IN THE DISTRICT COURT OF LANCASTER COUNTY NEBRASKA

ALEXANDER LANHAM, Plaintiff, vs. BNSF RAILWAY COMPANY, A Corporation, Defendant.	)	Case No. CI17-106 ORDER (re Motion for Summary Judgment)

This matter came on for consideration on October 15, 2018. The above-named parties were represented by their respective counsel. At issue was the Defendant's Motion for Summary Judgment (the Motion). Evidence was adduced, and arguments and briefs were submitted.

For the reasons set forth below, the Motion for Summary Judgment is overruled as to the issue of jurisdiction and sustained as to the issue of negligence.

JURISDICTION.

The claims of the Plaintiff arose while he was working on a railroad crew in Texas. At the time that the Plaintiff initiated this lawsuit, he was a resident of Nebraska (having since relocated to Oklahoma). The Defendant renews its jurisdictional arguments for the purpose of the Motion.

The Defendant makes several jurisdictional arguments. First, it argues that general

jurisdiction is not proper because the Defendant is not "at home" in Nebraska and further submits that it did not consent to general jurisdiction in Nebraska, and that exercising jurisdiction on an appointment basis would violate the Due Process Clause of the 14th Amendment. Similarly, BNSF argues that corporations do not "consent" to general jurisdiction by the appointment of a registered agent. The Plaintiff submits that the court should deny the motion of BNSF regarding jurisdiction as BNSF waived the due process argument because of the consent to personal jurisdiction in Nebraska.

Having considered the arguments and authority submitted by counsel, the court finds, as to jurisdiction, the motion should be and therefore is overruled.

NEGLIGENCE.

1. Duty under the FELA.

The FELA provides that railroads "shall be liable in damages to any person suffering injury while he is employed... resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51.

In order to present a prima facie case of negligence under the FELA, the Plaintiff must provide evidence showing that: (1) he was injured within the scope of his employment; (2) his employment was in furtherance of his employer's interstate transportation business; (3) his employer was negligent; and (4) that negligence played some part in causing his injury. ***Van Gorder v. Grand Trunk W. R.R.***, 509 F.3d 265, 269 (6th Cir. 2007). A plaintiff must prove the "traditional common law elements of negligence: duty, breach, foreseeability, and causation." ***Borger v. CSX Transp., Inc.***, 571 F.3d 559, 563 (6th Cir. 2009). Under FELA, a railroad has a duty to provide its employees with a reasonably safe workplace; this does not mean that a railroad has the duty to eliminate all workplace dangers, but only the duty of exercising reasonable care to that end. ***Van Gorder, supra.***

FELA has a relaxed standard of proximate cause, requiring only that an employer's negligence "played any part in causing the injury." ***CSX Transp., Inc. v. McBride***, 564 U.S. 685, 131 S. Ct. 2630, 2641, 180 L. Ed. 2d 637 (2011) (internal quotation marks and edits omitted).

FELA was enacted in response to the dangers inherent in working for the railroad and the high rate of injuries among railroad employees. ***Consolidated Rail Corp. v. Gottshall***, 512 U.S. 532, 542-43, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994). It establishes a standard for employer liability that is more lax than common law negligence standards and eliminates a number of traditional defenses such as contributory negligence, the fellow-servant rule, and assumption of risk. ***Williams v. National R.R. Passenger Corp.***, 161 F.3d 1059, 1061 (7th Cir. 1998); ***Gottshall***, 512 U.S. at 542-43. An employee in a FELA action is "entitled to a jury if 'the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury,'" a standard set forth by the Supreme Court in ***Rogers v. Missouri Pacific R.R. Co.***, 352 U.S. 500, 506 (1957).

The U.S. Court of Appeals notes:

> Summary judgment is proper if, upon viewing the facts in the light most favorable to the non-moving party and giving her or him the benefit of all reasonable inferences, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In ruling on a motion for summary judgment a court must not weigh evidence or make credibility determinations.

Kenney v. Swift Transp., Inc., 347 F.3d 1041, 1044 (8th Cir. 2003) (citations omitted).

Additionally:

> The Eighth Circuit has recognized that Congress intended FELA to be a broad statute designed to be liberally interpreted to fulfill the intent of Congress. FELA is a remedial statute grounded in negligence although the statute does not define negligence. To prevail on a FELA claim, a plaintiff must generally prove the traditional common law components of negligence which include duty, breach of duty, causation, injury, and damages. This

> includes showing whether the railroad failed to use reasonable or ordinary care under the circumstances. The plaintiff's burden of proof in a FELA action is significantly lighter than it would be in an ordinary negligence case. In a FELA action, the railroad is liable if its negligence played any part, even the slightest, in producing the injury.

