and his crew.[3] *See* petition filed 5/23/18 and amended petition filed 6/4/19, at ¶ 8(h) and (i) (alleging ISRY "violated 49 C.F.R. 214.303 as it failed to adopt and implement a program that provided for [OTS] to all roadway workers whose duties are performed on that railroad" and "violated 49 C.F.R. 214.307 … in that it failed to provide [OTS] manuals … for … compliance with 49 C.F.R. 214.301, *et seq.*").

Independent of the foregoing, Petitioner alleged that ISRY adopted an OTS program in compliance with § 214.303(a)—*i.e.*, ISRY's OTS Manual ("OTSM")[4]—in which ISRY imposed upon itself a duty to train, or ensure the training of, its contractors' roadway-worker employees covering part 214 on-track safety, and that ISRY breached that self-imposed duty so as to make it liable for Iowa state-law negligence. *See* Resistance to ISRY's motion for summary judgment filed 10/21/19, p. 10 ("ISRY failed to

3. Iowa common law recognizes as actionable a claim premised on an alleged breach of a federally-mandated standard of care. *See Wiersgalla v. Garrett*, 486 N.W.2d 290, 292-93 (Iowa 1992) ("As a preliminary matter, it is well established that if a statute or regulation such as an OSHA standard provides a rule of conduct specifically designed for the safety and protection of a certain class of persons, and a person within that class receives injuries as a proximate result of a violation of the statute or regulation, the injuries would be actionable, as [] negligence per se") (citations and internal quotation marks omitted).

4. ISRY's OTSM may be found in the Appendix to the proceedings in the Iowa appellate courts at 499-542. The OTSM refers to "PRI," which is the acronym for Progressive Rail, Inc., whose OTSM was adopted by ISRY.

comply with its own OTS Rule 23.2.1 because ISRY did not ascertain whether SPS workers were trained to operate the machine"); p. 11 ("ISRY's [OTS] Manual required it to provide [AJ and his co-workers] with [OTS] training"); p. 12 ("ISRY's own [OTSM] enacted pursuant to FRA requirement provides that 'All Roadway workers[] will receive [OTS] training[,]' and 'In addition to the training … machine operators will be qualified on [OTS] safety procedures specific to their positions'"); p. 13 (quoting from ISRY's OTSM requiring that contractors' roadway-worker employees "are [OTS] … qualified"); p. 13 ("ISRY had a duty under FRA regulations to ensure their own OTS Manual was being followed. … ISRY failed….")

The claim against the SPS defendants was brought under Iowa Code § 85.20, which recognizes an exception to Iowa's workers compensation exclusivity where a co-employee's conduct rises to the level of "gross negligence," as defined in the statute itself and construed in decisions of the Iowa Supreme Court. App. F, *infra*, 40a-41a. As to this claim, Petitioner alleged that SPS defendants were grossly negligent in breaching the part 214 duties that expressly apply to "employers," and in particular, 49 C.F.R. §§ 214.311, 214.341, 214.343, 214.357 ("the employer-duty regulations"). App. F, *infra*, 44a-45a (incorporating reference to such regulations in App. E, *infra*).

C. Proceedings in the Iowa District and Appellate Courts.

Both ISRY and the SPS defendants filed motions for summary judgment in the district court. ISRY argued that it owed no part 214 OTS duties to AJ and his co-workers, and therefore, could not be held liable for negligently

breaching such duties. The SPS defendants argued that, as a matter of law, Petitioner's failure-to-train claim did not rise to the level of "gross negligence" required to make a submissible case under Iowa Code § 85.20. Separately, the Ostrowski respondents, two of the four SPS defendants, argued that as "owners" and/or "partners" in the SPS LLC, they were immune from § 85.20 liability. As to ISRY, Plaintiff argued, *inter alia*, that 49 C.F.R. §§ 214.303 and 214.307 imposed on ISRY OTS duties owed to AJ and his co-workers, and that ISRY also breached self-imposed duties contained in its OTSM. *See* Resistance to ISRY's motion for summary judgment filed 10/21/19, pp. 3, 8-13. The district court denied all such motions, and thereafter denied all motions for reconsideration. App. C-F, *infra*.

Both ISRY and the SPS defendants requested interlocutory appeal. The Supreme Court of Iowa granted those requests and transferred the consolidated appeals to the Court of Appeals of Iowa for further proceedings. In briefing to the court of appeals, Petitioner persisted in her contentions that §§ 214.303(a)-(b) and 214.307 imposed duties on ISRY owed to AJ and his co-workers such that ISRY could be held liable for negligence in breaching such duties, and that independent of the duties imposed by these regulations, the provisions of ISRY's OTSM, adopted in compliance with § 214.303(a), created duties owed by ISRY to AJ and his co-workers, which were actionable for breach under 49 U.S.C. 20106(b)(1)(B). *See* Petitioner's brief filed in the Iowa Court of Appeals on 11/23/20, at pp. 64, 67, 70, 74, 76-77, 80-82 All Defendants/Respondents reiterated their trial court positions.

D. The Iowa Court of Appeals Decision.

The court of appeals first addressed the unique arguments of the Ostrowski defendants that their statuses as "owners" and/or "partners" in the SPS LLC rendered them immune to liability under Iowa Code § 85.20. App. B, *infra*, at 4a-8a. The court held the district court erred in resolving that issue, and reversed and remanded for further summary judgment proceedings as to those two defendants. *Id.* at 8a. If the district court were to hold, again, that the Ostrowski defendants were not immune from liability under § 85.20, it would then need to decide, again, but with the new guidance from the court of appeals' decision as to the other two SPS defendants, whether the Ostrowski defendants' alleged failure to provide OTS training to AJ and his co-workers made a submissible case of gross negligence within the meaning of § 85.20. These remaining and remanded claims against the Ostrowski defendants involve purely state-law issues to be decided under Iowa law.

The court of appeals next addressed the submissibility of Petitioner's claims of § 85.20 gross-negligence liability against the other two SPS Defendants, Runstrom and Gliniecki. *Id.* at 9a-13a. The court held the record evidence failed to make a submissible case of gross negligence against these defendants and ordered that judgment be entered in their favor on all claims against them. *Id.* at 13a.

Finally, the court of appeals addressed the submissibility of Petitioner's §§ 214.303(a)-(b) and 214.307 claim against ISRY. *Id.* at 13a-18a. The court held ISRY owed no part 214 OTS duties whatsoever to AJ and his crew, such that it could not be held negligent based upon

an alleged breach thereof, and the court ordered that judgment be entered in favor of ISRY on all claims. *Id.* at 17a-18a. Specific to §§ 214.303(a)-(b) and 214.307, the court of appeals concluded that notwithstanding the plain language of § 214.303(a)—imposing on railroads OTS duties owed to "all" roadway workers performing work on their tracks—those provisions must be construed "in tandem" with other part 214 provisions specifically imposing OTS duties on "employers" of roadway workers (here, SPS). *Id.* at 16a. The court held that because the duties Petitioner sought to impose on ISRY under §§ 214.303(a)-(b) and 214.307 were expressly imposed upon SPS under other, employer-specific provisions of part 214, ISRY owed no OTS duties to its contractors' roadway-worker employees, including AJ and his co-workers. *Id.* at 16a-18a. The court thus held that "all roadway workers" in § 214.303(a), carried through in §§ 214.303(b) and 214.307, actually means "roadway workers employed by that railroad," even though § 214.7 defines "roadway worker" to mean "an employee of a railroad, or of a contractor to a railroad."

The court purported to be adhering to the interpretive rules mandated by this Court's decision in *Kisor v. Wilkie*, __ U.S. __, 139 S. Ct. 2400 (2019). *Id.* at 15a. The court acknowledged that before judicial deference to an agency's interpretation is permissible, the court "'must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on.'" *Id.*, *quoting Kisor*, 139 S. Ct. at 2415. The court then proceeded to do none of that. The court engaged in no analysis of the actual text of 49 C.F.R. §§ 214.303(a)-(b) and 214.307. The court engaged in no analysis of the history or purpose of part 214 in general, or the railroad-duty

regulations in particular. As far as structural analysis, the court merely noted that the employer-duty regulations imposed on SPS the duties that Petitioner also sought to impose on ISRY under the railroad-duty regulations, so, the court thought, the railroad-duty regulations could not be construed to impose an overlapping and/or duplicative duty on ISRY. *Id.* at 16a-18a.

The court of appeals said this result was "clinched" by the FRA's interpretive "preamble" to the enactment of part 214, *id.* at 16a-17a. in which it said:

> Employees of contractors to railroads are included in the definition if they perform duties on or near the track. They should be protected as well as employees of the railroad. The responsibility for on-track safety of employees will follow the employment relationship. Contractors are responsible for the on-track safety of their employees and any required training for their employees. FRA expects that railroads will require their contractors to adopt the on-track safety rules of the railroad upon which the contractor is working. Where contractors require specialized on-track safety rules for particular types of work, those rules must, of course, be compatible with the rules of the railroad upon which the work is being performed.

61 Fed. Reg. 65959-01 at *65966, 1996 WL 716080 (Dec. 16, 1996) (App. G, *infra*, at 68a-70a). In finding that this FRA preamble "clinched" its interpretation of § 214.303(a)-(b) and 214.307, which deleted "all" from "all roadway

workers" in § 214.303(a), the court made no finding that the text of these regulations was ambiguous.

The court did not address Petitioner's separate claim based on ISRY's adoption, in compliance with § 214.303(a), of an OTS program (*i.e.*, its OTSM) creating federal duties owed to AJ and his co-workers, actionable under state law for breach thereof under 49 U.S.C. 20106(b)(1)(B).

On October 26, 2021, Petitioner timely filed an application for further review in the Supreme Court of Iowa. As it relates to the court of appeals' holdings specific to ISRY, Petitioner requested review because the court's decision (1) improperly construed §§ 214.303(a)-(b) and 214.307 to negate duties owed by ISRY to AJ and his co-workers by those regulations' plain language, (2) improperly relied on the FRA's preamble to abrogate the unambiguous meaning of that regulatory text, and (3) failed to address Petitioner's separate claim based on 49 U.S.C. 20106(b)(1)(B) and ISRY's breach of self-imposed duties in the OTSM it adopted in compliance with § 214.303(a). *See* application for further review filed in the Supreme Court of Iowa on 10/26/21, p. 2 (Question Presented—"Whether the court of appeals erroneously construed the mandatory duties imposed on railroads under 49 C.F.R. §§ 214.303 and 214.307 "to afford [OTS] to all roadway workers" in a manner that literally negates any duty of a railroad to provide [OTS] to any roadway workers except the railroad's own employees"); p. 4 ("The court of appeals erred in relying on the preamble to [OTS] regulations as justification to construe §§ 214.303(a)-(b) and 214.307 contrary to their unambiguous text"); p. 4 ("The court of appeals failed to recognize that ISRY, by including within its own [OTS] program—required under

§§ 214.303(a)-(b) and 214.307—a duty upon itself to ensure its contractors' employees received and were properly trained on [OTS], created a federal duty for which an action against it would lie for breach under 49 U.S.C. § 20106(b)(1)(B)"). On January 31, 2022, the Supreme Court of Iowa denied that petition.

REASONS FOR GRANTING THE PETITION

In conflict with *Kisor v. Wilkie*, __ U.S. __, 139 S. Ct. 2400 (2019), the court of appeals deferred to the FRA's interpretation of unambiguous regulations—49 C.F.R. §§ 214.303(a)-(b) and 214.307—notwithstanding that such interpretation is irreconcilable with the plain language of those regulations. The court construed part 214's *employer-duty* regulations to preclude, and effectively negate, part 214's *railroad-duty* regulations as applied to contractors' employees. In order to achieve this result, the court did not merely misconstrue the language of these regulations; instead, in conflict with longstanding federal jurisprudence, the court impermissibly read the word "all" out of § 214.303(a), effectively rewriting it to impose on railroads OTS duties owed *only to their own roadway-worker employees*.

Compounding the aforesaid error, the court simply ignored Petitioner's alternative theory of liability against ISRY, to-wit, its implementation of an OTS program—*i.e.*, its OTS manual—in which it imposed upon itself a duty to ensure the OTS training of its contractors' roadway-worker employees. By ignoring this theory of liability, the court failed to give effect to Congress' clear intent in 49 U.S.C. 20106(b)(1)(B) to enable state-law tort actions against railroads for breaches of self-imposed duties in

standards adopted by railroads in compliance with OTS regulatory requirements.

Having contemporaneously held that railroad contractor-employers (here, SPS defendants) can never be held liable in tort for breaches of their own OTS duties to their roadway-worker employees, the court has stripped all contractor roadway-worker employees in Iowa of all part 214 OTS protections. As to those employees, contractors and railroads alike may completely disregard part 214's requirements without consequence. That could not possibly have been the FRA's intent. Review is warranted.

