IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ERIC FELLAND,

Plaintiff,

v.

WISCONSIN CENTRAL LTD.,
a corporation,

Defendant.

OPINION AND ORDER

11-cv-656-slc

Plaintiff Eric Felland brings this civil suit for monetary damages against his former employer, Wisconsin Central, Ltd., pursuant to the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.* Felland alleges that he developed carpal tunnel syndrome in the Fall of 2010 while conducting required 10-year tests on Wisconsin Central's railway signal equipment; according to Felland, Wisconsin Central was negligent in assigning him to the task without assistance. Wisconsin Central has filed two motions for summary judgment: the first, on the ground that Felland cannot establish causation because the testimony of his expert, Dr. Gottlieb, is inadmissible, dkt. 11; the second, on the ground that Felland has not adduced sufficient evidence to warrant a jury trial on the elements of duty of care and foreseeability. Dkt. 26.[1]

As discussed below, I do not reach the issue of causation because I agree that Felland lacks sufficient evidence from which a reasonable jury could find Wisconsin Central negligent. Dr. Gottlieb's report, even if having some potential to establish causation, is not probative of Wisconsin Central's alleged negligence, and Felland has nothing else. Therefore, I am granting Wisconsin Central's second-filed motion for summary judgment and denying as moot its first-filed motion for summary judgment.

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[1] Wisconsin Central requested and was granted leave to file two motions for summary judgment. Dkts. 37, 38.

From those proposed findings that are properly supported by admissible evidence, I find the following facts to be material and undisputed:

FACTS

Defendant Wisconsin Central Ltd. is a corporation engaged in operating a railroad as a common carrier engaged in interstate commerce. At all relevant times, Plaintiff Eric Felland was employed by defendant as a Signal Testman. In this position, Felland was responsible for inspecting, maintaining, repairing, installing and testing active warnings devices at railroad-street crossings.

In the Fall of 2010, Felland was assigned duties in connection with a 10-year Federal Railroad Administration inspection of the Whitehall Subdivision, which had 24 signalized crossings spaced along a 116 mile stretch of railroad tracks. This inspection required testing the conductivity of each signal cable running from the signal box (or "bungalow") that housed the power source to the signal mast that supported the bells, flashers, cantilevers or gates.

When Felland learned of this assignment, he asked his supervisor, Brian Johnson, for assistance with the testing. Asistance sometimes had been provided by a member of the signal crew in connection with previous 10-year FRA inspections. At his deposition, Felland testified that he asked for this help in order to get the testing completed more quickly. Dep. of Eric Felland, dkt. 15 at 12-13. According to Felland, Johnson told him that no help was available.[2]

[2] This fact is disputed: according to Johnson, he told Felland that Felland could ask the signal maintainer for help if he needed it, but he never asked. As discussed below, this dispute turns out not to be material.

Felland conducted the 24 signal tests on ten days over a 44-day span from September to November 2010, testing 1 to 4 crossings on each of the ten testing days (with a mathematical average of 2.4 tests per day).[3] During the testing period, Felland reported to his office in Marshfield, Wisconsin at 7 a.m., where he would work for a while, then leave between 8 and 9:30 a.m. to drive to the signalized crossing or crossings that he planned to test that day. Because of the distance of the crossings from the Marshfield office, Felland spent at least a couple hours each testing day commuting in his company vehicle. Upon arriving at a signalized crossing to be tested, Felland sometimes had to wait half an hour or more to obtain authority to begin testing the signals. In addition, on testing days he took a lunch break and a couple of 10-minute breaks, time permitting. After testing the crossings on a given day's agenda, Felland would drive back to Marshfield, then leave work to go home at 3:00 p.m.