Thomas v. Union Pac. R.R. Co., No. 4:16-cv-04052, 2018 U.S. Dist. LEXIS 132160, at *6 (W.D. Ark. Aug. 7, 2018) (interior citations omitted).

The FELA does not impose strict liability on employers. A plaintiff must still prove the traditional, common-law elements of negligence, i.e., duty, breach, foreseeability, and causation. ***Adams v. CSX Transportation, Inc.***, 899 F.2d 536, 539 (6th Cir. 1990). A "trial court is justified in withdrawing FELA issues from the jury's consideration only in those extremely rare instances where there is a zero probability either of employer negligence or that any such negligence contributed to the injury of an employee". ***Pehowic v. Erie Lackawanna R.R. Co.***, 430 F.2d 697, 699-700 (3d Cir. 1970). While this burden is very low, this does not mean that a railroad has the duty to eliminate all workplace dangers, but only the "duty of exercising reasonable care." ***Van Gorder*** at ***269.***

2. Facts.

Relative to the Motion for Summary Judgment, the parties submitted statements of facts and disputed facts including the Defendant's Statement of Undisputed Material Facts (Defendant's Statement), the Plaintiff's Response to Defendant's Statement of Facts (Plaintiff's Response), the Plaintiff's Statement of Disputed Facts (Plaintiff's Statement) and the Defendant's Response to Plaintiff's Statement of Disputed Facts (Defendant's Response).

With very few exceptions, the Plaintiff did not disagree with the Defendant's Statements. (See Plaintiff's Response.) Those few exceptions generally related to the Plaintiff's assertions that he was not accustomed to working with a mixture of tie types,

that proper safety briefings were not conducted, and that the Defendant should have been warned to watch out how he placed his feet to avoid getting a foot pinned and injured.

The court will not repeat the rather extensive fact statements by the parties but highlight those facts necessary for this decision.

At all times material hereto, the Plaintiff had worked as a track laborer on a rail production gang. These groups repaired and replaced rail using the accoutrements of the trade. On the date of the injury, the Plaintiff was new to the production gang he had been assigned to. He was pulled off his initial task in order to remove Pandrol clips. Pandrol clips are used to hold rails onto a tie plate. The plate is spiked to the railroad tie and holds the rail in place. A Pandrol clip exerts pressure against the base of the rail to hold the rail in place. The Plaintiff was using methods that he had been taught and were familiar to him. The Plaintiff was familiar with the process of knocking off Pandrol clips and had done so thousands of times. The Plaintiff testified that removing the Pandrol clips was generally a "no-brainer" task. The Plaintiff was aware of the Defendant's safety rules addressing the use of a sledgehammer to remove such a Pandrol clip. In particular, BNSF Safety Rule S-7.8.3 directed employees to "lightly" tap the Pandrol clips with the sledgehammer. At the time of the injury, the weather was good and there were no issues with the general site condition. The Plaintiff admits that all relevant conditions were visible to him.

The Plaintiff was trained on the Defendant's Maintenance of Way Operating Rules, Maintenance of Way Safety Rules, and other relevant rules. He was annually certified on the Maintenance of Way Operating Rules. He was aware of the Defendant's Engineering Instructions. Removing Pandrol clips was an "every day" experience for the Plaintiff during the time he worked for the Defendant. The Plaintiff acknowledges receiving on-the-job training to remove Pandrol clips in Wyoming.

On the day the Plaintiff was injured. he was moved from one task and directed to remove Pandrol clips. Those clips were in an area of track having a mixture of wood and concrete railroad ties which the Plaintiff claims was unusual. There were only a "handful" of Pandrol clips that needed to be removed. The Plaintiff testified the first clip he approached was rusty and "gunked up." On his first swing at the first clip the Plaintiff used a full 320° swing with a sledgehammer. During that swing, the sledgehammer glanced off the Pandrol clip and struck the Plaintiff's foot. His foot did not kick back or release like it might have normally but was trapped against a McKay clip sticking up behind his foot. (A McKay clip is a different type of tie clip that routinely is used with concrete ties and protrudes higher than a Pandrol clip.) The blow to the Plaintiff's trapped foot caused the injury.

The Defendant requires supervisors to perform pre-job surveys and job briefings. A morning job briefing was conducted on the day of the injury. The Plaintiff is critical of the context and conduct of that briefing. The Plaintiff was not given a job briefing when he switched tasks and was given no additional training on the specifics of removing Pandrol clips.

3. Arguments of the Parties.

The Defendant submits that the Plaintiff has no evidence of the Defendant's negligence. In particular, the Defendant submits that the weather conditions were not a problem, it was a nice day with good visibility, there were no defective tools or equipment, the Plaintiff had extensive experience and had safely removed thousands of Pandrol clips, and the Plaintiff was familiar with the rules and regulations governing the task he was assigned. The Defendant points to the Plaintiff's admission that a briefing on the mixture of wood and concrete ties would not have changed anything. Restated, the Defendant contends

summary judgment is proper because the Defendant met the appropriate standard of care and that the Plaintiff's negligence was the sole cause of the injury.

On the other hand, the Plaintiff submits the Defendant's negligence is apparent. The Plaintiff alleges that the Defendant was negligent by failing to furnish and provide the Plaintiff with "a reasonably safe place to work", with "reasonably safe equipment for work" and failed to provide "reasonably safe methods of work." Plaintiff's Complaint, ¶ 16. The Complaint further alleges the Defendant was negligent in failing to conduct a proper pre-job survey, failing to conduct a proper job briefing, failing to give adequate instructions, failing to assign a proper workload, failing to provide functioning equipment and safety devices, failing to properly inspect the work site to discover defective or unsafe conditions, failing to provide adequate manpower to complete the work tasks required and failing to allot sufficient time to perform the work. Plaintiff's Complaint, ¶ 17.

The Plaintiff ultimately submits that the Defendant's "failure to conduct a proper pre-job survey and proper job briefings, as well as its failure to instruct [the Plaintiff] on how to remove Pandrol clips under the unique conditions along this area of rail, contributed to [his] injury and prevents summary judgment" Plaintiff's Brief, page 27. The Plaintiff goes on to argue that, "the McKay clip that caused the injury was not the focal point of his task. He was focused on the job at hand, which was removing the Pandrol clips from the wood ties. Without having been warned of the risks of the McKay clip position behind his foot, he did not look at the McKay clip....[His] injury could have been prevented had the Assistant Foreman or Foreman taken time to properly instruct him. The Employee in charge should have pointed out the McKay clips mixed in with the Pandrol clips and instructed and demonstrated the safest way to remove the Pandrol clips under these conditions." Plaintiff's Brief, pages 29-30.

4. Analysis.

Summary judgment is appropriate when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." ***Harbin v. Burlington Northern R. Co.***, 921 F.2d 129, 130 (7th Cir. 1990). "Congress enacted the FELA to require employers to shoulder responsibility for damages attributable in whole or in part to their negligence." ***Id.*** at 131. In view of FELA's broad remedial purpose, the quantum of evidence a plaintiff must present to withstand summary judgment is "much less" than in an ordinary negligence action. Nevertheless, the FELA is not a strict liability statute, ***Fulk v. Illinois Cent. R. Co.***, 22 F.3d 120, 124 (7th Cir. 1994), and it does not make the employer an insurer of its employees. ***Inman v. Baltimore & Ohio R.R Co.***, 361 U.S. 138 (1959). To prevail on a FELA claim, a plaintiff must establish the traditional common law elements of negligence, including duty, breach, foreseeability, and causation.

While it is true that an employee is entitled to a jury if "the proofs justify with reason the conclusion that employer negligence played any part, ***even the slightest***, in producing the injury," ***Harbin***, 921 F.2d at 131 (emphasis added), the import of this principle is merely that under the FELA, an employer will be liable for its negligence even if the injured worker was even more negligent. ***Coffey v. Northeast Illinois Regional Commuter Railroad Corp.***, 479 F.3d 472, 476 (7th Cir. 2007).

The United States Court of Appeals for the Sixth Circuit recently stated:

> Under FELA, a railroad has a duty to provide its employees with a reasonably safe workplace; this does not mean that a railroad has the duty to eliminate all workplace dangers, but only the 'duty of exercising reasonable care to that end.'" ***Id.*** (quoting ***Balt. & Ohio S.W.R.R. Co. v. Carroll***, 280 U.S. 491, 496, 50 S. Ct. 182, 74 L. Ed. 566 (1930)). As Seto has admitted, CSXT provided and required that he use the safety gear recommended by the manufacturer of the rivet buster machine. Seto claims that CSXT's safety measures must have been inadequate, as shown by his injury, and should have included the measures previously discussed. This reasoning "would effectively replace the FELA's negligence standard with strict liability" and is not sufficient to establish negligence. ***Borger v. CSX Transp., Inc.***, 571 F.3d 559, 567 (6th Cir. 2009).

Seto v. CSX Transp., Inc., No. 17-5880, 2018 U.S. App. LEXIS 14825, at 13-14 (6th Cir. June 1, 2018).

FELA law does not place a duty on employers to provide specific training on each and every task their employees may have to perform let alone every conceivable circumstance in which their employees may need to perform them. ***Lafevers v. Norfolk Southern Ry. Co,*** 2014 U.S. Dist. Lexis 84778 (holding that railroad was not negligent in failing to train employee on lifting and carrying rails, because the plaintiff was generally trained on proper lifting techniques.)

The Plaintiff cites to a number of cases to support the proposition that the failure-to-warn or train fits the facts here. In the often-cited ***Cincinnati N.O. v. Davis,*** 293 F (1923). In ***Davis,*** an 18-year-old employee jumped down from the engine of the train and started to run forward to throw a switch. He tripped over cross-ties that had been thrown along the track suffering injury. The ***Davis*** court determined that there was a lack of "experience or information" as to his duties and found that the claimant had not been warned or instructed as to those duties. ***Id.*** at 484. Additionally, the Plaintiff relies on ***Marmo v. Chicago R.I.***, 350 F2d 236 (7th Cir, 1965), where the claimant's hand was crushed on his first time performing a task where he had no instruction warning. Again, those circumstances are not present in this case. The Plaintiff was well aware of the circumstances and the modalities of removing the clip at issue and actually violated a known Rule doing so.

Similarly, in ***Lynch v. Northern Reg'l Commuter RR,*** 700 F3d 906 (7th Cir, 2012), the claimant, a job-site mechanic, alleged lack of training, failure to adopt safe work methods and procedures and the failure to inspect, discover and remedy unsafe conditions.

He was injured when the top rail of a fence he was installing fell and struck him. The trial court's summary judgment was vacated with the appellate court determining, in part, that the claimant had never worked in circumstances with the particular elevation difference and had received no training on fence installation relative to the unusual circumstances he faced. The court further determined that the evidence raised a genuine issue of fact as to how the fence rails had been cut by another employee amounting to a negligent breach of duty. Unlike ***Lynch***, the Plaintiff here was extremely familiar with the circumstances and the requirements necessary to execute the job. All the circumstances were clearly in front of him. Further, the Plaintiff does not claim that another employee caused the condition giving rise to the injury.

The Plaintiff correctly points out that the ordinary care required under FELA includes training on how to avoid or reduce injuries. 49 C.F.R. § 217.1, provides generally that "each railroad is required to instruct its employees in operating practices." See ***Madden v. Antonov & A.V. Transp.***, 156 F. Supp. 3rd 1011 (Nebr. 2015). But, the FELA does not require training on each and every task let alone every conceivable circumstance. "Lafevers has not presented and the court has not found any legal authority suggesting that the railroad's duty to train requires it to provide specific training on each task its employees might have to perform." ***Lafevers, supra*** at 3. The Plaintiff suggests that a warning would have caused him to watch out where he placed his feet in order to avoid being trapped between a clip and the sledgehammer. However, the Plaintiff offers no evidence suggesting that the training was, in fact, inadequate under the circumstances, that better training methods existed, that the Defendant knew or should have known of those methods, and that such training might have prevented the injuries. The court cannot find any evidence showing that the Defendant's supervisors were aware of any particular or unusual hazard confronting the Plaintiff on the day of the injury. There was nothing about

the tracks, clips, ties, ballast, or the tools being used that were not absolutely apparent to the Plaintiff. Importantly, the Plaintiff even admitted that a briefing on the mixture of wood or concrete ties would not have changed anything. The Plaintiff fails to suggest how the spacing between the clips amounted to negligence on behalf of the Defendant.