A. Discussion of *Kisor*.

In *Kisor*, a majority of the Court upheld the fundamental principle of *Auer* deference to agency interpretation of federal regulations, but clarified its limitations. __ U.S. __, 139 S. Ct. 2400, 2408 (2019) ("*Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits. *Auer* deference is sometimes appropriate and sometimes not. Whether to apply it depends on a range of considerations that we have noted now and again, but compile and further develop today."). The most critical limitation the Court identified for *Auer* deference to apply is that the federal regulation under scrutiny must truly be ambiguous. *Id.* at 2414 ("[T]he possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation."). The Court noted that the burden involved in ascertaining a regulation's true meaning is not itself indicative of ambiguity. *Id.* at 2414

> Agency regulations can sometimes make the eyes glaze over. But hard interpretive conundrums, even relating to complex rules, can often be solved. … A regulation is not ambiguous merely because discerning the only possible interpretation requires a taxing inquiry. To make that effort, a court must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on.

Id. at 2414 (internal citations, parentheses and quotation marks omitted). In other words, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id*. at 2415, *quoting Chevron U.S.A. Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 843 n.9, 104 S. Ct. 2778 (1984).

The Court cautioned that when these traditional tools elucidate the meaning of a regulation, nevertheless deferring to an agency's contrary interpretation would impermissibly "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Id*. *See also id.* at 2425 and 2434-35 (deference to agency interpretation that is not the "best and fairest reading" of a regulation "subverts" the Administrative Procedure Act's ("APA"), 5 U.S.C. 551 *et seq*., notice-of-proposed-rule-making requirements) (Gorsuch, J., concurring). Indeed, the Court reversed and remanded to the Circuit Court precisely because that court had given deference to the involved agency's interpretation of the subject regulation without first using the aforesaid traditional tools, and without first finding that the regulation was genuinely ambiguous.

B. The decision below runs afoul of *Kisor*.

The court below placed significant reliance on the FRA's preamble to its enactment of part 214, in which the FRA expressed its expectation that, in general, contractors would adopt railroads' OTS programs for the training of their employees, but that the responsibility for such training nevertheless would be solely on contractors, not railroads. Under *Kisor*, no such reliance on the FRA's preamble was permissible unless the court, after using all of the traditional tools of construction, found the railroad-duty regulations to be genuinely ambiguous. The court used no such tools and made no such finding.

The plain language of the railroad-duty regulations, and in particular § 214.303(a), requires that railroads "shall implement" a program that "will afford" OTS to "all" roadway workers performing work on their tracks. The terms "shall," "implement," "will," "afford" and "all" are undefined in part 214, so they should be given their common and ordinary meanings. *See, e.g., HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Assoc*, __ U.S. __, 141 S. Ct. 2172, (2021) (where not defined in statute or regulation, Court uses "ordinary or natural meaning") (citation and internal quotation marks omitted). Construing § 214.303(a) text in this manner, it plainly imposes on railroads *some duty* owed to *all roadway workers*, which is irreconcilable with the court of appeals' holding that it imposes on railroads *no* duties owed to contractors' roadway workers.

The terms "shall" and "will," when used in a statutory or regulatory context, describe a mandatory duty. *Hewitt v. Helms*, 459 U.S. 460, 471-72, 103 S. Ct. 864, 871-72

(1983) (finding liberty interests are created by statutes or regulations containing "language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must,' be employed....").

To "implement" means:

- to "carry out," "esp[ecially] to give practical effect to and ensure of actual fulfillment by concrete measures." Webster's Third New International Dictionary 1134 (2002);

- "to fulfill; perform; carry out," or "to put into effect according to or by means of a definite plan or procedure." Webster's Encyclopedic Unabridged Dictionary 961 (2001);

- to "complete, perform, carry into effect." Oxford English Dictionary, available at http://www.oed.com. (last visited April 18, 2022)

See also Project Vote, Inc. v. Kemp, 208 F. Supp. 3d 1320, 1337 (N.D. Ga. 2016) (using these definitions to construe statutory term "implementation").

Merriam-Webster defines the term "afford" to mean "to make available, give forth, or provide naturally or inevitably. https://www.merriam-webster.com/dictionary/afford (last visited April 17, 2022). Black's Law Dictionary defines the term "provide" as "[t]o supply; *to afford*; to contribute." BLACK'S LAW DICTIONARY 1224 (6th ed. 1990) (emphasis added).

With few exceptions, if any, federal courts have held that "all," when used in a statute or regulation, means all. *Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254 (5th Cir. 2014) (statute affording "*all* relief necessary to make the employee whole ... mean[s] what it [says]. All means all.") (italics in original); *County of Oakland v. Fed. Housing Finance Agency*, 716 F.3d 935, 940 (6th Cir. 2013) ("[W]hen Congress said 'all taxation,' it meant *all* taxation") (italics in original); *Sander v. Alexander Richardson Inv.*, 334 F.3d 712, 716 (8th Cir. 2003) ("'[A]ll' means all"); *Appalachian States Low-Level Radioactive Waste Comm. v. O'Leary*, 93 F.3d 103, 109 n.6 (3d Cir. 1996) (no deference to agency position that "all" in statute means something less).

With the operative words of § 214.303(a) thus defined by their common and ordinary meaning, there can be no doubt that this regulation imposes on railroads OTS duties owed to *all* roadway workers performing work on their tracks, *including roadway workers employed by contractors*. The precise contours of those duties, how they must be fulfilled, and how they interact and/or overlap with the employer-duty regulations contained elsewhere in part 214, may be open to debate and require further analysis using the traditional tools of interpretation, but it simply cannot be said that the regulation imposes no OTS duties on railroads owed to their contractors' employees. Yet that is exactly what the court below held.

To the extent the FRA's preamble may be understood to indicate otherwise, the preamble must yield to the actual regulatory language. *District of Columbia v. Heller*, 554 U.S. 570, 578 n.3, 128 S. Ct. 2783 (2008) (preamble cannot control statute expressed in clear, unambiguous terms).

See also Peabody Twentymile Mining LLC v. Sec'y of Labor, 931 F.3d 992, 998 (10th Cir. 2019) (rejecting agency position construction consistent with preamble because "while the preamble can inform the interpretation of the regulation, it is not binding and cannot be read to conflict with the language of the regulation itself," and "refus[ing] to engraft ... onto the language" limitations that "do not appear in the language"); *Wyo. Outdoor Council v. U.S. Forest Svc.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (same); *El Comite Para El Bienstar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1070 (9th Cir. 2008) (same). The court below thus erred in allowing the FRA's preamble to override the actual text of the railroad-duty OTS regulations. In fact, the court below did exactly that which *Kisor* held to be error; it deferred to an agency interpretation without first using traditional tools of interpretation, and without first finding the regulation to be ambiguous.

The result of this decision is that an Iowa state-law claim by a roadway-worker employee of a railroad contractor, brought against a railroad for breach of its part 214 OTS duties owed to him—a claim expressly recognized as actionable by 49 U.S.C. 20106(b)(1)(A)—is now precluded. This result, achieved only through interpretive reasoning diametrically the opposite of what *Kisor* requires, is untenable. Review in this Court is warranted.

C. The decision below conflicts with decisions of this Court and several Circuit Courts that require courts to give meaning to every word of a federal statute or regulation.

"It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed

that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441 (2001). *See also Century Aluminum of S.C., Inc. v. S.C. Pub. Svc. Auth.*, 278 F. Supp. 3d 877, 887 (D. S.C. 2017) ("[C]ourts do not read language out of statutes"); *In re Any and All Funds, et al. v. Opportunity Fund*, 613 F.3d 1122, 1130 (D.C. Cir. 2010), *quoting Fla. Dept. of Rev. v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 128 S. Ct. 2326 (2008) (not court's role to substitute its view of policy for legislation passed by Congress").

Courts will not rewrite regulations under the guise of interpretation. *Kinney v. Yerusalim*, 9 F.3d 1067, 1072 n.4 (3d Cir. 1993) ("[W]e cannot rewrite the plain language of the regulations"); *U.S. v. Hoyts Cinemas Corp.*, 380 F.3d 558, 568 (1st Cir. 2004) (rejecting construction that was not merely a "gloss" on a word, but "rewrites the regulation"); *Kappler v. Shalala*, 840 F. Supp. 582, 585-86 (N.D. Ill. 1994) (refusing to rewrite "unambiguous text" of regulation by removing/adding words or punctuation).

In the instant case, the court of appeals' construction of §214.303(a)—as imposing on railroads OTS duties owed only to their own roadway-worker employees, and not to their contractors' roadway-worker employees— runs afoul of the above federal interpretive rules, and conflicts with the above-cited decisions. The court below impermissibly rewrote the regulation by reading the word "*all*" out of it. This Court can and should grant review to correct this obvious error.

D. The decision below conflicts with decisions of this Court addressing federal-on-federal statutory preclusion.

This Court has long cautioned against statutory constructions that would lead a court to hold that one federal statute precluded a cause of action supplied by another federal statute. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("In approaching a claimed conflict [between two federal statutes], we come armed with the 'stron[g] presum[ption]' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute") (citations omitted); *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 134 S. Ct. 2228 (2014) ("When two [federal] statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other"); *FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293, 304, 123 S. Ct. 832 (2003) ("[W]hen two statutes are capable of co- existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective" (internal quotation marks omitted); *Morton v. Mancari*, 417 U.S. 535, 550-51, 94 S. Ct. 2474 (1974) (Presented with two statutes, the Court will "regard each as effective"—unless Congress' intention to repeal is "clear and manifest," or the two laws are "irreconcilable"). Surely, the same is true of duties imposed by federal regulations, to-wit, a court should not construe one federal regulation as overriding another federal regulation unless the promulgating agency's intention for such result is "clear and manifest" in the text of the regulations themselves, or the regulations are "irreconcilable." *Morton v. Mancari*, 417 U.S. at 550-51.

Yet the court below did just that. There is nothing in the regulatory text of 49 C.F.R. part 214 signaling a clear agency intent that the railroad duties set forth in §§ 214.303(a)-(b) and 214.307 should not, let alone do not, apply to contractors' roadway-worker employees; and there is nothing untenable about a plain-language construction of part 214 that gives full effect to both the railroad-duty regulations and the employer-duty regulations. Nevertheless, the court held that the railroad-duty regulations must yield to the employer-duty regulations.

The court said it was construing the railroad-duty regulations by reading them "in tandem" with the employer-duty regulations, but, in fact, the court construed the employer-duty regulations to broadly *nullify* all duties imposed upon railroads and owed to contractors' employees in the railroad-duty regulations. Cambridge defines "in tandem" to mean "working together, especially well or closely." https://dictionary.cambridge.org/us/dictionary/english/in-tandem (last visited April 18, 2022). Britannica defines it to mean "working or happening together or at the same time." https://www.brittannica.com dictionary/tandem (last visited April 18, 2022); Merriam-Webster defines it to mean "in partnership or conjunction. https://www.merriam-webster.com/dictionary/tandem (last visited April 18, 2022). The court below did not read or construe the railroad-duty and employer-duty regulations in tandem; it read the employer-duty regulations to the exclusion of the railroad-duty regulations. That is just the opposite of in tandem. Review is warranted.

E. The decision below attempts to solve a non-existent problem.

Federal regulatory schemes that place identical or overlapping duties on multiple persons or entities are not uncommon. Nevertheless, the court of appeals seemed to accept the opposite notion, to-wit, that because the employer-duty regulations specifically obligate employers to train and test their roadway-worker employees on OTS, the railroad-duty regulations could not possibly place that same obligation, *or any obligation*, on railroads as to their contractors' roadway-worker employees. The court cited no authority for this proposition, and offered no reasoned justification for it. In fact, logic would seem to dictate the opposite conclusion.

Title 49 of the U.S. Code is specific to the railroad industry. The regulations contained in 49 Code of Federal Regulations are specific to the railroad industry. The FRA promulgated 49 C.F.R. part 214 to enhance roadway-worker safety in the railroad industry. The FRA did so by not only imposing *on railroads* OTS duties owed to "all roadway workers" performing work on their tracks, but also by imposing overlapping duties *on contractor-employers of roadway-worker employees*.

In contrast, the court of appeals' reasoning—that the FRA's inclusion in part 214 of specific OTS regulations imposing duties on employers precludes a finding that railroads also owe OTS duties to their contractors' roadway workers—disserves the FRA's fundamental purpose in promulgating part 214 in the first place, and leads to an absurd result in which railroads owe no duties to non-employee roadway workers performing work on

their tracks. *See Griffin v. Oceanic Contractor, Inc.*, 458 U.S. 564, 575, 102 S. Ct. 3245, 3252 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available") (citation omitted); *U.S. v. Boynton*, 63 F.3d 337, 344 (4th Cir. 1995) ("… so too interpretations of a regulation which would produce absurd results may be avoided by adopting an alternative interpretation consistent with the regulation's purpose").

The most reasonable interpretation of the interrelationship between the railroad-duty regulations and the employer-duty regulations is that the FRA intended, through 49 C.F.R. §§ 214.303(a)-(b) and 214.307, to impose on railroads duties owed to both their own roadway-worker employees and the roadway-worker employees of their contractors, and intended, through 49 C.F.R. §§ 214.311, 214.341, 214.343, 214.357, to clarify that those contractor-employers also owe those duties to their own roadway-worker employees. This interpretation is not only reasonable, it logically serves the purpose of part 214.