Conducting the 10-year FRA inspection of the signalized crossings required Felland to perform these tasks: drive to a signalized crossing, obtain the appropriate permission to disable the signals, then "open" the cables for each signal at the signal mast and at the bungalow box. To do this, Felland used a terminal wrench,[4] to loosen"test nuts" or "test straps" to separate the continuity between the cables. Once the wires were open, Felland went to the signal bungalow,

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[3] The parties dispute whether Felland was expected to continue performing all of his ordinary job duties during the testing period. Felland asserts that he was not relieved of his other duties, but the only fact he proposes about those duties is that he used a terminal wrench. Felland does *not* allege that his other duties outside of the FRA inspection caused or contributed to his carpal tunnel syndrome. On this factual record, it is immaterial for the purposes of this motion whether the FRA duties were in addition to or instead of his regular duties.

[4] So named because it is designed to loosen and tighten battery terminal bolts or posts. The one Felland used was similar in size and appearance to an ordinary screwdriver with a socket wrench head, *see* photograph, dkt. 44-3.

attached a "megger" tool[5] to the appropriate wire and to the ground connection, energized the set and took a reading to verify that voltage was not lost through the insulation of the wire. Once the test was finished, he re-tightened the nuts with the terminal wrench. Sometimes, the bungalow contained spare wires that also had to be tested, which sometimes required additional loosening and tightening of test nuts or straps using the terminal wrench. By Felland's estimate, it took 40 to 60 minutes to complete the testing at a single crossing station.

Felland previously had been issued a drill that he could use in place of the terminal wrench to loosen and tighten the nuts but he had lost it. Although Felland was aware that he probably would have received another drill if he had he asked, he never asked because he did not think that he needed a drill.

While performing the testing on the Whitehall Subdivision, Felland began noticing tingling and numbness in both hands, which worsened over the course of the testing. However, Felland did not report this fact to anyone at the railroad, and as just noted, he never asked the railroad to provide him with a replacement drill. At his deposition, Felland denied having experienced similar symptoms at any time before he began the FRA testing.

On November 9, 2010, Felland sought treatment with Drs. Jingo Huang and Ewa Kubica, who diagnosed carpal tunnel syndrome; a nerve conduction study on December 3, 2010 confirmed that diagnosis. Felland was then referred to Dr. Viktor Gottlieb, a plastic surgeon, to discuss surgical options.

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[5] More formally known as a megohmmeter; the top half of one can be seen at the bottom of the photograph docketed as 44-4.

In preparation for his treatment of Felland, Dr. Gottlieb reviewed Felland's nerve conduction study and his most recent treating physician record. Felland informed Dr. Gottlieb that he had to twist wires and performing wrenching as part of his job, but Dr. Gottlieb does not recall Felland specifically describing the motions in any way; Dr. Gottlieb incorrectly assumed that Felland was describing the work of a switchman and that he was using a large tool to operate railroad switches. In a report issued on December 17, 2010, Dr. Gottlieb indicated that plaintiff had carpal tunnel syndrome that likely was related to his work as a railroad switchman.

Dr. Gottlieb performed left carpal tunnel and right carpal tunnel release on December 29, 2010 and January 10, 2011, respectively. After recovering from surgery, Felland returned to work with no restrictions.

At the time he treated Felland, Dr. Gottlieb was not familiar with the nuts that Felland had to loosen and re-tighten in order to perform the 10-year FRA inspection, he was not familiar with the tools that Felland used, he did not know how many rotations Felland had to make with his wrench in a given work day, he did not know how much time Felland spent turning a wrench, he did not know the pace at which Felland worked, he did not know how much force Felland used to operate his terminal wrench and he had not observed Felland or anyone else actually performing the work required for the inspection. Dr. Gottlieb does not have any training or background in ergonomics, is not aware of any studies or journal articles that analyze CTS for railroad workers and has not authored any articles on CTS.[6]

[6] Wisconsin Central has asked this court to exclude Dr. Gottlieb's testimony regarding causation on the grounds that Felland did not meet the disclosure requirements under Fed. R. Civ. P. 26(a)(2) and because Dr. Gottlieb's opinion fails the test for admissibility under Fed. R. Civ. P. 702. *See* Dkt. 12 at 10-33. I do not reach the question of causation because I am granting Wisconsin Central's motion for summary judgment on the ground that Felland has produced no evidence that Wisconsin Central was negligent. Dr. Gottlieb's opinion does not address this element of Felland's claim.