> There is some degree of risk inherent in all work, and the level of risk that is acceptable for any given job depends on the specific nature of that job. For example, "[a] yardman dealing with moving cars cannot expect the same safety as a clerical worker in a ticket office." ***Conway v. Consol. Rail Corp.***, 720 F.2d 221, 223 (1st Cir. 1983) (quoted in ***Potrykus v. CSX Transp., Inc.***, No. 3:09CV744, 2010 U.S. Dist. LEXIS 73722, 2010 WL 2898782, at *4 (N.D. Ohio July 21, 2010)). An employer is only required to eliminate those dangers "that can reasonably be avoided in light of the normal requirements of the job." ***Stevens v. Bangor & Aroostook R.R. Co.***, 97 F.3d 594, 598 (1st Cir. 1996) (emphasis added) (quoted in ***Potrykus, No. 3:09CV744***, 2010 U.S. Dist. LEXIS 73722, 2010 WL 2898782, at *4).

Lewis v. CSX Transp., Inc., 778 F. Supp. 2d 821, 845 (S.D. Ohio 2011)

The Plaintiff also argues that the morning job briefing on January 16, 2014 was poorly conducted "largely because too much work was scheduled for the day." Plaintiff Brief pg. 23. "FELA negligence may be predicated on the railroad's failure to furnish sufficient help if, but for that failure, the injury would not have occurred." ***Montgomery v. CSX Transp., Inc.***, 376 S.C. 37, 55, 656 S.E.2d 20 (2008). The courts look to the nature of the assigned task. In this case, the Plaintiff does not argue that removing Pandrol clips is more than a one-person job. Assigning an extra worker to that task may decrease the number of clips to remove and the total time it would take to complete the job, but it would not change the nature of the work. Under these circumstances, the fact that the Defendant did not have or did not assign additional workers to assist him does not constitute negligence. The Plaintiff points to no evidence suggesting that if the crew had more members he would not have been injured. Further, the Plaintiff cites no authority suggesting such a manpower issue, assuming it exists, constitutes negligence on the part of the Defendant in this case.

On the other hand, the Defendant points to several summary judgment cases where an employee failed to show railroad negligence starting with ***Jennings v. Ill. Centr. R. Co.***, 993 S.W.2d. 66 (1998) (railroad was not negligent for failure to inspect when a tool routinely used and inspected by the plaintiff broke and caused injury) and ***Lafevers, supra.*** (railroad was not negligent for failing to instruct and train on how to lift and carry materials). "[The] mere fact that a tool slips from the hand of a user does not raise a presumption of negligence," ***Stillman v. Norfolk & W. Ry.***, 811 F.2d 834, 836-37 (4th Cir. 1987).

The Defendant also relies on ***Ambold v. Seaboard Air Line R. Co.***, 345 F. 2d. 30 (4th Cir 1965) in which the claimant was injured when he stepped across a stepwell, slipped, and fell. The claimant was familiar with the job and conditions, there was no offending grease or oil, there was sufficient lighting, and the claimant admitted that he simply misjudged the stepping distance. In that case, the court concluded that to find negligence of the railroad, even the slightest, would result in making the railroad and insurer of the safety of its employees.

Liability cannot be imposed for failure to warn or protect the employees or an independent contractor against obvious, apparent, or known dangers. "How could there be a legal duty to warn Anderson when the situation was perfectly obvious to Anderson...? The law is well settled that there is no duty to warn of known or obvious dangers and no negligence, therefore, in failing to do so." ***Atl. C. L. R. Co. v. Anderson***, 221 F.2d 548, 553 (5th Cir. 1955) (citations omitted). This is not a case of contributory negligence or assumed risk but of sole negligence. The Plaintiff in the case at hand put himself in danger by failing to follow the stated rules and be somewhat observant to the conditions.

The Plaintiff has presented no evidence that *properly* removing the Pandrol clip posed any known danger to himself or others or that the Defendant overlooked a condition that was known, or should have been known, to be dangerous. Taking the position of the Plaintiff is paramount to having a supervisor stand over every working employee to recount the rules and describe every observable circumstance that might pose a risk.

The court is aware of the diminished burden in a FELA case. Both the Nebraska Supreme Court and the Nebraska Court of Appeals have repeatedly emphasized FELA's remedial nature and that granting summary judgment is the exception and not the rule in a FELA case. ***Deviney v. Union Pac. R.R. Co.***, 280 Neb. 450, 786 N.W.2d 902 (2010); ***Miakar v. Union Pac. R.R. Co.***, No. A-10-662, 2011 Neb. App. LEXIS 92 (Ct. App. July 12, 2011). See also, ***Lavender v. Kurn***, 327 U.S. 645, (1946) (judgment as a matter of law is appropriate "[o]nly when there is *a complete absence of probative facts* to support the" plaintiff's claim (emphasis added); ***Wilson v. Chicago, Milw., St. P., & Pac. R.R. Co.***, 841 F.2d 1347, 1353 (7th Cir. 1988) ("The evidence required for a finding of negligence [under FELA] dictates a corresponding *'slightest'* hurdle for avoiding [summary judgment.]").

Under the FELA:

> [I]f an injury has multiple causes, "it is sufficient if the railroad's negligence played a part—no matter how small—in bringing about the injury." As the Fifth Circuit has held, the plaintiff's burden of proof in a FELA case is "featherweight" and "a judgment as a matter of law against the plaintiff in a FELA suit is appropriate only when there is a complete absence of probative facts supporting the plaintiff's position."

Johnson v. Clark Gin Serv., No. 15-3290, 2017 U.S. Dist. LEXIS 73224, at *24 (E.D. La. May 12, 2017).

However, in the case at hand, the Plaintiff acknowledges that the weather conditions were not a problem. There was good visibility. Removing Pandrol clips was a common task for the Plaintiff. The Plaintiff also acknowledges that there was nothing

wrong with his tools or the equipment he was using. The Plaintiff admitted that a further briefing about a mix of wooden and concrete ties would not have made a difference to him. The Plaintiff had extensive experience in using a sledgehammer to remove Pandrol clips and considered doing so a "no-brainer" task. It is also undisputed that the instructions for removing Pandrol clips required *lightly* tapping of the Pandrol clip pursuant to the Defendant's Safety Rule S-7.8.3. Yet, the Plaintiff has admitted using a 320° swing. Despite the fact that the Pandrol clip at issue might have been "gunked up", the Plaintiff provides no evidence to suggest his initial swing was reasonable given the applicable Rule. Further, the protrusion of the McKay clip behind the Plaintiff's foot when he decided to make the swing with his sledgehammer was clearly obvious. The Plaintiff's argument that he was focused on the Pandrol clip (to the exclusion of the apparent McKay clip) points to no quantifiable failure of the Defendant in this case. The Plaintiff's actions here are much the same as the employee in ***Arnold, supra*** (misjudged a stepwell).

"If the employee's own negligence was the sole cause of the accident, then it is proper to conclude that the employer negligence played no role in causing the injury." ***Toth v. Grand Trunk***, 306 F3d 351, 355 (6th Cir 2002). See ***Beimert v. Burlington Northern, Inc.***, 726 F2d 412, 414 (8th Cir). (While contributory negligence is not a bar to an action brought under the FELA yet where the negligence is that of the employee alone there can be no recovery." ***Barnett v. Terminal R. Ass'n of St. Louis***, 228 F2d 756, 762(8th Cir).

The Plaintiff was performing a routine task. He was familiar with the task. He had safely completed the task thousands of times. The Plaintiff does not allege that his equipment was defective or unsafe. He could not articulate how any further training would have been of assistance and in fact denied that instruction would have assisted him. The operation was under his control and there was nothing obscuring the Plaintiff's view of the conditions. Interestingly, the Plaintiff's liability expert did not endorse the fact that the

Plaintiff took such a mighty blow to strike the Pandrol clip. The Defendant's Safety Rule S-7.8.3, directed employees to stand facing the rail and *lightly* tap the Pandrol clip with a sledgehammer to remove it. Whether it was a McMay clip, a rock, or a piece of debris, the Plaintiff was in the closest position to see and evaluate the circumstances and act accordingly. Given the circumstances, the court can only find that the Plaintiff's negligence was the sole cause of the injury.

Plaintiff has failed to show evidence that the Defendant has even a featherweight of negligence. Accordingly, this is one of "the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury," ***Rogers, supra***, at 510.

CONCLUSION.

To take the Plaintiff's position would make any FELA Defendant an insurer of safety since there are no facts that would fall outside of the failure to warn and train claims of the Plaintiff in this case. There is no evidence in this case that the Defendant failed to use ordinary care under the circumstances or failed to do what a reasonably prudent employer would have done under the circumstances to improve safety in the working environment. The Plaintiff's negligence was, as a matter of law, the sole proximate cause of the accident he suffered. Accordingly, the Motion for Summary Judgment of the Defendant on the issue of jurisdiction is overruled and on the issue of negligence is sustained. The case is dismissed at Plaintiff's cost. Any other relief sought is hereby denied.

SO ORDERED on January 4, 2019.

BY THE COURT:

ROBERT R. OTTE
DISTRICT JUDGE