If left unreviewed, the erroneous reasoning of the decision below, and the absurd result it yields, will lead all railroads in the State of Iowa to believe they owe no OTS duties to their contractors' roadway-worker employees, and may lead railroads in other states to believe the same. The danger posed to contractors' roadway-worker employees by the decision below cannot be overstated. This Court should grant review and reverse.

F. The decision below failed to address Petitioner's independent theory of liability against ISRY based on ISRY's breach of self-imposed duties actionable under 49 U.S.C. 20106(b)(1)(B).

Independent of the railroad-duty regulations themselves, ISRY was dutybound to provide OTS to AJ and his co-workers based upon the self-imposed duties in ISRY's own OTSM, a manual it adopted in compliance with the Secretary's requirement in § 214.303(a). 49 U.S.C. 20106(b)(1)(B) allows a state-law claim for breaches of such self-imposed duties.

ISRY, through its OTSM, imposed the following duties upon itself:

- To "provide proper training of every Roadway Worker," defined the same as in § 214.7 to include "employees of contractors";

- To "[p]rovide training on the requirements of Roadway Maintenance Machine Safety";

- Requiring that operators of on-track equipment "must be qualified on the rules for operation" of such equipment "and necessary [OTS] rules"; and

- Requiring that all roadway workers "follow [ISRY's] On-Track Safety Procedures."

See OTSM, found in the Appendix in the Iowa appellate courts at 499-542 (at internal page numbers 6, 16, 29 and 30).

It is undisputed that ISRY provided no OTS training whatsoever to AJ and his co-workers. Under 49 U.S.C. 20106(b)(1)(B), ISRY's breach of its self-imposed OTSM duties owed to AJ and his crew is actionable under state law, and the court below erred in failing to address this issue that was properly before it. This error is not merely an error in regulatory interpretation; it is a total frustration of Congressional legislative intent, warranting this Court review.

G. The decision below achieves a result diametrically opposite the humanitarian purpose of 49 C.F.R. part 214.

The FRA articulated the purpose of its part 214 enactment in 49 C.F.R. § 214.1(a): "The purpose of this part is to prevent accidents and casualties to employees involved in certain railroad inspection, maintenance and construction activities." Specific to the case at bar, the purpose of part 214 was to prevent AJ's death. He died because neither ISRY nor the SPS defendants fulfilled their part 214 duties.

On an issue as to which review in this Court is *not* sought, the decision below holds an Iowa employer's breach of its part 214 duties can never be actionable under Iowa law because it can never rise to the requisite level of "gross negligence" within the meaning of Iowa Code § 85.20. On the issue as to which review in this Court *is* sought, the decision holds railroads owe no part 214 duties whatsoever to the Iowa roadway-worker employees of their contractors and so cannot be held liable for breach thereof. Thus, in Iowa, part 214's purpose as applied to roadway worker employees of railroad contractors is a

literal dead letter, as is AJ. Their contractor-employers owe part 214 duties to them but can never be successfully sued for breach thereof, and railroads on whose track they perform their work have no duties to them at all and so can never be sued.

It is within the province of the courts of the State of Iowa to determine whether, and under what circumstances, Iowa law will recognize an action for personal injury or death. That is why the court of appeals' decision on the liability of the SPS defendants is not a proper issue for review by this Court—*i.e.*, the decision correctly construes those defendants' federal duties under part 214, and their potential breaches of those duties, but holds, for reasons that turn exclusively on Iowa law, that they cannot be held liable.

The decision as to ISRY's liability exposure, in contrast, turns on purely federal issues, to-wit, whether ISRY owed duties to AJ under 49 C.F.R. §§ 214.303(a)-(b) and 214.307, and whether ISRY's self-imposed duties under its OTSM adopted in compliance with § 214.303(a) created duties for which an action for breach thereof lies under 49 U.S.C. 20106(b)(1)(B). The court of appeals' finding of no duty on the former issue, and failure to address the latter issue, leaves railroad contractors' roadway-worker employees without any remedy for breach.

Depriving contractor roadway-worker employees of the railroad-owed part 214 protections disserves the purpose of part 214, not only by erroneously communicating to railroads in Iowa that they owe no duties to such contractors' employees when, in fact, they do, but also by removing the recognized incentive that

potential tort liability provides to industry to enhance safety in order to avoid costly payouts that liability entails. *See, e.g., Wyeth v. Levine*, 555 U.S. 555, 578-79, 129 S. Ct. 1187, 1203 (2009) (noting with approval FDA's view that "[s]tate tort suits uncover unknown … hazards and provide incentives … to disclose safety risks promptly") (internal quotation marks omitted); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 272, 131 S. Ct. 1068, 1098-99 (2011) ("there is no reason to think that Congress intended in the vaccine context to eliminate the traditional incentive and deterrence functions served by state tort liability in favor of a federal regulatory scheme providing only carrots and no sticks") (Sotomayor and Ginsburg, JJ., dissenting); *Rodi Yachts, Inc. v. Nat'l Marine, Inc.*, 984 F.2d 880, 889 (7th Cir. 1993) (noting tort liability for breach of duty incentivizes industry "to adopt optimal safety precautions"); *generally* G. Calabresi, *The Costs of Accidents* (1970) (recognizing tort liability provides a powerful set of economic incentives and disincentives to engage in economic activity or to make it safer). This Court should grant review in order to correct the court of appeals' interpretive errors and omissions, and restore to contract roadway workers in Iowa the rights to safety and legal recourse that Congress and part 214 clearly intended for them.

CONCLUSION

For the foregoing reasons, Petitioner prays this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER DENYING REVIEW IN THE SUPREME COURT OF IOWA, FILED JANUARY 31, 2022

IN THE SUPREME COURT OF IOWA

No. 20–0233

Appanoose County No. LALA002509

ORDER

THE ESTATE OF ANTHONY J. ZDROIK, DECEASED, BY TRISHANN W. ZDROIK, PERSONAL REPRESENTATIVE,

Plaintiff-Appellee,

vs.

IOWA SOUTHERN RAILWAY COMPANY, BRIAN OSTROWSKI, JOHN OSTROWSKI, STEVEN RUNSTROM AND PHIL GLINIECKI,

Defendants-Appellants.

After consideration by this court, en banc, further review of the above-captioned case is denied.

So Ordered

/s/_____
Susan Larson Christensen,
Chief Justice

APPENDIX B — OPINION OF THE COURT OF APPEALS OF IOWA, FILED OCTOBER 6, 2021

IN THE COURT OF APPEALS OF IOWA

No. 20-0233

Filed October 6, 2021

THE ESTATE OF ANTHONY J. ZDROIK, DECEASED, BY TRISHANN W. ZDROIK, PERSONAL REPRESENTATIVE,

Plaintiff-Appellee,

vs.

IOWA SOUTHERN RAILWAY COMPANY, BRIAN OSTROWSKI, JOHN OSTROWSKI, STEVEN RUNSTROM AND PHIL GLINIECKI,

Defendants-Appellants.

Appeal from the Iowa District Court for Appanoose County, Gregory G. Milani, Judge.

Defendants appeal several rulings by the district court on summary judgment with regard to various claims of negligence brought by the Estate of Anthony J. Zdroik. REVERSED AND REMANDED.

Heard by Bower, C.J., and Vaitheswaran and Schumacher, JJ.

Appendix B

VAITHESWARAN, Judge.

Sheet Piling Services, LLC dispatched twenty-three-year-old Anthony Zdroik and two other employees to repair a railroad bridge belonging to Iowa Southern Railroad Company. The crew used a grapple and sling to transfer railroad ties to a crane truck. Zdroik stood on the bed of the truck to remove the ties from the sling. During one of the transfers, the railroad tie or crane grapple struck Zdroik. Zdroik died as a result of his on-the-job injury.

Zdroik's estate sued the railroad as well as four people associated with Sheet Piling: Brian Ostrowski, John Ostrowski, Steven Runstrom, and Phil Gliniecki, none of whom worked with Zdroik on the day of the accident. The estate alleged the railroad violated the Federal Employers' Liability Act and was negligent in training crew members; and the Sheet Piling defendants were co-employees of Zdroik who were grossly negligent in training him.

The defendants filed motions for summary judgment. The court denied the Sheet Piling defendants' motion on the ground that the Ostrowskis were co-employees of Zdroik who could be sued for gross negligence and because fact issues on the elements of gross negligence precluded summary judgment. As for the railroad, the court granted the summary judgment motion on the Federal Employer's Liability Act claim but denied the motion on the negligence claim. The court denied motions to reconsider the rulings.

Appendix B

The defendants applied for interlocutory review. The supreme court granted the applications and stayed further proceedings.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). Our review is for correction of errors at law. *See Barker v. Capotosto*, 875 N.W.2d 157, 161 (Iowa 2016).

I. Gross Negligence Claims—Sheet Piling Defendants

The rights and remedies of an employee against an employer for an on-the job injury "shall be the exclusive and only rights and remedies of the employee . . . at common law or otherwise, on account of such injury." Iowa Code § 85.20(1) (2018). That exclusivity provision does not apply if the injury was caused by a co-employee's "gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another." *Id.* § 85.20(2).

A. Co-Employee Status—Ostrowskis

As a preliminary matter, the Ostrowskis assert they were not co-employees. Their assertion implicates the subject matter jurisdiction of the district court. *See Henrich v. Lorenz*, 448 N.W.2d 327, 331 (Iowa 1989) ("[I]f the defendants were, in fact, in the position of . . . employer, then the court [would] lack[ ] subject matter jurisdiction

over [the] suit. Jurisdiction over [the] complaint would lie exclusively with the industrial commissioner."). Subject matter jurisdiction may not be waived. *See State v. Mandicino*, 509 N.W.2d 481, 482 (Iowa 1993) ("[S]ubject matter jurisdiction is a statutory matter and cannot be waived by consent, waiver, or estoppel."). Accordingly, we must address their status.

The Ostrowskis specifically claim they cannot be considered co-employees because they "have not chosen to be covered by" the workers' compensation act. They point to Iowa Code section 85.1A, which states:

> A proprietor, limited liability company member, limited liability partner, or partner who is actively engaged in the proprietor's, limited liability company member's, limited lability partner's, or partner's business on a substantially full-time basis may elect to be covered by the workers' compensation law of this state by purchasing . . . workers' compensation insurance.

They note that "[p]roprietors, limited liability company members, limited liability partners, and partners who have not elected to be covered by the workers' compensation law of this state pursuant to section 85.1A" are excluded from the statutory definition of "workers" or "employees." Iowa Code § 85.61(11)(c)(5).

The supreme court addressed and rejected this election-of-coverage argument as a basis for analyzing

the exclusivity language of section 85.20. *See Horsman v. Wahl*, 551 N.W.2d 619, 621 (Iowa 1996). The court made a distinction between coverage and remedy and concluded: "The exclusive remedy provision of workers' compensation law, set forth in section 85.20, does not relate to coverage; therefore, in the context of section 85.20 a definition of [the defendant] as an "employer," pursuant to section 85.61(2), is required." *Id.; see also Mullen v. Grettenberg*, No. 14-1699, 872 N.W.2d 199, 2015 WL 5965221, at *1-2 (Iowa Ct. App. Oct. 14, 2015). We turn to section 85.61(2) to determine whether the Ostrowskis were Zdroik's employers rather than his co-employees.

Section 85.61(2)(a) defines "[e]mployer" as including and applying to the following: "A person, firm, association, or corporation, state, county, municipal corporation, school corporation, area education agency, township as an employer of volunteer fire fighters and emergency medical care providers only, benefited fire district, and the legal representatives of a deceased employer." The Ostrowskis assert Sheet Piling "is a corporation/partnership under the State of Wisconsin" and "[i]t is owned by [them] in a partnership." They cite *Carlson v. Carlson*, 346 N.W.2d 525, 526 (Iowa 1984), for the proposition that "a member of a partnership, even if he is a 'working partner,' is still in law the employer of employees of the partnership and cannot be sued."

The Ostrowskis correctly characterize *Carlson*. There, the court concluded "that a member of a partnership is an employer of the partnership's employees" and, "[a]ccordingly, Iowa Code section 85.20 precludes an

injured employee and his dependents from suing a partner in an independent tort action for his injuries received during the course of his employment for the partnership." *Carlson*, 346 N.W.2d at 527. If the Ostrowskis were partners in a partnership, *Carlson* would be dispositive and we would be obligated to dismiss them from the suit for lack of subject matter jurisdiction.

Sheet Piling was not a partnership; it was listed as an "L.L.C." An LLC is a limited liability company. *See* Iowa Code § 489.108(1) ("The name of a limited liability company must contain the words 'limited liability company' or 'limited company' or the abbreviation 'L.L.C.', 'LLC', or 'LC'."). Sheet Piling itself might have satisfied the section 85.61(2)(a) definition of "employer" and been immune from suit for gross negligence.[1] But that is not the issue. The issue is the status of the Ostrowskis individually.