OPINION

Summary judgment is proper where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56©; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Spath v. Hayes Wheels Int'l–Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). The reviewing court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Spath*, 211 F.3d at 396.

In responding to a summary judgment motion, the nonmoving party may not simply rest upon the allegations contained in the pleadings but must present specific facts to show that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 322–26; *Johnson v. City of Fort Wayne*, 91 F.3d 922, 931 (7th Cir. 1996). A genuine issue of material fact is not demonstrated by the mere existence of "some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, or by "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson*, 477 U.S. at 252.

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. 51 *et seq.*, governs the liability of common carriers by railroads in interstate or foreign commerce for injuries to employees resulting from the employer's negligence. Enacted in 1908 in response to the exceptionally high number of railroad workers killed or maimed on the job (281,645 in 1908 alone) and the hazards inherent in railroading, FELA prescribes:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death 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.

Under FELA, a railroad has a duty to exercise reasonable care in furnishing its employees a safe place to work. *Urie v. Thompson*, 337 U.S. 163, 179 n.16 (1944)). FELA does not, however, hold employers to be the insurers of their employees. *Inman v. Baltimore & Ohio R.R. Co.*, 361 U.S. 138, 140 (1959). Rather, the plaintiff must show both negligence on the part of the employer and causation before liability will be found. *Heater v. Chesapeake & O. Ry. Co.*, 497 F.2d 1243, 1246 (7th Cir. 1974). *See also Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) ("FELA does not make the employer the insurer of the safety of [its] employees while they are on duty. The basis of [its] liability is negligence, not the fact that injuries occur.").

Relying on *Harbin v. Burlington Northern R. Co.*, 921 F.2d 129 (7th Cir. 1990), Felland correctly notes that in deciding the motion for summary judgment, this court must "view the evidence presented through the prism of the substantive evidentiary burden," *id*. at 130, and that in FELA cases, "the quantum of evidence required to establish liability . . . is much less than in an ordinary negligence action." *Id*. at 131. As the Supreme Court reiterated last year, Congress's use of the broad phrase "resulting in whole or in part from the [railroad's] negligence" means that the railroad is liable if "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *CSX Transportation, Inc. v. McBride*, __U.S. __, 131 S. Ct. 2630, 2643 (2011). *See also Gottshall*, 512 U.S. at 542-43; *Rogers v. Missouri Pacific R.R.*, 352 U.S. 500, 506

(1957) (emphasis added). *Heater*, 497 F.2d at 1246-47 ("The fact that there may have been a number of causes of the injury is . . . irrelevant as long as one cause may be attributable to the railroad's negligence."). Thus, a plaintiff in a FELA case need only show slight proof of causation in order to have his case presented to the jury.

I do not agree with Felland, however, to the extent that he may be suggesting that this relaxed burden of proof regarding causation also applies to his burden of proof regarding the railroad's negligence. Although it is true that in cases such as *Harbin* and the Seventh Circuit's most recent FELA case, *Lynch v. Northeast Regional Commuter Railroad Corp.*, __ F.3d __, 2012 WL 5290146 (7th Cir. Oct. 29, 2012), the court at times uses language that could be read to suggest that the lightened standard of proof applies to both causation and negligence, the court explicitly denounced this suggestion in *Coffey v. Northeast Illinois Regional Commuter R. Corp. (METRA)*, 479 F.3d 472 (7th Cir. 2007), declaring that:

> causation and failure to exercise due care are separate inquiries, and the relaxation of common law standards of proof applies to the first rather than to the second.
>
> *Id.* at 476.

Indeed, in *Lynch*, 2012 WL 5290146, *4, in which the court reversed the district court's grant of summary judgment to the railroad, the only question before the court was "whether the district court properly granted summary judgment based on Lynch's failure to raise a genuine issue of fact as to causation."