John Ostrowski attested he was "an owner and partner of Sheet Piling." Brian Ostrowski similarly attested he was "an owner and partner of Sheet Piling." The statute governing limited liability companies makes no reference to owners or partners of limited liability companies. It refers to "[m]anager," "[m]anager-managed limited liability company," "[m]ember", "[m]ember-

1. Limited liability companies are not expressly mentioned in the section 85.61(2)(a) definition of employer, but the legislature's inclusion of "person" encompasses them. *See* Iowa Code § 4.1(20); 5 Matthew G. Doré, *Iowa Practice Series: Business Organizations* § 13:6 (2020). The prefatory language of section 85.61(2)(a) also uses the word "include," which suggests entities other than those that are expressly enumerated may fit within the definition of employer.

managed limited liability company," and "person." Iowa Code § 489.102(11), (12), (13), (14), (17). As Zdroik notes, Sheet Piling's operating agreement, which might have clarified the Ostrowskis' status, was not included in the summary judgment record. *See Felt v. Felt*, No. 18-0710, 928 N.W.2d 882, 2019 WL 2372321, at *3 (Iowa Ct. App. June 5, 2019) ("[T]he operating agreement governs the LLC, with the statutory provisions governing where the operating agreement does not otherwise provide.").

We conclude there is a genuine issue of material fact as to the status of the Ostrowskis within the limited liability company. That issue of fact must be resolved to determine whether the Ostrowskis were co-employees for purposes of section 85.20 or whether they were employers of Zdroik who would not be subject to gross negligence liability under section 85.20. As noted at the outset, this is an issue of subject matter jurisdiction that cannot be waived.

Because the district court resolved the co-employee issue based on election of coverage under section 85.1A and 86.61(11)(c)(5) rather than their employer status under 86.61(2), we reverse the denial of summary judgment and remand for reconsideration of the issue under section 85.61(2). *See Horsman*, 551 N.W.2d at 621. If the Ostrowskis are deemed to be co-employees, the court may examine whether one or more of the elements of gross negligence were satisfied as a matter of law. We proceed to that question with respect to the remaining two Sheet Piling defendants.

B. Co-Employee Negligence—Runstrom, Gliniecki

To establish co-employee gross negligence, a plaintiff must prove the defendants had: "(1) knowledge of the peril to be apprehended[2] ; (2) knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril." *Thompson v. Bohlken*, 312 N.W.2d 501, 505 (Iowa 1981). Allegations of gross negligence "carry a high burden of proof," *see Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 321 (Iowa 1992), and proving a case of gross negligence under section 85.20(2) is "difficult." *See Swanson v. McGraw*, 447 N.W.2d 541, 543 (Iowa 1989); *cf. Dudley v. Ellis*, 486 N.W.2d 281, 283 (Iowa 1992) (listing opinions in which plaintiffs failed to present substantial evidence of gross negligence to submit to jury).

Runstrom and Gliniecki contend the estate failed to establish the elements of gross negligence as a matter of law. If we conclude the estate could not establish any of the three elements, we need not address the remaining elements. *See, e.g., Mrla v. Johnson*, No. 20-0448, 2021 Iowa App. LEXIS 249, 2021 WL 1016905, at *3 (Iowa Ct. App. Mar. 17, 2021); *Whitacre v. Brown*, No. 11-0088, 2011 Iowa App. LEXIS 1156, 2011 WL 4950183, at *3 (Iowa Ct. App. Oct. 19, 2011). We elect to focus on the second element—"knowledge that injury is a probable, as

2. Runstrom and Gliniecki argue the "peril" was Zdroik's presence on the truck bed as the railroad ties were being unloaded. For purposes of summary judgment, we accept the estate's characterization of the peril—a failure of Runstrom and Gliniecki to properly train Zdroik and his coworkers.

opposed to a possible, result of the danger." *Thompson*, 312 N.W.2d at 505.

""Probably' is defined as that which 'seems reasonably . . . to be expected: so far as fairly convincing evidence or indications go.'" *Nelson v. Winnebago Indus., Inc.*, 619 N.W.2d 385, 391 (Iowa 2000) (quoting Webster's Third New Int'l Dictionary 1806 (unabr. ed.1986)). "[P]ossible consequences are those which happen so infrequently that they are not expected to happen again." *Whitacre*, 2011 Iowa App. LEXIS 1156, 2011 WL 4950183, at *3 (quoting *Thomas v. Food Lion, L. L. C.*, 256 Ga. App. 880, 570 S.E.2d 18, 20 (Ga. Ct. App. 2002)). A plaintiff "must show that the defendant[s] knew or should have known that [their] conduct placed the plaintiff in a zone of imminent danger." *Alden v. Genie Indus.*, 475 N.W.2d 1, 2 (Iowa 1991); *see also Hernandez v. Midwest Gas Co.*, 523 N.W.2d 300, 305 (Iowa Ct. App. 1994). A zone of imminent danger may be shown by establishing the defendants' "actual or constructive awareness of a history of accidents under similar circumstances" or by establishing a "high probability of harm is manifest even in the absence of a history of accidents or injury." *Alden*, 475 N.W.2d at 2-3. The estate essentially concedes it did not rely on a history of accidents to establish a zone of imminent danger but relied on the obviousness of a high probability of harm.

The district court found a genuine issue of material fact on whether an injury "could be reasonably expected if Zdroik and his co-employees were not properly trained" on whether "one or more of the Defendants had a duty to ensure that Zdroik and his co-employees had a degree

of training and that failure to do so would have made the injury to Zdroik probable." We disagree with this assessment.

Runstrom testified by deposition that he served as safety director for Sheet Piling. He worked with management on "developing safety policies [and] procedures", and also did "field visits to just kind of check on people." He characterized Zdroik's accident as "an unforeseeable event." He attested Zdroik would have participated in a "tailgate safety meeting" on the day of the accident, which would have included a discussion of "working near [railroad] tracks"; getting "hit by/struck by/caught between"; and "positive confirmation from operator." He further attested he was "570 miles from the accident."

While Runstrom may have had a duty to train Zdroik and his crew members on safety procedures, the estate failed to establish that he was aware injury was a probable result of his training protocols or a breach of those protocols. *See Walker v. Mlakar*, 489 N.W.2d 401, 405 (Iowa 1992) ("For us to say that a coemployee's constructive knowledge or constructive 'consciousness' of a hazard, without any actual knowledge thereof, is adequate to establish the coemployee's 'gross negligence,' would be to require plant safety managers and safety engineers to become the insurers of other employees for every potential peril, real or otherwise, within the plant."); *Anderson v. Bushong*, No. 12-0640, 829 N.W.2d 191, 2013 WL 530961, at *6 (Iowa Ct. App. Feb. 13, 2013) (concluding the defendants "knew the plywood coverings could possibly

result in a harmful fall, not that such a consequence was the probable result of the safety breach."). We reverse the denial of Runstrom's summary judgment motion and remand for entry of summary judgment in favor of Runstrom on the gross negligence claim.

Unlike Runstrom, Gliniecki was at the job site the day before the accident and was the site supervisor on that day. He acknowledged having a discussion with the crew members about placing the railroad ties in a sling "so they can't fall free." He agreed that, at the time, there was "[n]o procedure" in place to specify where a crew member should stand relative to the materials in the sling but he thought the procedure "was probably in their briefing where to stand or where not to be." Such a procedure was incorporated into a subsequent version of the safety manual. At the time of the accident, Gliniecki stated the company had a "15/40 rule" that required crew members "to stay out of . . . the working area . . . so the operator knows they're clear, anybody walking in." The rule referred to the worker's "distance" from the "operator, the swing, the swing boom" and they "talk[ed] about that all the time."

Gliniecki had actual knowledge of the procedure to be followed on the date of the accident. But he did not have "knowledge that injury [was] a probable, as opposed to a possible, result of the danger." *See Thompson*, 312 N.W.2d at 505; *see also Tisor v. Hollerauer*, No. 19-0673, 2020 Iowa App. LEXIS 952, 2020 WL 5943994, at *5 (Iowa Ct. App. Oct. 7, 2020); *Lancial v. Burrell*, No. 20-0136, 2020 Iowa App. LEXIS 914, 2020 WL 5650616, at *2 (Iowa Ct.

App. Sept. 23, 2020). We reverse the denial of summary judgment as to Gliniecki and remand for entry of summary judgment in his favor.

II. Railroad—Negligence

As noted at the outset, the district court granted summary judgment for the railroad on the estate's claim that the railroad violated the Federal Employers' Liability Act. The court reasoned that Zdroik was not an employee of the railroad. The estate also alleged the railroad violated regulations promulgated by the Federal Railroad Administration, part of the federal Department of Transportation, and the "violations constitute[d] negligence per se." *See Wiersgalla v. Garrett*, 486 N.W.2d 290, 292 (Iowa 1992) (stating injuries sustained as a proximate result of violations of regulations could constitute negligence per se). Relatedly, the estate alleged several specifications of negligence.[3]

The district court focused on the negligence per se theory. The court denied the railroad's summary judgment motion on that theory, reasoning "regulations can serve[ ] as the foundation for a negligence per se claim, irrespective of the employment roles of the parties." On reconsideration, the court acknowledged certain federal regulations placed the burden of safety training on employers and confirmed the railroad was not Zdroik's employer. But the court determined "other regulations

3. There is also an indication of a premises liability claim that was not pursued.

specifically place[d] burdens on railroads . . . regardless of [their] payment relationship to workers." Finding Zdroik "was a member of the protected class" under the regulations, the court concluded "[t]he remaining issues of negligence are for the jury to decide."

On appeal, the railroad reiterates that, because it was not Zdroik's employer, the Federal Railroad Administration regulations could not establish a duty of care owing to Zdroik. *See Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 811 (Iowa 1994) ("[T]he threshold question in any tort case is whether the defendant owed the plaintiff a duty of care" and this is a matter of law for the court.).

The estate counters that two regulations unambiguously require the railroad to afford on track safety training "to every roadway worker on its tracks," and Zdroik's death "was the result of [the railroad's] failure to itself provide proper" training or "ensure they had received such training from" Sheet Piling. The first regulation cited by the estate states, "Each railroad to which this part applies shall adopt and implement a program that will afford on-track safety to all roadway workers whose duties are performed on that railroad. . . ." 49 C.F.R 214.303(a). The second regulation states, "Each railroad subject to this part shall maintain and have in effect an on-track safety program which complies with the requirements of this subpart." 49 C.F.R. 214.307.

The railroad responds that the two regulations must be considered in conjunction with the definition of "employer" which is the entity that "directly engages or

compensates individuals to perform any of the duties defined in *this part*." 49 C.F.R. 214.7 (emphasis added). "This part" includes "Subpart C," titled "[r]oadway [w]orker [p]rotection," which contains the two regulations—49 C.F.R. 214.303 and 214.307. The railroad also notes that the "roadway worker protection" subpart places the onus of complying with its safety provisions on the employer. Specifically, 49 C.F.R. 214.311(a) states "[e]ach employer is responsible for the understanding and compliance by its employees with the rules and the requirements of *this part*." (emphasis added). Finally, the railroad argues that, if the regulations are vague, we must defer to the interpretation of the regulation by the Federal Railroad Administration (FRA) under *Kisor v. Wilkie*, 139 S. Ct. 2400, 204 L. Ed. 2d 841 (2019), *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997), and *Chevron USA v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

In interpreting federal regulations, "the possibility of deference can arise only if a regulation is genuinely ambiguous." *Kisor*, 139 S. Ct. at 2414. "[B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* at 2415 (*citing Chevron*, 467 U.S. at 843, n.9). "[A] court must carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." *Id.* (internal citations and quotations omitted). "Doing so will resolve many seeming ambiguities out of the box, without resort to *Auer* deference." *Id.; cf. Messina v. Iowa Dep't of Job Serv.*, 341 N.W.2d 52, 56 (Iowa 1983) ("Generally, the rules of statutory construction

and interpretation also govern the construction and interpretation of rules and regulations of administrative agencies." (citation omitted)); *see also State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003) (same).

We agree with the railroad that the two regulations on which the estate relies to find a duty of care running from the railroad to Zdroik must be read in tandem with the provisions defining who is responsible for carrying them out. When read as a whole, there is no question the "who" is the employer, Sheet Piling, not the railroad.

The "supplementary information" accompanying the regulations clinch that construction of the regulations. *See* Roadway Worker Protection, 61 Fed. Reg. 65959-01, 1996 WL 716080 (F.R. Dec. 16, 1996). In explaining the rationale for adding definitions of "employer" and "employee," the agency stated:

> Employees of contractors to railroads are included in the definition if they perform duties on or near the track. They should be protected as well as employees of the railroad. *The responsibility for on-track safety of employees will follow the employment relationship. Contractors are responsible for the on-track safety of their employees and any required training for their employees.* FRA expects that railroads will require their contractors to adopt the on-track safety rules of the railroad upon which the contractor is working. Where contractors require specialized on-track safety

> rules for particular types of work, those rules must, of course, be compatible with the rules of the railroad upon which the work is being performed.

Id. at 65966 (emphasis added). And in explaining the interplay of 214.303 and 214.311, the agency stated:

> Railroads are specifically required by § 214.303 to implement their own on-track safety programs. *Section 214.311 however, places responsibility with all employers (whether they are railroads or contractors) to see that employees are trained and supervised to work with the on-track safety rules in effect at the work site. The actual training and supervision of contractor employees might be undertaken by the operating railroad, but the responsibility to see that it is done rests with the employer.*

Id. at 65967 (emphasis added). These statements establish that the employer, not the railroad, is responsible for implementing the safety regulations.

Having applied the traditional rules of construction in our toolkit as required by *Kisor*, we conclude there is no genuine ambiguity concerning the entity that is charged with implementing the safety regulations. *Cf. Lessert v. BNSF Ry. Co.*, 476 F. Supp. 3d 926, 943-44 (D.S.D. 2020) (finding an FRA regulation unambiguous but also concluding "the FRA interpretation defendant would have

the court defer to hardly contradicts the court's reading of" the regulation"). Because the two regulations apply to an employer, and the railroad was not Zdroik's employer, we reverse the denial of the railroad's summary judgment motion on the negligence per se claim and remand for entry of summary judgment in favor of the railroad.

We find it unnecessary to address the remaining arguments raised by the parties.

REVERSED AND REMANDED.

APPENDIX C — ORDER OF THE IOWA DISTRICT COURT, APPANOOSE COUNTY, FILED JANUARY 10, 2020

IN THE IOWA DISTRICT COURT IN
AND FOR APPANOOSE COUNTY

CASE NO. LALA002509

THE ESTATE OF ANTHONY J. ZDROIK,
DECEASED, BY TRISHANN W. ZDROIK,
PERSONAL REPRESENTATIVE,

Plaintiff,

v.

IOWA SOUTHERN RAILWAY COMPANY, AN
IOWA CORPORATION, BRIAN OSTROWSKI, JOHN
OSTROWSKI, STEVEN RUNSTROM,
AND PHIL GLINIECKI,

Defendants.

RULING ON IOWA SOUTHERN RAILROAD COMPANY'S MOTION TO RECONSIDER

This Court ruled on the Motion for Summary Judgment filed by Defendant Iowa Southern Railroad Company (ISRY) on November 21, 2019. ISRY filed this Motion to Reconsider on December 5, 2019. The Plaintiff, The Estate of Anthony J. Zdroik, filed a Resistance on December 16, 2019 and ISRY subsequently filed a Reply

to Resistance and Supplemental Authority for Reply to Plaintiff's s Resistance To Motion to Reconsider.

FINDINGS OF FACT

For the purposes of this Motion, the Court incorporates its factual findings from the Ruling on Motion for Summary Judgment filed by Iowa Southern Railway filed on November 21, 2019.

CONCLUSIONS OF LAW

Iowa Rule of Civil Procedure 1.904(2) allows a party on motion to reconsideration, enlargement, or amendment to the findings and conclusions made by the court and that the judgment or decree be modified accordingly. The Rule not only grants the right to litigants, but also authorizes the court to change its ruling when deemed prudent. *Meier v. Senecaut*, 641 N.W.2d. 532 (2002). A legal or factual issue may be modified as long as the issue was solely for the court's determination, but when the motion is "strictly limited to a question of law, a motion to reconsider amounts to nothing more than a rehash of the legal question." *Id*. at 538.

ANALYSIS

The Court has reviewed ISRY's Motion to Reconsider, the Plaintiff's Resistance, ISRY's Response to Resistance and ISRY's Supplemental Authority for Reply to Plaintiff's Motion to Reconsider . ISRY submits two premises in their motion. That the court incorrectly found that 49

C.F.R. part 214 requires ISRY to provide an on track safety program to SPS employees and that a violation of regulations, namely 49 C.F.R. § 214.303, could serve as a basis of plaintiff's negligence claim against ISRY.

The Court disagrees.

In the ruling on the ISRY's Motion for Summary Judgement, the Court addressed 49 C.F.R. part 214 in the context of whether the regulations, namely 49 C.F.R. §214.303, could serve as a basis of negligence per se. ISRY argues that 49 C.F.R. §214 puts the responsibility of compliance with the employer, and the Court ruled SPS was the employer of Zdroik. ISRY asserts this question is a matter of law and proper for the Court to resolve.

The Court agrees that certain regulations, such 49 C.F.R. §214.311 "Responsibility of employers," do thrust the burden of responsibility upon employers. The Court further agrees with ISRY that "employer" is a statutorily defined term to mean "a railroad, or a contractor to a railroad, that directly engages or compensates individuals to perform any of the duties defined in this part" and the definition applies to the entirety of the part. 49 C.F.R. §214.7. However, other regulations specifically place burdens on railroads, including 49 C.F.R. §214.303 and §214.307. Upon a cursory review at §214.307, it is clear that the regulation could only apply to the railroad, regardless of its payment relationship to workers. Further, §214.307 affords protection to roadway workers, which is defined at §214.7 to mean:

> any employee of a railroad, or of a contractor to a railroad, whose duties include inspection, construction, maintenance or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track or with the potential of fouling a track, and flagmen and watchmen/lookouts as defined in this section.

At the hearing on the motion for summary judgment, the parties agreed that Zdroik falls under this definition. The Court concludes that Zdroik was an employee of a contractor to a railroad who was performing construction, maintenance, and/or repair of track and bridge and is therefore a roadway worker for the purpose of the regulation. The specific choice to put some requirements in the hands of employers and others with railroads appears to be a deliberate choice and the Court finds no reason to doubt this choice. Plaintiff's Petition in Count II alleges ISRY violated numerous regulations that give rise to a negligence cause of action, including certain regulations that apply to employers only.

ISRY's argues that a duty of care can only be established in three ways:

1. Employer/Employee

2. Business Invitee and Possessor of Land

3. Contractor and Employee of Subcontractor

While those methods are ways in which a duty of care can be established, they are not the exclusive methods. In *Wiersgalla v. Garrett*, the case previously cited by the Court, the Iowa Supreme Court held that when a plaintiff, who was a member of the class afforded protection under the regulation, establishes the defendant violated the regulation that resulted in the plaintiff's injuries, "there is in effect a presumption that the defendant has violated his legal duty exercise due care." 486 N.W.2d 290, 293 (Iowa 1992). It is clear in *Wiersgalla* that statutes or regulations can impose a legal duty of care. The Court has already found that Zdroik was a member of the protected class of 49 C.F.R. part 214. The remaining issues of negligence are for the jury to decide.

The defendant's motion to reconsider is overruled.

So Ordered

/s/_____
Greg Milani, District Court Judge
Eighth Judicial District of Iowa

APPENDIX D — ORDER OF THE IOWA DISTRICT COURT, APPANOOSE COUNTY, FILED JANUARY 10, 2020

IN THE IOWA DISTRICT COURT
FOR APPANOOSE COUNTY

THE ESTATE OF ANTHONY J. ZDROIK,
DECEASED, BY TRISHANN W. ZDROIK,
PERSONAL REPRESENTATIVE,

Plaintiff,

vs.

IOWA SOUTHERN RAILWAY COMPANY,
AN IOWA CORPORATION, BRIAN OSTROWSKI,
JOHN OSTROWSKI, STEVEN RUNSTROM,
AND PHIL GLINIECKI,

Defendants.

CAUSE NO. LALA002509

RULING ON DEFENDANT BRIAN OSTROWSKI, JOHN OSTROWSKI, STEVEN RUNSTROM, and PHIL GLINIECKI'S MOTION TO RECONSIDER, AMEND, OR ENLARGE FINDINGS

The Court ruled on the Motion for Summary Judgment filed by the above-named defendants on November 21, 2019. The defendants filed a Motion to Reconsider, Amend, or Enlarge Findings on December 5, 2019. The plaintiff filed a Resistance to Defendants' Motion to Reconsider, Amend, or Enlarge Findings on December 16, 2019.

Appendix D

FINDINGS OF FACT

For the purposes of this Motion, the Court incorporates its factual findings from the Ruling on Motion for Summary Judgment filed by Defendants Brian Ostrowski, John Ostrowski, Steven Runstrom, and Phil Gliniecki filed on November 21, 2019.

CONCLUSIONS OF LAW

Iowa Rule of Civil Procedure 1.904(2) allows a party, on motion, to reconsideration, enlargement, or amendment to the findings and conclusions made by the Court and that the judgment or decree be modified accordingly. The Rule not only grants the right to litigants, but also authorizes the Court to change its ruling when deemed prudent. *Meier v. Senecaut*, 641 N.W.2d. 532 (2002). A legal or factual issue may be modified as long as the issue was solely for the court's determination, but when the motion is "strictly limited to a question of law, a motion to reconsider amounts to nothing more than a rehash of the legal question." *Id.* at 538.

ANALYSIS

The Court has reviewed Defendants' Motion to Reconsider and Plaintiffs' Resistance thereto. Plaintiff submits that the Court should amend that portion of its ruling wherein the Court referenced the fact that there was a dispute as to whether the Ostrowskis are covered by SPS's worker's compensation insurance. The Court anticipated that the issue could be subject to resolution upon SPS providing adequate proof of Brian Ostrowski

and John Ostrowski's election to opt out of being covered by SPS's worker's compensation insurance.

A review of the filings herein make it clear that the issue as to said election has not been resolved. The Court sustains Plaintiff's best evidence rule objection and/or argument related to the affidavit provided by Defendant. The Court additionally enlarges its ruling to find that the Ostrowskis have not produced their original nonelection of worker's compensation coverage. Such nonelection, had it been made, would have been filed with the worker's compensation commissioner. Therefore, so much of the Court's Ruling on Motion for Summary Judgment that left at issue Brian Ostrowski and John Ostrowski's status as co-employees is amended to wit: the Court finds that Brian Ostrowski and John Ostrowski are co-employees of Plaintiff Zdroik.

The second issue raised by the defendants is that part of the Court's ruling that finds that issue of the defendants' failure to train as gross negligence should be submitted to the jury. The defendants submit to the Court that the Court of Appeals' recent decision in *Ganka v. Clark*, 18-1397, 2019 WL, 6358301 (Iowa Court of Appeals, November 27, 2019) warrants the Court reconsider its ruling.

The Court has reviewed the Ruling in the *Ganka* case along with previous submitted exhibits and arguments and, by way of clarification of its previous order, finds that when the evidence is reviewed in the light most favorable to the plaintiff, a jury could conclude that a co-employee's failure to train was gross negligence. The Court did not

intend to indicate that the *Thompson v. Bohlken* elements would not apply. The Court simply found that, based upon the evidence, a reasonable fact finder could find that the defendant knew that failure to train Zdroik, Frazier, and Yenter was perilous, that said failure to train made death or serious injury (to Zdroik) a probable result and that one or more of the defendants consciously failed to provide the training necessary to avoid the peril.

The Court's Ruling filed November 21, 2019, is amended to provide that Defendants Brian Ostrowski and John Ostrowski are co-employees of Plaintiff Zdroik,.

The balance of Plaintiff's Motion to Enlarge and Amend is overruled.

Type: OTHER ORDER

Case Number	**Case Title**
LALA002509	ESTATE OF ZDROIK, ET AL. V. IOWA SOUTHERN RAILWAY

So Ordered
/s/
Greg Milani, District Court Judge
Eighth Judicial District of Iowa

APPENDIX E — ORDER OF THE IOWA DISTRICT COURT, APPANOOSE COUNTY, DATED NOVEMBER 21, 2019

IN THE IOWA DISTRICT COURT IN
AND FOR APPANOOSE COUNTY

CASE NO. LALA002509

THE ESTATE OF ANTHONY J. ZDROIK,
DECEASED, BY TRISHANN W. ZDROIK,
PERSONAL REPRESENTATIVE,

Plaintiff,

v.

IOWA SOUTHERN RAILWAY COMPANY,
AN IOWA CORPORATION, BRIAN OSTROWSKI,
JOHN OSTROWSKI, STEVEN RUNSTROM,
AND PHIL GLINIECKI,

Defendants.

RULING ON MOTION FOR
SUMMARY JUDGMENT FILED BY
IOWA SOUTHERN RAILWAY

Plaintiff filed a Petition in this matter on May 23, 2018. Defendant Iowa Southern Railway filed the Motion for Summary Judgment at issue on October 3, 2019, with supporting documents. On the same day, Defendants Brian

Ostrowski, John Ostrowski, Steven Runstrom, and Phil Gliniecki filed a separate Motion for Summary Judgment. Plaintiff filed separate Resistances to the two Motions on October 21, 2019. Defendants Ostrowski, Ostrowski, Runstrom, and Gliniecki filed a Reply on October 28, 2019. Defendant Iowa Southern Railway filed a Reply on October 29, 2019. Hearing was held on both Motions on November 4, 2019. Plaintiff was represented by attorneys George F. Davison, Jr., Steven L. Groves, and Emery A. Reusch. Iowa Southern Railway appeared by counsel Jennifer K. Eggers, in person, and Kimberly K. Hardeman, by telephone. Ostrowski, Ostrowski, Runstrom, and Gliniecki were represented by attorney Daniel B. Shuck.