As the Supreme Court noted in *McBride*, the *negligence* inquiry is guided by ordinary common law principles, which asks the jury to consider whether the railroad observed that degree of care that would have been observed by a reasonably prudent person under the same

or similar circumstances. *McBride*, 131 S. Ct. at 2643 (citing *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 117 (1963)). *See also Van Gorder v. Grand Trunk Western R.R., Inc.*, 509 F.3d 265, 269 (6th Cir. 2007) ("[T]he relaxed causation standard under FELA does not affect [plaintiff's] obligation to prove that [the railroad] was in fact negligent"); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 338 (5th Cir. 1997) ("[N]othing in the text or structure of the FELA-Jones Act legislation suggests that the standard of care to be attributed to either an employer or an employee is anything different than ordinary prudence under the circumstances"); *but see Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 n. 1 (2nd Cir. 1996) (noting that although Supreme Court had "not expressly held that a relaxed standard for negligence, as distinguished from causation, applies under FELA," the second, third and ninth circuits had construed FELA in that manner). In any case, even if it is the case that Felland can establish liability only upon"slight" evidence of negligence, he still loses because he lacks such evidence. *See Williams v. Nat'l R.R. Passenger Corp.*, 161 F.3d 1059, 1061 (7th Cir. 1998) ("A FELA plaintiff who fails to produce even the slightest evidence of negligence will lose at summary judgment.")

To survive summary judgment, Felland must submit evidence creating a genuine issue of fact on the common law elements of negligence, including duty, breach and foreseeability. *Green v. CSX Transportation, Inc.*, 414 F.3d 758, 766 (7th Cir. 2005). A railroad breaches its duty to its employees when it fails to use ordinary care under the circumstances or fails to do what a reasonably prudent person would have done under the circumstances to make the working environment safe. *Williams*, 161 F.3d at 1062 (citation omitted); *Tiller v. Atlantic C.L.R. Co.*, 318 U.S. 54, 67 (1943).

Wisconsin Central argues that Felland has failed to produce evidence showing that his working conditions were unsafe or that the railroad should have reasonably have foreseen that the conditions were unsafe or inadequate. As the railroad points out, Felland has not produced any expert testimony establishing that the tasks associated with the 10-year FRA inspection were inherently unsafe or were likely to lead to carpal tunnel syndrome. Further, Felland does not claim that he was not provided with the proper tools to perform the work or that he was not adequately trained. Finally, argues Wisconsin Central, even if the job was somehow unsafe, Felland has produced no evidence showing that the railroad knew or should have known of the risks associated with the work.

Although Felland's response is not a model of clarity, I do not understand him to be contending that the tasks associated with the 10-year inspection were inherently unsafe or of such a nature that the railroad knew or should have known that employees performing those tasks were likely to develop carpal tunnel syndrome. Indeed, such a contention would require expert testimony, which Felland does not have. *See Doty v. Ill. Cent. R.R. Co.*, 162 F.3d 460, 462 (7th Cir.1998) (research showing general link between occupational stress and carpal tunnel syndrome was insufficient to establish that the plaintiff's particular workplace was unsafe without well-founded expert testimony addressing the specific conditions of the plaintiff's workplace or the type of tools the plaintiff had to use); *Lewis v. CSX Transportation, Inc.*, 778 F. Supp. 2d 821, 837-38 (S.D. Ohio 2011) (without expert testimony, report discussing occupational risk factors for carpal tunnel syndrome failed to create jury question as to safety of tools and equipment railroad provided to plaintiff or conditions under which plaintiff was required to work). *Cf. Aparicio v. Norfolk & W. Ry. Co.*, 84 F.3d 803, 807 (6th Cir. 1996)

(describing the detailed evidence– including an ergonomist's expert testimony that the plaintiff's job involved particular risk factors associated with carpal tunnel syndrome and that there were known remedial measures that the railroad could have implemented– that would permit a jury to conclude that railroad was negligent).