FINDINGS OF FACT

The Court finds the following facts undisputed. Sheeting Piling Services (SPS) hired Anthony Zdroik on May 1, 2017. Iowa Southern Railway (IS) contracted with SPS for services in connection of the repair of a railroad bridge near Moulton, Iowa. IS is managed by Progressive Rail, Inc., who had contracted with SPS on other projects previously. On October 12, 2017, Zdroik was working on the bridge when an accident occurred that resulted in Zdroik's death. Zdroik was working with Luke Frazier and Justin Yenter replacing and removing ties on the girder of the bridge. Frazier's role was to cut the ties in half and attach a sling to the tie pieces. Then Yenter, operating a truck mounted machine, would pick up the ties and place them on the bed of a truck, where Zdroik would then unhook the sling freeing Yenter to pick up another tie. In the course of swinging the tie to the truck bed,

something unexplained occurred that caused some part of the machinery or tie to hit Zdroik who was in the bed of the truck. The medical evidence suggests that Zdroik was killed almost instantly and was later pronounced dead at the worksite.

CONCLUSIONS OF LAW

Summary judgment is proper only when the entire record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007) (citing *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 903 (Iowa 1996)); Iowa R. Civ. P. 1.981(3). An issue of fact is material when a dispute exists that may affect the outcome of the suit, given the applicable governing law. *Fees v. Mutual Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992) (citing *Hike v. Hall*, 427 N.W.2d 158, 159 (Iowa 1988)). The requirement that the issue be genuine "means the evidence is such that a reasonable jury could return a verdict" for the party resisting the motion. *Id.* (citing *Hike*, 427 N.W.2d at 159). In determining whether a motion for summary judgment should be granted, the court "'must determine whether any facts have been presented over which a reasonable difference of opinion could exist that would affect the outcome of the case.'" *Id.* (quoting *Behr v. Meredith Corp.*, 414 N.W.2d 339, 341 (Iowa 1987)).

The party requesting summary judgment bears the burden of proof. *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005) (citing *Estate of Harris v.*

Papa John's Pizza, 679 N.W.2d 673, 677 (Iowa 2004)). "A court entertaining a motion for summary judgment must view the evidence in the light most favorable to the nonmoving party." *Id.* (citing *Harris*, 679 N.W.2d at 677). "Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and thereby reach different conclusions." *Id.* (citing *Walker Shoe Store, Inc. v. Howard's Hobby Shop*, 327 N.W.2d 725, 728 (Iowa 1982)). The nonmoving party should be afforded every legitimate inference that can be reasonably deduced from the evidence. *Id.* (citing *Cent. Nat'l. Ins. Co. v. Ins. Co. of N. Am.*, 522 N.W.2d 39, 42 (Iowa 1994)). However, "[t]he resistance must set forth specific facts constituting competent evidence to support a prima facie claim." *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 339 (Iowa 1991) (citing *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 454 (Iowa 1989); *Prior v. Rathjen*, 199 N.W.2d 327, 330 (Iowa 1972)). The adverse party "may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered." Iowa R. Civ. P. 1.981(5).

Speculation is not sufficient to generate a genuine issue of fact. *Walls v. Jacob North Printing Co.,* 618 N.W.2d 282, 284 (Iowa 2000). "A fact issue is generated if reasonable minds can differ on how the issues should be resolved, but if the conflict in the record consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper." *Uhl v. City of Sioux City*, 490 N.W.2d 69, 74 (Iowa App. 1992).

Appendix E

ANALYSIS

Iowa Southern Railway Company argues that Plaintiff's claims against it must fail as a matter of law. Plaintiff has alleged two counts against IS. In Count I, Plaintiffs allege that IS breached its duty and is liable under the Federal Employers' Lability Act (FELA). Count II alleges common law claims of negligence, wrongful death, and personal injury. Beginning with the FELA claim, IS argues that a claim may be pursued if IS actually controlled or had the right to control Anthony Zdroik's job performance as their employee as a FELA claim is predicated upon an employer-employee relationship. 45 U.S.C. § 51. Plaintiff agrees this is the legal standard, but argues the issue is for a jury to decide due to the unique role of juries in FELA actions. Further, the parties do not dispute the relevant facts. Therefore, the issue before the Court first is whether summary judgment is proper in this situation despite there not being a dispute as to fact or legal standard.

On this issue, both parties cite cases that support their positions. IS cites *Royal v. Missouri & Northern Railroad Company, Inc.*, 857 F.3d 759 (8th Cir. 2017) in which the 8th Circuit Court of Appeals affirmed the district court's grant of summary judgment on the issue of whether the plaintiff was an railroad employee under FELA. The Court did not mention any special role of juries in the employment status determination, and instead held that no reasonable jury could find the plaintiff was an employee of the railroad. Plaintiff cites *Baker v. Texas and Pacific Railway Company,* 359 U.S. 227 (1959) for the proposition

that a jury is the proper party to determine employment status. At first blush, the cases seem incompatible with one another. However, upon closer reading, it is made clear that a court may determine employment status through summary judgment, but only when "reasonable men could not reach differing conclusions on the issue." *Baker*, 359 U.S. at 228. Therefore, the standard for summary judgment here is whether there is any reasonable jury that could find in Plaintiff's favor on this issue.

It has long been observed that FELA does not assign any particular meaning to the word "employee" under the statute, and the determination of status must be made based upon the unique facts of the case and no specific factor is dispositive. *Baker*, 359 U.S. 227 (1959). When examining the right to control, "all of the surrounding circumstances must be considered." *Buccieri v. Illinois Cent. Gulf R.R.*, 601 N.E.2d 840, 846 (Ill. App. Ct. 1992). Employment is to be determined by the common-law master-servant relationship. *Royal*, 857 F.3d 759. Even when the plaintiff was nominally employed by another party, employment can be established with a railroad by showing the plaintiff is a borrowed servant, a dual servant, or a subservant. *Id.* For such a relationship, the railroad must have possessed the right to control the plaintiff's performance of his job. *Id.*

The facts here present that Zdroik was employed by Sheet Piling Services (SPS). This fact is uncontroverted. The standard is then whether IS had the right to control Zdroik in the performance of his job. IS argues that it hired SPS because IS does conduct the type work that was

required. Both parties look to the letter sent to IS from SPS dated July 13, 2017, which IS has submitted as Exhibit 1. The letter states that SPS will perform the work asked and that the attached price includes the "equipment, labor, materials, mobilization, and demobilization of required equipment for completion of the job." The letter also states, "All repairs will be done under the direction of Progressive Rail and repairs will be approved by a representative of Progressive Rail." IS argues this letter shows that labor is matter of SPS, while Plaintiff argues the letter clearly states the work performed is under the direction of IS's managing company, Progressive Rail. IS also presents evidence of SPS managing Zdroik's employment such as payment, employee withholding allowance from multiple states, a signed acknowledgment that Zdroik has read SPS's confidentiality statement from a handbook, an "Employee Competency Report Reference Guidelines" from SPS signed by Zdroik and a SPS employee, and an identification badge labelling Zdroik as a "contractor."

Plaintiff resists citing the IS OTS Manual, which dictated that SPS workers had to follow, IS rules on the worksite. Plaintiff also notes that IS had the authority to remove a SPS worker from a worksite if they failed to follow the Manual rules. IS does not dispute this fact, but argues it power was limited solely to removal, not termination of the worker. Plaintiff also points to the fact that it was IS who performed the daily safety briefings and would set the working limits on the track.

The Court finds the facts of this case similar to that in *Royal*. Royal was found to not be an employee of

the railroad as it was the nominal employer who "hired him, trained him, sent him to do maintenance work on railroads." *Royal*, 857 F.3d at 763. The Court found that the railroad's requirement of following the railroad's safety guidelines, his work being subject to railroad employee approval, or even that the railroad coordinated the locations and schedules for work assignments as immaterial. *Id.* While the contract between IS and SPS did not specifically call SPS and independent contractor as it did in *Royal*, the fact remains that IS had less day-today control over SPS employees that that in *Royal.* The record demonstrates that IS managed safety in the form of the safety briefings and work limits, but that it was SPS who dictated the work that Zdroik performed. The *Royal* Court held "the mere existence of safety guidelines does not suggest that MNA [the railroad] had the right to control Royal's work." *Id.* at 763. Further, the Court held that minimal cooperation is necessary in such projects and the work being subject to approval by the railroad was insufficient to bring the plaintiff under the control of the railroad. *Id.* at 764. It is agreed that IS could have a SPS worker removed from the jobsite; however, this power is limited to instances in which the worker failed to follow the rules and did not grant IS the power to general control Zdroik's performance in his job duties.

In this case, IS assumed a role of a safety manager and lacked the general authority inherent to an employer. The case law states that the "test of whether a company is the employer of a particular worker turns on the degree of control the company exerts over the physical conduct of the worker in the performance of services."

Schmidt v. Burlington Northern and Santa Fe Ry. Co., 605 F.3d 686 (9th Cir. 2010). Plaintiff cites *Schmidt* for its argument that requiring a worker to follow policies of the railroad and attend the railroad's safety meetings might be sufficient for a reasonable jury to find the worker was an employee of the railroad. However, in *Schmidt*, the Court also noted that it was the railroad who actually paid the worker, it was individuals who appeared to be railroad employees who directly supervised the work suggesting the railroad controlled how the worker did his work, and railroad policies regulated how he did his work. *Id.* 605 F.3d at 690-91. These elements of direct control are all missing in the present case. Therefore, the Court finds no reasonable jury could find that Anthony Zdroik was an employee of Iowa Southern Railway. Based upon this finding, Plaintiff's claim under FELA must fail as a matter of law.

The second issue IS argues is that it has no duty to an independent contractor and as a result, Count II must also fail. Plaintiff argues that federal law dictates several safety measures that railroads are required to employ, that IS failed to do what was required, and that failure constitutes negligence. The issue of whether IS can be held liable based upon negligence is matter of law and may be decided by the Court.

Plaintiff cites *Wiersgalla v. Garrett*, 486 N.W.2d 290 (Iowa 1992), in which the Court stated:

> As a preliminary matter, it is well established that if a statute or regulation such as an OSHA

> standard provides a rule of conduct specifically designed for the safety and protection of a certain class of persons, and a person within that class receives injuries as a proximate result of a violation of the statute or regulation, the injuries "would be actionable, as ... negligence per se." To be actionable as such, however, "the harm for which the action is brought must be of the kind which the statute was intended to prevent; and the person injured, in order to recover, must be within the class which [the statute] was intended to protect."

(internal citations omitted). *Id.*at 292. It is clear, under the negligence per se doctrine highlighted here, an essential requirement is that the regulation be specific to the harm suffered and to the person who suffered the harm. Plaintiff cites numerous regulations promulgated by the Federal Railroad Administration designed to increase safety, including 49 C.F.R. § 214.303, which states:

> (a) Each railroad to which this part applies shall adopt and implement a program that will afford on-track safety to all roadway workers whose duties are performed on that railroad. Each such program shall provide for the levels of protection specified in this subpart.

This regulation is clearly designed for the safety of roadway workers. There was argument and general agreement that Zdroik is considered a roadway worker

under the statutory definition. IS's argument that it owes no common-law duty to Zdroik is not persuasive here. Our case law shows that regulations can served as the foundation for a negligence per se claim, irrespective of the employment roles of the parties. In after-hearing filings, IS argues that Plaintiff is alleging a private right of action under the federal railroad safety law. The Court understands Plaintiff's filings and argument to be that Count II is an allegation brought under state law claiming a violated safety regulation as negligence per se. On this claim, Iowa Southern Railway has not carried its burden and shown that it is entitled to judgment as a matter of law.

ORDER

IT IS THEREFORE ORDERED AS FOLLOWS:

1. Defendant Iowa Southern Railway's Motion for Summary Judgment is granted as to Count I, the claim under the Federal Employers' Liability Act.

2. Defendant Iowa Southern Railway's Motion for Summary Judgment is denied as to Count II, the state law claim of negligence, personal injury, and wrongful death.

So Ordered

/s/ Greg Milani
Greg Milani, District Court Judge
Eight Judicial District of Iowa

APPENDIX F — ORDER OF THE IOWA DISTRICT COURT, APPANOOSE COUNTY, FILED NOVEMBER 21, 2019

IN THE IOWA DISTRICT COURT
FOR APPANOOSE COUNTY

THE ESTATE OF ANTHONY J. ZDROIK,
DECEASED, BY TRISHANN W. ZDROIK,
PERSONAL REPRESENTATIVE,

Plaintiff,

vs.

IOWA SOUTHERN RAILWAY COMPANY,
AN IOWA CORPORATION, BRIAN OSTROWSKI,
JOHN OSTROWSKI, STEVEN RUNSTROM,
AND PHIL GLINIECKI,

Defendants.

CAUSE NO. LALA002509

RULING ON MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANTS BRIAN OSTROWSKI, JOHN OSTROWSKI, STEVEN RUNSTROM, AND PHIL GLINIECKI

This case arises from the death of a young man, Anthony Zdroik, who was struck in the chest by either a railroad tie or a piece of machinery while he was assisting in the loading of railroad ties on a railroad overpass bridge near Moulton, Appanoose County, Iowa.

Appendix F

The Personal Representative of Zdroik's Estate brought an action against the owner of the rail line, Iowa Southern Railway Company, and four individuals: John Ostrowski, Brian Ostrowski, Steven Runstrom, and Phil Gliniecki, all who held some position at or with the company that had employed Zdroik, Sheet Piling Services. (SPS)

The individual Defendants filed a Motion for Summary Judgment and supporting pleadings. This Motion was resisted. Hearing was held on November 4, 2019. Counsel for plaintiff Steve Groves and Emery Reusch and George Davison appeared on behalf of the Plaintiff. The individual Defendants, John Ostrowski, Steve Runstrom, Brian Ostrowski, and Phil Gliniecki, were represented by Dan Shuck. The matter was submitted, and after a review of the pleadings and considering the arguments of counsel, the Court enters the following:

FINDINGS OF FACT

Zdroik brought separate but identical claims against Brian Ostrowski (Count III), John Ostrowski (Count IV), Steven Runstrom (Count V), and Phil Gliniecki (Count VI). All four Defendants held some position at or with Sheet Piling Services (SPS), the company that employed Zdroik. This Ruling applies to Counts III through VI of Plaintiff's Petition.

These Plaintiff's claims against the four Defendants are based upon Iowa Code section 85.20. This Code Section exempts co-employees from liability in all cases *except*

those where the co-employee caused the injury through *gross negligence* amounting to such lack of care as to be a wanton neglect for the safety of another. (Iowa Code section 85.20 (2019).

When Zdroik was killed, there were two other co-employees of Zdroik working with him. These employees were Luke Frazier, who was cutting railroad ties and putting them in a sling, and Justin Yenter, who was operating the machine used to sling the ties into the truck box where Zdroik was ultimately struck and killed. Frazier and Yenter where not named as Defendants.

The alleged gross negligence against the co-employee Defendants in this case is the failure of the named co-employees to ensure that Zdroik, Frazier, and Yenter had the appropriate training for the activity they were performing.

At the hearing on the motion for summary judgment, there was a dispute as to whether or not the Ostrowskis were or were not, at the time of Zdroik's death, covered by SPS's workers' compensation insurance. This is relevant for if Defendants Brian Ostrowski and John Ostrowski, as the owners of Sheet Piling Services (SPS), had elected not to be covered by SPS's workers' compensation insurance policy under Iowa Code Chapter 85, then the Ostrowskis would not be co-employees that could be held negligent under Plaintiff's 85.20 (gross negligence) claim. This fact is undisputed. The court has not been advised as to the status of the inquiry, and holds that Plaintiffs' claims, as they are related to Defendants Brian Ostrowski and

John Ostrowski, will be dismissed in the event Defendants provide proof that at the time of the death of Zdroik they had opted out of being covered under SPS's workers' compensation insurance.

In the event Brian Ostrowski and John Ostrowski were covered by SPS's workers' compensation coverage at the time of Zdroik's death, then the balance of this opinion as it applies to Steven Runstrom and Phil Gliniecki will also apply to them.

CONCLUSIONS OF LAW

Summary judgment is proper only when the entire record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007) (citing *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 903 (Iowa 1996)); Iowa R. Civ. P.1.981(3). An issue of fact is material when a dispute exists that may affect the outcome of the suit, given the applicable governing law. *Fees v. Mutual Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992) (citing *Hike v. Hall*, 427 N.W.2d 158, 159 (Iowa 1988)). The requirement that the issue be genuine "means the evidence is such that a reasonable jury could return a verdict" for the party resisting the motion. *Id.* (citing *Hike*, 427 N.W.2d at 159). In determining whether a motion for summary judgment should be granted, the court "'must determine whether any facts have been presented over which a reasonable difference of opinion could exist that would affect the outcome of the case.'" *Id.* (quoting *Behr v. Meredith Corp.*, 414 N.W.2d 339, 341 (Iowa 1987)).

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The party requesting summary judgment bears the burden of proof. *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005) (citing *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 677 (Iowa 2004)). "A court entertaining a motion for summary judgment must view the evidence in the light most favorable to the nonmoving party." *Id.* (citing *Harris*, 679 N.W.2d at 677). "Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and thereby reach different conclusions." *Id.* (citing *Walker Shoe Store, Inc. v. Howard's Hobby Shop*, 327 N.W.2d 725, 728 (Iowa 1982)). The nonmoving party should be afforded every legitimate inference that can be reasonably deduced from the evidence. *Id.* (citing *Cent. Nat'l. Ins. Co. v. Ins. Co. of N. Am.*, 522 N.W.2d 39, 42 (Iowa 1994)). However, "[t]he resistance must set forth specific facts constituting competent evidence to support a prima facie claim." *Hoefer v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 339 (Iowa 1991) (citing *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 454 (Iowa 1989); *Prior v. Rathjen*, 199 N.W.2d 327, 330 (Iowa 1972)). The adverse party "may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered." Iowa R. Civ. P. 1.981(5).

Speculation is not sufficient to generate a genuine issue of fact. *Walls v. Jacob North Printing Co.*, 618 N.W.2d 282, 284 (Iowa 2000). "A fact issue is generated if reasonable minds can differ on how the issues should be

resolved, but if the conflict in the record consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper." *Uhl v. City of Sioux City*, 490 N.W.2d 69, 74 (Iowa App. 1992).

ANALYSIS

There is no dispute that for the Plaintiff to be successful in its claim, must prove that the Defendants, as co-employees, were grossly negligent and that said gross negligence must amount to a wanton neglect for the safety of another.

The controlling case in Iowa is *Thompson v. Bohlken*, 312 N.W.2d (Iowa 1981) wherein the Court outlined three elements necessary to establish a claim of gross negligence of a co-employee as (1) knowledge of the peril to be apprehended; (2) knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) a conscious failure to avoid the peril.

It is undisputed that at the time of Zdroik's death, Steve Runstrom was in Wisconsin and Phillip Gliniecki was in Illinois. The plaintiff's claim does not arise from any active actions or inactions by Defendants at the time of Zdroik's death. Instead, Plaintiffs' claim lies in the alleged failure to ensure that Zdroik and or one or more of his co-employees had been properly trained for the machinery they were using and activities they were undertaking.

The parties agree that Plaintiffs' claim of gross negligence is solely based upon the premise that the

Defendants failed to properly train Zdroik, Frazier and/or Yenter. Plaintiff argues that the duty to train is provided for in Federal Railroad Administration On Track Safety Regulations (49 CFR 214). The Defendants presented scant rebuttal to that position, instead offering that the Plaintiff "may have a negligence claim" on training, but they don't have a gross negligence claim. For a further analysis of the duty imposed by safety standards, see the Court's Ruling on Defendant Iowa Southern Railway Company's Motion for Summary Judgment filed herein.

Although there is no Iowa case law directly providing that failure of a co-employee to ensure that employees have proper training is negligence, or as this case requires, arises to gross negligence, there are no cases holding that it does not. The Court having reviewed the filings herein, including but not limited to the parties' Statements of Undisputed Facts, the expert reports, and affidavits, concludes that the degree of Zdroik, Frazier, and Yenter's training, the quality and amount of Zdroik, Frazier, and Yenter's training by common law or statute and whether training Zdroik, Frazier and Yenter would have prevented Zdroik's death are all in dispute. In addition, whether the co-employee Defendants' failure, if any, to provide training to Zdroik, Frazier and Yenter arises to gross negligence is at issue.

By and large, "questions of negligence and proximate cause are for the jury." *Hollingsworth v. Schminkey*, 553 N.W.2d 591, 597 (Iowa 1996). A reasonable fact finder could find that an injury to Zdroik or others similarly situated could be reasonably expected if Zdroik and his

co-employees were not properly trained. A reasonable fact finder could find that one or more of the Defendants had a duty to ensure that Zdroik and his co-employee had a degree of training and that failure to do so would have made the injury to Zdroik probable. A reasonable fact finder could further conclude that one or more of the Defendants consciously failed to ensure that Zdroik and his co-employees were properly trained to avoid death or serious injury.

A reasonable fact-finder could therefore conclude that the alleged failure to train Zdroik, Frazier or Yenter by the defendant co-employees rises to the level of gross negligence. Therefore, a jury should decide based upon the evidence submitted and testimony of the witnesses whether Zdroik's Defendant co-employees', Brian Ostrowski, John Ostrowski, Steven Runstrom and Phil Gliniecki failed to ensure Zdroik, Frazier, or Yenter were properly trained and whether the failure, if any, arose to the level of gross negligence as required in Iowa Code sections 85.20 and defined in *Thompson v. Bohlken*.

IT IS THERFORE THE RULING OF THE COURT that the Defendants' Motion for Summary Judgment is overruled.

So Ordered
/s/_____
Greg Milani, District Court Judge
Eighth Judicial District of Iowa

APPENDIX G — RELEVANT STATUTORY AND REGULATORY PROVISIONS

49 U.S.C. § 20106. Preemption

(a) NATIONAL UNIFORMITY OF REGULATION.—

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

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(b) CLARIFICATION REGARDING STATE LAW

CAUSES OF ACTION.—(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) JURISDICTION.—Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

(Pub. L. 103–272, § 1(e), July 5, 1994, 108 Stat. 866; Pub. L. 107–296, title XVII, § 1710(c), Nov. 25, 2002, 116 Stat. 2319; Pub. L. 110–53, title XV, § 1528, Aug. 3, 2007, 121 Stat. 453.)

Appendix G

49 C.F.R. § 214.1 Purpose and scope.

(a) The purpose of this part is to prevent accidents and casualties to employees involved in certain railroad inspection, maintenance and construction activities.

(b) This part prescribes minimum Federal safety standards for the railroad workplace safety subjects addressed herein. This part does not restrict a railroad or railroad contractor from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

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49 C.F.R. § 214.5 Responsibility for compliance.

Any person (an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; ... any independent contractor providing goods or services to a railroad; and any employee of such ... independent contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $853 and not more than $27,904 per violation, except that penalties may be assessed against individuals only for willful violations, and where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed $111,616 per violation may be assessed. See appendix A to this part for a statement of agency civil penalty policy.

[57 FR 28127, June 24, 1992, as amended at 63 FR 11620, Mar. 10, 1998; 69 FR 30593, May 28, 2004; 72 FR 51196, Sept. 6, 2007; 73 FR 79701, Dec. 30, 2008; 77 FR 24419, Apr. 24, 2012; 81 FR 43109, July 1, 2016; 82 FR 16132, Apr. 3, 2017]

Appendix G

49 C.F.R. § 214.7 Definitions.

Unless otherwise provided, as used in this part—

***

Employee means an individual who is engaged or compensated by a railroad or by a contractor to a railroad to perform any of the duties defined in this part.

Employer means a railroad, or a contractor to a railroad, that directly engages or compensates individuals to perform any of the duties defined in this part.

***

On-track safety means a state of freedom from the danger of being struck by a moving railroad train or other railroad equipment, provided by operating and safety rules that govern track occupancy by personnel, trains and on-track equipment.

On-track safety manual means the entire set of on-track safety rules and instructions maintained together in one manual designed to prevent roadway workers from being struck by trains or other on-track equipment. These instructions include operating rules and other procedures concerning on-track safety protection and on-track safety measures.

***

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Railroad means all forms of non-highway ground transportation that run on rails or electro-magnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, and (2) high-speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Railroad bridge means 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.

Railroad bridge worker or bridge worker means any employee of, or employee of a contractor of, a railroad owning or responsible for the construction, inspection, testing, or maintenance of a bridge whose assigned duties, if performed on the bridge, include inspection, testing, maintenance, repair, construction, or reconstruction of the track, bridge structural members, operating mechanisms and water traffic control systems, or signal, communication, or train control systems integral to that bridge.

Roadway maintenance machine means a device powered by any means of energy other than hand

power which is being used on or near railroad track for maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems. Roadway maintenance machines may have road or rail wheels or may be stationary.

Roadway maintenance machines equipped with a crane means any road-way maintenance machine equipped with a crane or boom that can hoist, lower, and horizontally move a suspended load.

Roadway work group means two or more roadway workers organized to work together on a common task.

Roadway worker means any employee of a railroad, or of a contractor to a railroad, whose duties include inspection, construction, maintenance or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track or with the potential of fouling a track, and flagmen and watchmen/lookouts as defined in this section.

Roadway worker in charge means a roadway worker who is qualified under §214.353 to establish on-track safety for roadway work groups, and lone workers qualified under §214.347 to establish on-track safety for themselves.

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[57 FR 28127, June 24, 1992, as amended at 61 FR 65975, Dec. 16, 1996; 67 FR 1906, Jan. 15, 2002; 68 FR 44407, July 28, 2003; 76 FR 74614, Nov. 30, 2011; 79 FR 66500, Nov. 7, 2014; 81 FR 37884, June 10, 2016]

Appendix G

49 C.F.R. § 214.301 Purpose and scope.

(a) The purpose of this subpart is to prevent accidents and casualties caused by moving railroad cars, locomotives or roadway maintenance machines striking roadway workers or roadway maintenance machines.

(b) This subpart prescribes minimum safety standards for roadway workers. Each railroad and railroad contractor may prescribe additional or more stringent operating rules, safety rules, and other special instructions that are consistent with this subpart.

(c) This subpart prescribes safety standards related to the movement of roadway maintenance machines where such movements affect the safety of roadway workers. Except as provided for in §214.320, this subpart does not otherwise affect movements of roadway maintenance machines that are conducted under the authority of a train dispatcher, a control operator, or the operating rules of the railroad.

[61 FR 65976, Dec. 16, 1996, as amended at 81 FR 37885, June 10, 2016]

Appendix G

49 C.F.R. § 214.303 Railroad on-track safety programs, generally.

(a) Each railroad to which this part applies shall adopt and implement a program that will afford on-track safety to all roadway workers whose duties are performed on that railroad. Each such program shall provide for the levels of protection specified in this sub-part.

(b) Each on-track safety program adopted to comply with this part shall include procedures to be used by each railroad for monitoring effectiveness of and compliance with the program.

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49 C.F.R. § 214.307 On-track safety programs.

(a) Each railroad subject to this part shall maintain and have in effect an on-track safety program which complies with the requirements of this sub-part. New railroads must have an on-track safety program in effect by the date on which operations commence. The on-track safety program shall be retained at a railroad's system headquarters and division headquarters, and shall be made available to representatives of the FRA for inspection and copying during normal business hours. Each railroad to which this part applies is authorized to retain its program by electronic recordkeeping in accordance with §§217.9(g) and 217.11(c) of this chapter.

(b) Each railroad shall notify, in writing, the Associate Administrator for Safety and Chief Safety Officer, Federal Railroad Administration, RRS–15, 1200 New Jersey Avenue SE., Washington, DC 20590, not less than one month before its on-track safety program becomes effective. The notification shall include the effective date of the program and the name, title, address and telephone number of the primary person to be contacted with regard to review of the program. This notification procedure shall also apply to subsequent changes to a railroad's on-track safety program.

(c) Upon review of a railroad's on-track safety program, the FRA Associate Administrator for Railroad Safety and Chief Safety Officer may, for cause stated, may disapprove the program. Notification of such disapproval shall be made in writing and specify the basis for the disapproval

decision. If the Associate Administrator for Railroad Safety and Chief Safety Officer disapproves the program:

(1) The railroad has 35 days from the date of the written notification of such disapproval to:

(i) Amend its program and submit it to the Associate Administrator for Railroad Safety and Chief Safety Officer for approval; or

(ii) Provide a written response in support of its program to the Associate Administrator for Railroad Safety and Chief Safety Officer.

(2) FRA's Associate Administrator for Railroad Safety and Chief Safety Officer will subsequently issue a written decision either approving or disapproving the railroad's program.

(3) Failure to submit to FRA an amended program or provide a written response in accordance with this paragraph will be considered a failure to implement an on-track safety program under this subpart.

[81 FR 37885, June 10, 2016]

Appendix G

49 C.F.R. § 214.309 On-track safety manual.

(a) The applicable on-track safety manual (as defined by §214.7) shall be readily available to all roadway workers. Each roadway worker in charge responsible for the on-track safety of others, and each lone worker, shall be provided with and shall maintain a copy of the on-track safety manual.

(b) When it is impracticable for the on-track safety manual to be readily available to a lone worker, the employer shall establish provisions for such worker to have alternative access to the information in the manual.

(c) Changes to the on-track safety manual may be temporarily published in bulletins or notices. Such publications shall be retained along with the on-track safety manual until fully incorporated into the manual.

[81 FR 37885, June 10, 2016]

Appendix G

49 C.F.R. § 214.311 Responsibility of employers.

(a) Each employer is responsible for the understanding and compliance by its employees with its rules and the requirements of this part.

***

Appendix G

49 C.F.R. § 214.313 Responsibility of individual roadway workers.

(a) Each roadway worker is responsible for following the on-track safety rules of the railroad upon which the roadway worker is located.

***

(c) Each roadway worker is responsible to ascertain that on-track safety is being provided before fouling a track.

***

Appendix G

49 C.F.R. § 214.341 Roadway maintenance machines.

(a) Each employer shall include in its on-track safety program specific provisions for the safety of roadway workers who operate or work near roadway maintenance machines. Those provisions shall address:

(1) Training and qualification of operators of roadway maintenance machines.

(2) Establishment and issuance of safety procedures both for general application and for specific types of machines.

(3) Communication between machine operators and roadway workers assigned to work near or on roadway maintenance machines.

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(5) Space between machines and roadway workers to prevent personal injury.

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(b) Instructions for the safe operation of each roadway machine shall be provided and maintained with each machine large enough to carry the instruction document.

(1) No roadway worker shall operate a roadway maintenance machine without having been trained in accordance with § 214.355.

(2) No roadway worker shall operate a roadway maintenance machine without having knowledge of the safety instructions applicable to that machine. For purposes of this paragraph, the safety instructions applicable to that machine means:

(i) The manufacturer's instruction manual for that machine; or

(ii) The safety instructions developed to replace the manufacturer's safety instructions when the machine has been adapted for a specific railroad use. Such instructions shall address all aspects of the safe operation of the crane and shall be as comprehensive as the manufacturer's safety instructions they replace.

(3) No employer shall assign roadway workers to work near roadway machines unless the roadway worker has been informed of the safety procedures applicable to persons working near the roadway machines and has acknowledged full understanding.

(c) Components of roadway maintenance machines shall be kept clear of trains passing on adjacent tracks. Where operating conditions permit roadway maintenance machines to be less than four feet from the rail of an adjacent track, the on-track safety program of the railroad shall include the procedural instructions necessary to provide adequate clearance between the machine and passing trains.

[61 FR 65976, Dec. 16, 1996, as amended at 79 FR 66501, Nov. 7, 2014]

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49 C.F.R. § 214.343 Training and qualification, general.

(a) No employer shall assign an employee to perform the duties of a roadway worker, and no employee shall accept such assignment, unless that employee has received training in the on-track safety procedures associated with the assignment to be performed, and that employee has demonstrated the ability to fulfill the responsibilities for on-track safety that are required of an individual roadway worker performing that assignment.

(b) Each employer shall provide to all roadway workers in its employ initial or recurrent training once every calendar year on the on-track safety rules and procedures that they are required to follow.

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[61 FR 65976, Dec. 16, 1996, as amended at 81 FR 37889, June 10, 2016]

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49 C.F.R. § 214.345 Training for all roadway workers.

Consistent with §214.343(b), the training of all roadway workers shall include, as a minimum, the following:

(a) Recognition of railroad tracks and understanding of the space around them within which on-track safety is required.

(b) The functions and responsibilities of various persons involved with on-track safety procedures.

(c) Proper compliance with on-track safety instructions given by persons performing or responsible for on-track safety functions.

(d) Signals given by watchmen/look-outs, and the proper procedures upon receiving a train approach warning from a lookout.

(e) The hazards associated with working on or near railroad tracks, including review of on-track safety rules and procedures.

(f) Instruction on railroad safety rules adopted to comply with § 214.317(b).

[61 FR 65976, Dec. 16, 1996, as amended at 81 FR 37889, June 10, 2016]

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49 C.F.R. § 214.355 Training and qualification of each roadway worker in on-track safety for operators of roadway maintenance machines.

(a) The training and qualification of roadway workers who operate roadway maintenance machines shall include, as a minimum:

(1) Procedures to prevent a person from being struck by the machine when the machine is in motion or operation.

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(4) Methods to determine safe operating procedures for each machine that the operator is expected to operate.

(b) Initial and periodic (as specified by §243.201 of this chapter) qualification of a roadway worker to operate roadway maintenance machines shall be evidenced by demonstrated proficiency.

[61 FR 65976, Dec. 16, 1996, as amended at 81 FR 37890, June 10, 2016]

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49 C.F.R. § 214.357 Training and qualification for operators of roadway maintenance machines equipped with a crane.

(a) In addition to the general training and qualification requirements for operators of roadway maintenance machines set forth in §§214.341 and 214.355 of this subpart, each employer shall adopt and comply with a training and qualification program for operators of roadway maintenance machines equipped with a crane to ensure the safe operation of such machines.

(b) Each employer's training and qualification program for operators of roadway maintenance machines equipped with a crane shall require initial and periodic qualification of each operator of a roadway maintenance machine equipped with a crane and shall include:

(1) Procedures for determining that the operator has the skills to safely operate each machine the person is authorized to operate; and

(2) Procedures for determining that the operator has the knowledge to safely operate each machine the person is authorized to operate. Such procedures shall determine that either:

(i) The operator has knowledge of the safety instructions (*i.e.,* the manufacturer's instruction manual) applicable to that machine; or

(ii) The operator has knowledge of the safety instructions developed to replace the manufacturer's safety instructions when the machine has been adapted for a specific railroad use.

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Roadway Worker Protection, 49 C.F.R. part 214, Preamble, Federal Railroad Administration, 61 FR 65959-01, 1996 WL 716080 (F.R.) (Dec. 16, 1996)

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One commenter inquired whether contractors would be in compliance with the rules by adopting the on-track safety programs of the host railroad. The committee understood the circumstances under which most contractors conduct their work and in an effort to promote uniformity and safety, as well as minimize the burden on contractors to railroads, the committee concluded that contractors should not devise their own complete programs in most instances, but would be expected to comply with programs established by the railroads on which they are working (61 FR 10531). Contractors would be responsible for ensuring that their employees received the appropriate training and that their employees complied with the appropriate railroad's program, but would not necessarily need their own FRA approved program. *Id.* at *65961-62.

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Employees of contractors to railroads are included in the definition if they perform duties on or near the track. They should be protected as well as employees of the railroad. The responsibility for on-track safety of employees will follow the employment relationship. Contractors are responsible for the on-track safety of their employees and any required training for their employees. FRA expects that railroads will require their contractors to

adopt the on-track safety rules of the railroad upon which the contractor is working. Where contractors require specialized on-track safety rules for particular types of work, those rules must, of course, be compatible with the rules of the railroad upon which the work is being performed. *Id.* at *65966.

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Contractors will be required to conform to the on-track safety programs on the railroads upon which they are working. Contractors whose employees are working under a railroad's approved on-track safety program need not submit a separate on-track safety program to FRA for review and approval. *Id.* at *65967.

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An employer, such as a contractor, whose roadway workers work on another employer's railroad, will usually adopt and issue the on-track safety manual of that railroad for use by their employees. It will be the employer's responsibility to provide the manual to its employees who are required to have it and to know that each of its employees is knowledgeable about its contents. *Id.*

***

Section 214.311 addresses the employer's responsibility in this rule. This section applies to all employers of roadway workers. Employers may be railroads, contractors to railroads, or railroads whose employees are working on

other railroads. Although most on-track safety programs will be implemented by railroads rather than contractors, both are employers and as such each is responsible to its employees to provide them with the means of achieving on-track safety. *Id.*

***

Railroads are specifically required by §214.303 to implement their own on-track safety programs. Section 214.311 however, places responsibility with all employers (whether they are railroads or contractors) to see that employees are trained and supervised to work with the on-track safety rules in effect at the work site. The actual training and supervision of contractor employees might be undertaken by the operating railroad, but the responsibility to see that it is done rests with the employer. *Id.*

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49 C.F.R. § 243.1(c) and (d).

The requirements in this part do not exempt any other requirement in this chapter[]" and "[u]nless otherwise noted, this part augments other training and qualification requirements contained in this chapter.

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I.C.A. § 85.20 Rights of employee exclusive

The rights and remedies provided in this chapter, chapter 85A, or chapter 85B for an employee, …, on account of injury, occupational disease, or occupational hearing loss for which benefits under this chapter, chapter 85A, or chapter 85B are recoverable, shall be the exclusive and only rights and remedies of the employee or … the employee's … personal or legal representatives, dependents, or next of kin, at common law or otherwise, on account of such injury, occupational disease, or occupational hearing loss against any of the following:

1. Against the employee's employer.

2. Against any other employee of such employer, provided that such injury, occupational disease, or occupational hearing loss arises out of and in the course of such employment and is not caused by the other employee's gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of another.

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Amended by Acts 1970 (63 G.A.) ch. 1051, § 6; Acts 1974 (65 G.A.) ch. 1111, § 1; Acts 1980 (68 G.A.) ch. 1026, § 17, eff. Jan. 1, 1981; Acts 1997 (77 G.A.) ch. 37, § 1; Acts 2016 (86 G.A.) ch. 1108, H.F. 2392, §§ 12, 13, eff. July 1, 2016; Acts 2018 (87 G.A.) ch. 1130, H.F. 648, § 1, eff. April 26, 2018.