Even if this court were to permit Felland to introduce Dr. Gottlieb's testimony that Felland's use of a terminal wrench at work was a cause of his carpal tunnel syndrome (an issue I am not deciding in this order), it is undisputed that Dr. Gottlieb did not conduct a study of the tasks associated with the FRA testing, he did not analyze the ergonomic forces required to perform those tasks and he did not opine whether there were steps the railroad could have taken to make this job safer to perform. Absent these specifics, Dr. Gottlieb's general testimony regarding causation does not create a genuine issue of fact as to Wisconsin Central's negligence. In any event, as noted previously, Felland frames no clear argument to the contrary.

Instead, Felland identifies two alleged omissions by Wisconsin Central that he contends were breaches of its duty to provide a reasonably safe workplace: 1) it failed to provide sufficient manpower to perform the FRA testing; and 2) it failed to assign Felland to work within his physical abilities. Neither of these claims is backed by admissible evidence sufficient to support a jury finding of negligence.

First, central to both of these allegations is Felland's affidavit testimony that, before the testing began, Felland "advised his supervisor that he had pain and swelling in his hands after using a terminal wrench." Plt.'s Br. in Opp. to Mot. for Summ. Judg., dkt. 48, at 11; Aff. of Eric Felland, dkt. 50, at ¶10. But this assertion squarely contradicts Felland's earlier deposition testimony, in which Felland not only denied *reporting* his hand and finger symptoms to anyone

at the railroad, he denied that he had ever *had* such symptoms at any time before he began the FRA testing:

> Q: Did you report [your symptoms] to anyone at the railroad?
>
> A: No.
>
> Q: Why not?
>
> A: Because I wasn't sure what was happening. I've had, you know, you do a project and, you know, your fingers or your hands or your body is a little sore. After a while, you know, it goes away. Well, this wasn't starting to – you know, it wasn't going away towards the mid, end of November. That's why I went to the doctor, and I didn't know what it was at that time, you know, I mean–
>
> Q: Did you ever experience that type of numbness and tingling and pain that wouldn't go away before?
>
> A. No.

Dep. of Eric Felland, dkt. 15, at 76.

Felland gave this same answer later in the deposition:

> Q: Did you ever have stiffness or soreness in your hands prior to doing the work on the Whitehall sub?
>
> A: No.

Id. at 78.

At the summary judgment stage the court must interpret the evidence in the light most favorable to Felland, but this presumption is not a license for Felland to contradict his sworn deposition testimony with a later-prepared affidavit aimed at evading summary judgment. As the Court of Appeals for the Seventh Circuit has explained,

> [w]e have long followed the rule that parties cannot thwart the purposes of Rule 56 by creating 'sham' issues of fact with affidavits that contradict their prior depositions . . . . If such contradictions were permitted . . . 'the very purpose of the summary judgment motion–to weed out unfounded claims, specious denials, and sham defenses–would be severely undercut.'
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> *Bank of Illinois v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1168-69 (7th Cir. 1996) (citation omitted).

The court cautioned district courts not to disregard testimony unless the contradiction with deposition testimony was unmistakably clear, *id*. at 1169-70, but that criterion has been met here. Felland's later-filed affidavit cannot be reconciled with his prior, unequivocal deposition testimony; indeed, Felland offers no explanation for this diametric change in his testimony. Under these circumstances, his affidavit testimony is plainly incredible and cannot be used to defeat summary judgment.

Apart from his own affidavit, the only other evidence to which Felland points in support of his claim that Wisconsin Central had a duty to provide assistance for the FRA testing is his testimony that assistance had been provided in the past and that he asked his supervisor for help before testing began in 2010. But just because help had been provided in the past and would have made Felland's job easier is not evidence that the FRA testing was unreasonably strenuous or that Wisconsin Central made Felland perform the testing in an unreasonably unsafe manner. Instead, Felland must point to some evidence, however slight, that allows an inference that having to perform the FRA testing alone created an unreasonably unsafe work environment. As the court observed in *Lewis*, 778 F. Supp. 2d at 840, "[i]f evidence of overtime alone would suffice, any employee who develops a cumulative trauma injury would be able to establish a jury question as to inadequate manpower simply by showing he or she generally worked extended hours."

The court in *Lewis* noted that in most FELA cases involving an inadequate-assistance claim that survived summary judgment, the employee had presented evidence that he was forced to perform a particular task that usually required more assistance and that "under the circumstances, it was unreasonable to require the plaintiff to perform the task without assistance." *Id*. (citing *Ross v. Chesapeake & O. Ry.*, 421 F.2d 328 (6th Cir. 1970) (plaintiff was injured because he was required to lift or drag a 600 pound barrel by himself); *Hamilton v. CSX Transp., Inc.*, No. 3:08 CV 2601, 2009 WL 3353557, at *3 (N.D. Ohio Oct. 15, 2009) (denying CSX's motion for summary judgment on the plaintiff's FELA negligence claim where there was evidence that the foreman failed to provide the plaintiff with help carrying a 100 pound keg, such assistance was readily available, and CSX knew the risks involved in having an individual lift the 100 pound kegs without assistance); *Beeber v. Norfolk S. Corp.*, 754 F. Supp. 1364, 1372 (N.D. Ind.1990) (finding sufficient evidence to allow the issue of inadequate assistance to be considered by the jury where the plaintiff showed that although he had recently sustained a hernia injury, his employer assigned him to a 100–car train with only two other employees well knowing that lengthy freight trains have separated in the past and that the repairs would require the plaintiff to lift heavy equipment); *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 43–45, 54–55, 656 S.E.2d 20, 23–24, 29–30 (S.C. 2008) (holding that the plaintiff presented sufficient evidence to raise a jury question as to whether CSX was negligent in failing to provide sufficient manpower where the plaintiff submitted the affidavits of two expert witnesses who stated that it was unreasonable and went against common industry practice for the railroad to assign the plaintiff to a particular task without any assistance)).

Here, Felland has presented no evidence that it was unreasonable for Wisconsin Central to have assigned him to perform the FRA testing alone. Although there is evidence that assistance might have been provided when this testing had been done in the past, there is no evidence that assistance was necessary due to the demands of the work, or to avoid a known risk of injury. Indeed, Felland testified at his deposition that the reason he asked for help was so the testing could be completed more quickly; he did not say that he asked for help because the job was too strenuous to perform on his own. Felland presents no evidence regarding what is common in the industry, or that Wisconsin Central had actual or constructive notice that Felland would develop carpal tunnel syndrome if he performed the testing alone. Indeed, the inference that Felland would have the court draw—that more help = less wrenching = less chance of injury—is not necessarily correct. As the railroad points out, working with a helper, Felland may well have tested more stations each day, which could have meant as much or more daily wrenching per worker. Essentially, any hypothesized change in the ratio of wrenching time per worker is speculative.

Further, and more saliently, Felland has not even established that the railroad required him to use the terminal wrench. By his own admission, Felland knew that, simply by asking, he could have obtained a drill to tighten and loosen the nuts. Although Felland offers a number of reasons why he preferred the wrench over the drill, his implication that the railroad "required" him to use a wrench during the FRA testing period is not supported by the record.

All told, at this "put up or shut up" moment in his lawsuit, Felland has not produced evidence that would allow a reasonable jury to conclude that Wisconsin Central failed to do what a reasonably prudent person would have done under the circumstances to make the

working environment safe. The mere fact that more assistance might have made his job easier by splitting the work or completing the job more quickly does not support the reasonable inference that Wisconsin Central was negligent for not providing such assistance. Wisconsin Central's motion for summary judgment on negligence will be granted.

ORDER

IT IS ORDERED THAT:

1. Defendant Wisconsin Central's motion for summary judgment on the elements of duty of care and foreseeability, dkt. 26,is GRANTED.

2. Defendant's motion for summary judgment on causation, dkt. 11, is DENIED as unnecessary in light of the court's ruling on defendant's other motion for summary judgment.

3. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 6th day of November, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge