2015 IL App (1st) 1142164-U

THIRD DIVISION
June 3, 2015

No. 1-14-2164

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES SMITH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 11 L 9676
	)	
UNION PACIFIC RAILROAD COMPANY,	)	Honorable
	)	Susan Zwick,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Pucinski and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Various evidentiary rulings made by trial court in the course of plaintiff's trial did not constitute an abuse of discretion and, either alone or in combination, did not deprive plaintiff of a fair trial. Judgment in favor of defendant affirmed.

¶ 2 Plaintiff-appellant, James Smith, appeals from a jury verdict in favor of defendant-appellee, Union Pacific Railroad Company on Smith's claim under the Federal Employers' Liability Act. 45 U.S.C. §51, *et seq.* (West 2010). Smith alleged that Union Pacific failed to provide him a reasonably safe place to work and, as a result, he sustained

compensable injuries to his cervical spine. On appeal, Smith challenges a number of evidentiary rulings made by the trial court during the course of the trial. Finding no error, we affirm.

¶ 3 BACKGROUND

¶ 4 Smith began employment with Union Pacific in 1998 at the age of 50 as a utility clerk. From July 2007 until July 2010, he was employed in Union Pacific's train yard in Council Bluffs, Iowa. At the time Smith's spinal injury was diagnosed in 2010, he was 62 years old. Smith had several pre-existing health issues including diabetes, high blood pressure and a heart condition. In 2010, he was 5'4" tall and weighed 210 pounds.

¶ 5 Smith alleged that his job primarily required him to transport train crews through the train yard to and from their assignments. In his complaint, Smith claimed that the terrain of the train yard was uneven and marked with numerous potholes of which Union Pacific was aware. Smith claimed that as a result of repetitive trauma experienced during countless trips through the train yard over three years, he sustained injuries to his spinal cord.

¶ 6 Sometime in 2010, Smith began experiencing tingling in his left hand and went to the emergency room because he was concerned it was related to his heart condition. After it was determined that the tingling was not heart-related, Smith was referred to a neurosurgeon who informed him that his spinal cord was dangerously compressed and swollen. The neurosurgeon recommended immediate surgery, but Smith declined, electing instead to get a second opinion.

¶ 7 Smith later saw Dr. Martin Luken, a neurosurgeon in Chicago. An MRI ordered by Dr. Luken revealed anatomical abnormalities and degenerative changes in Smith's

cervical spine resulting in severe spinal cord impingement due to compression. Dr. Luken presumed that Smith had longstanding and progressive degenerative spine disease. Smith displayed symptoms of spastic quadirparesis (a weakness in all four extremities) and Dr. Luken further noted that Smith's spinal canal was congenitally narrow, rendering him more susceptible to the effects of degenerative changes. Based on Smith's description of his job activities, Dr. Luken was of the opinion that the mechanical stress from repeatedly driving over potholes and rough terrain was, in part, the cause of Smith's symptoms. Smith ultimately had surgery to relieve the spinal cord impingement, but still experiences numbness.

¶ 8 After Smith filed his lawsuit on September 9, 2011, the parties engaged in discovery. Smith served one set of interrogatories on Union Pacific. Interrogatory number 20 requested Union Pacific to "[i]dentify each expert witness you expect to testify at the trial of this matter," including "the subject matter of the expert testimony" and "the facts and opinions to which the expert is expected to testify with a summary of the basis thereof." Smith's interrogatory did not reference Illinois Supreme Court Rule 213 (eff. Jan. 1, 2007) and, specifically, Smith did not propound an interrogatory pursuant to Rule 213(f)(1) seeking the identity of lay fact or opinion witnesses. Union Pacific responded to this interrogatory by indicating that it had not yet identified any experts, but to the extent that "experts" included lay opinion witnesses, Union Pacific might call Smith's co-workers or supervisors to testify regarding accepted work practices or the correct way to perform a job. Union Pacific did not further supplement its response to this interrogatory prior to trial.

¶ 9 Union Pacific also propounded interrogatories, including an interrogatory

pursuant to Rule 213(f)(1), requesting Smith to identify lay witnesses he intended to call at trial. In response to this interrogatory, Smith identified five witnesses: four Union Pacific employees (Albert Boston, Clauzel Williams, John Johnson and Mike Tedeschi) and his treating physician, Dr. Luken. Smith also later designated Dr. Luken as his Rule 213(f)(3) expert witness on the issue of causation.

¶ 10 Discovery of fact witnesses was closed on November 28, 2012, and on February 26, 2013, discovery related to independent expert witnesses designated pursuant to Rule 213(f)(2) was closed. The parties originally agreed to a trial date of January 3, 2014. On August 14, 2013, the court set a deadline of October 13, 2013, for the disclosure of Union Pacific's Rule 213(f)(3) controlled expert witnesses with depositions to be completed by December 13. On August 28, 2013, again based on the parties' agreement, the case was re-set for trial to commence on February 13, 2014. Union Pacific did not disclose its Rule 213(f)(3) expert witness until December 6, 2013. In particular, Union Pacific designated Gregory Weames of Page Engineering as its expert on the issue of the ergonomic and safety conditions at the Council Bluffs train yard.

¶ 11 On January 3, 2014, Union Pacific filed a motion to extend discovery to allow the depositions of its expert, to reopen discovery based on recently acquired surveillance video evidence of Smith's activities (which Union Pacific contended were inconsistent with his claimed injuries), and to continue the trial. On January 9, the trial court denied the motion in its entirety as untimely and barred Union Pacific from calling any controlled expert witnesses at trial based on the belated disclosure. The court also entered an order striking a motion for summary judgment filed by Union Pacific as untimely as well.

¶ 12 On January 13, 2014, Smith served Union Pacific with a notice to produce certain of its employees at trial pursuant to Illinois Supreme Court Rule 237 (eff. July 1, 2005). In addition to witnesses already identified by Smith in response to Union Pacific's interrogatories, the notice sought to require Union Pacific to produce three other employees: Brenda Way, Karolyn Burchfield and Lisa Welling.

¶ 13 On January 24, 2014, Union Pacific sent Smith a list of fact witnesses expected to testify at trial, which included George Page and Ronald Calloway. Page is the owner of Page Engineering, the firm that employed Weames, Union Pacific's barred expert. Page is also Union Pacific's in-house manager of ergonomics. Calloway is Union Pacific's director of track programs, the department that inspects, maintains and repairs railroad tracks and their surrounding structures and roadways.

¶ 14 In a January 24, 2013 cover letter accompanying the disclosure, counsel for Union Pacific stated his position that although Smith's failure to propound Rule 213(f)(1) and (f)(2) interrogatories was a "condition precedent to Union Pacific's duty to disclose its trial witnesses," Union Pacific was electing to make a voluntary disclosure to avoid any surprise at trial. Union Pacific also offered to make Page and Calloway available for deposition in advance of the trial. Finally, Union Pacific indicated that Way was no longer in its employ and would therefore not be produced at trial.[1] We discuss below the substance of these witnesses' testimony as it relates to the issues raised on appeal.

¶ 15 On February 3, 2014, Smith filed a motion for sanctions pursuant to Illinois Supreme Court Rule 219(c) (eff. July 1, 2002), seeking to bar Page and Calloway from

[1] Union Pacific did produce Burchfield at trial despite Smith's failure to disclose her as a 213(f)(1) witness and Welling testified as a defense witness.

testifying at trial. (Vol. 2, C384-398) Smith argued that the designation of Page, in particular, was an effort by Union Pacific to circumvent the bar order given that Page was the owner of the engineering firm where Weames worked. Based on the trial court's finding that Smith failed to serve Rule 213(f)(1) interrogatories, the motion for sanctions was denied.

¶ 16 Smith renewed his request to bar Union Pacific from calling Page and Calloway as witnesses in a motion *in limine* presented to the judge assigned to conduct the trial. After an extensive hearing, relief was again denied, but the trial judge indicated that given the order barring Union Pacific from calling expert witnesses, neither Page nor Calloway would be permitted to offer any opinions—lay or expert—and would be limited to fact testimony based on their personal observations. Smith did not elect to depose Page or Calloway prior to their testimony.

¶ 17 The case proceeded to trial on February 19, 2014. Smith sought to introduce the discovery deposition of Way at trial on the ground that she was unavailable to testify given that she no longer worked for Union Pacific. The trial court denied the request in light of Smith's failure to disclose Way as a witness in response to Union Pacific's Rule 213(f)(1) interrogatories. Smith also suggested that the jury should be instructed that a negative inference could be drawn from Union Pacific's failure to call Way as a witness (see Illinois Pattern Jury Instructions, Civil, No. 5.01 (2011)), a request that was also denied given that Way was no longer under Union Pacific's control. The transcript of Way's deposition is not included in the record on appeal.

¶ 18 Dr. Luken, Smith's treating physician and his designated expert, testified via evidence deposition that based on Smith's account of his work activities,

> "if my understanding of his history is accurate and that is that repetitive jouncing about on unpaved surfaces with potholes was a daily occurrence for a prolonged period of time coincident with the onset of his symptoms, the attendant mechanical stresses were a significant causal factor in precipitating the symptoms he described to me."

Dr. Luken also testified that in addition to driving over potholes, Smith described whiplash-type movements, which could also have aggravated Smith's pre-existing conditions.

¶ 19 Over Smith's objection, counsel for Union Pacific was allowed to cross-examine Dr. Luken regarding his lack of personal knowledge of Smith's work activities and, in particular, the type of vehicle Smith drove at work or Smith's exposure to repetitive movements or whiplash while driving the vehicle. Dr. Luken also acknowledged that he was unaware of any epidemiological studies that supported his causation opinion. Finally, Dr. Luken admitted that Smith could have required surgical intervention for his spinal condition regardless of his occupation.

¶ 20 At the conclusion of the trial, the jury returned a unanimous verdict in favor of Union Pacific. The jury also answered "yes" to the following special interrogatory: "Did Union Pacific use ordinary care to provide James Smith with a reasonably safe place to work in the Council Bluffs yard?"

¶ 21 Smith filed a posttrial motion for a new trial or, in the alternative, for judgment notwithstanding the verdict (JNOV) in which he raised errors predicated on (i) the refusal to allow Way's discovery deposition to be read to the jury, (ii) the allowance of Page and

Calloway's testimony and (iii) the improper cross-examination of Dr. Luken. The motion was denied on June 17, 2014, and Smith timely appealed.

¶ 22 ANALYSIS

¶ 23 Although Smith's posttrial motion sought JNOV or, alternatively, a new trial, on appeal he requests only that we reverse and remand the case for a new trial. A motion for a new trial calls upon the trial court to weigh the evidence and determine if the jury verdict is contrary to the manifest weight of the evidence. *Lawlor v. North America Corp. of Illinois*, 2012 IL 112530, ¶ 38. "A verdict is against the manifest weight of the evidence only where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary, and not based upon any of the evidence." *Id.* On review, we will not reverse a trial court's ruling on a motion for a new trial unless the denial constitutes an abuse of discretion. *Id.*

¶ 24 The issues raised by Smith on appeal all relate to evidentiary rulings made either prior to or during trial. Evidentiary rulings made by a trial court will not be disturbed on appeal "absent a clear showing of abuse of discretion." *In re C.N.*, 196 Ill. 2d 181, 223 (2001). "[E]rror in the admission or exclusion of evidence does not require reversal unless one party has been prejudiced or the result of the trial has been materially affected." (internal quotation marks omitted) *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 36 (2010); see also *Schacter v. City of Chicago*, 2011 IL App (1st) 103582, ¶ 80 ("reversal on appeal is not required unless an erroneous evidentiary ruling was substantially prejudicial"). "[T]he burden of establishing prejudice is on the party seeking reversal." *Schacter*, 2011 IL App (1st) 103582, ¶ 80.

¶ 25 As the appellant, Smith bears the burden to provide this court with a record adequate to address the issues he raises.

> "The appellant has the burden to present a complete record on appeal to support [his] claims of error. *Balough v. Northeast Illinois Regional Commuter R.R. Corp.*, 409 Ill. App. 3d 750, 770 (2011) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 393 (1984)). Absent an adequate record, there is no basis upon which to determine whether the trial court abused its discretion in its ruling. *In re Marriage of Blinderman*, 283 Ill. App. 3d 26, 34 (1996). If we are not provided with a complete record, we must presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391-92; see also *Corral v. Mervis Indsutries*, 217 Ill. 2d 144, 157 (2005) ('without an adequate record preserving the claimed error, the reviewing court must presume that the circuit court had a sufficient factual basis for its holding and that its order conforms to the law.')" *Young v. Alden Gardens of Waterford*, 2015 IL App (1st) 131887, ¶ 67.

¶ 26 1. Way's Deposition Testimony

¶ 27 We first address Smith's claim that the trial court erred in refusing to permit him to read portions of Way's discovery deposition to the jury. Smith claims that although he did not list Way in response to Union Pacific's interrogatory seeking the identity of fact witnesses he intended to call at trial, Union Pacific could not have been surprised by his decision to call Way as a witness because he took her deposition. Further, in light of Way's unavailability, Smith contends he should have been allowed to read portions of her deposition testimony to the jury despite his failure to list her as a witness.

¶ 28 We need not decide whether the trial court's refusal to allow Smith to use Way's discovery deposition at trial constituted an abuse of discretion for the simple reason that Smith does not identify what portion of Way's testimony he contends should have been admitted or indicate how this testimony would have made a difference in the outcome of the trial. As noted above, the transcript of the deposition is not in the record and, therefore, we are unable to evaluate the substance or significance of Way's testimony. In addition, Smith's failure to develop any meaningful argument on this point results in forfeiture. See Ill. S. Ct. R. 341 (eff. Feb. 6, 2013) ("[p]oints not argued are waived"); *Lake County Grading Company, LLC v. Village of Antioch*, 2014 IL 115805, ¶ 36 (both argument and citation to relevant authority are required). Consequently, this ruling provides no basis to reverse the jury's verdict in favor of Union Pacific.

¶ 29 2. Page and Calloway's Testimony

¶ 30 Both Page and Calloway were identified as trial witnesses by Union Pacific shortly before trial. Despite the timing of the disclosure, the trial court refused to bar their testimony given Smith's failure to propound Rule 213(f)(1) interrogatories. But mindful of the sanction imposed for Union Pacific's untimely disclosure of experts, the trial court limited the substance of both witness's testimony to factual observations based on their respective employment with Union Pacific. We find no error in the court's treatment of these witnesses.

¶ 31 Smith first contends that by virtue of the various case management orders entered, which set deadlines for completing written and oral discovery, Union Pacific was under a duty to disclose lay fact witnesses it intended to call at trial, notwithstanding Smith's failure to propound interrogatories seeking this information. We disagree.

¶ 32 Discovery deadlines set in case management orders do not relieve litigants of the obligation to propound discovery pursuant to the applicable rules. Rule 213(f)'s obligation to furnish the identity and addresses of witnesses who will testify at trial is expressly conditioned upon the tendering of a "written interrogatory." Ill. S. Ct. R. 213(f) (eff. Jan. 1, 2007). See also *Heriford v. Moore*, 377 Ill. App. 3d 849, 852 (2007) (rejecting the proposition that a party has a continuing duty to disclose evidence it intends to use at trial regardless of whether the other party specifically asks for the information by propounding interrogatories); *In re J.D.*, 332 Ill. App. 3d 395, 403 (2002) ("A party must first serve the opposing party with a written interrogatory before it can allege a violation of Rule 213."). No interrogatory propounded by Smith sought the identification of witnesses who Union Pacific anticipated calling at trial and who had knowledge of the facts relevant to the issues in the case. The closest Smith came to seeking such information was an interrogatory asking Union Pacific to identify any person having "information or knowledge relevant to the plaintiff's claim of sustaining injury to his back and neck while performing his duties as a Driver-Clerk at the Council Bluffs yard." But neither Page nor Calloway had any personal knowledge of Smith's claim and so their disclosure was not called for by this request.

¶ 33 *Fortae v. Holland*, 334 Ill. App. 3d 705 (2002), cited by Smith, does not warrant a different result. In that case, the defendants, seeking reversal of a jury verdict in plaintiff's favor, assigned error to the trial court's decision to bar an undisclosed opinion witness from testifying. Although defendants claimed disclosure was not necessary because plaintiff failed to propound interrogatories requesting the subject matter of any witness's testimony, the record did not include those interrogatories. *Id.* at 711. As the

appellants, it was the defendants' burden to present the court with a complete record. *Balough*, 409 Ill. App. 3d at 770; *Cambridge Engineering v. Mercury Partners*, 378 Ill. App. 3d 437, 445-46 (2007) ("When there is a gap in the record that could have a material impact on the outcome of the case, the reviewing court will presume that the missing evidence supported the judgment of the trial court and resolve any doubts against the appellant."). Further, the court observed the exclusion of witnesses was within the trial court's discretion in light of a case management order directing the defendant to "identify" opinion witnesses by a date certain. *Fortae*, 334 Ill. App. 3d at 712.

¶ 34 Here, in contrast, the record does contain Smith's interrogatories and they do not seek identification of fact witnesses Union Pacific anticipated calling at trial or even reference Rule 213, but seek the identification of "experts" only. The fact that in responding to these interrogatories Union Pacific interpreted them to potentially include its own employees who might be considered "experts," does not mean that if those employees would not be called upon to offer an expert opinion, Union Pacific was nonetheless obligated to disclose their identity. Further, the witnesses identified by Union Pacific were not opinion witnesses and, as employees of Union Pacific, both Page and Calloway possessed personal knowledge of facts relevant to the issue of whether the train yard at Council Bluffs was a reasonably safe workplace. And, unlike *Fortae*, the case management orders entered by the trial court here did not direct any party to "identify" witnesses, but set deadlines for "[w]ritten & 213(f)(1) and (2) discovery to be *answered*." Implicit in these orders is the assumption that such discovery had been propounded.

¶ 35 Finally, *Fortae* recognizes the well-settled proposition that trial courts are vested with broad discretion in discovery matters. *Id.* at 712. Although *Fortae* concluded that the trial court did not abuse its discretion in barring the witnesses, it does not necessarily follow that an order allowing the witnesses to testify would have constituted an abuse of discretion. See *People v. Witherspoon*, 379 Ill. App. 3d 298, 310 (2008) ("Just because the appellate court found no abuse of discretion in the finding that a particular injury was not severe, it does not follow that the opposite finding would have been an abuse of discretion either. Both findings could be rationally defensible.").

¶ 36 Nothing in *Fortae* supports the broad conclusion that a litigant who fails to avail himself of available discovery methods will be relieved of the consequences of that failure by the entry of case management orders setting discovery deadlines. Under the circumstances of this case, we reject Smith's contention that the trial court's case management orders imposed disclosure obligations on the parties—at least for fact witnesses—independent of propounded discovery.

¶ 37 Smith further argues that even if Union Pacific was properly permitted to designate Page and Calloway as lay fact witnesses, their background and expertise lent their testimony the air of expert opinions and allowed Union Pacific to circumvent the order barring it from calling experts at trial. Yet, as discussed below, Page had a decades-long relationship with Union Pacific in the field of ergonomics and thus Smith's suggestion that he was belatedly designated as a subterfuge to avoid the effect of the bar order is without merit. And Calloway's position with Union Pacific required him to oversee repairs to the roadways in the Council Bluffs yard. Further, the record reflects that on multiple occasions prior to and during trial, the experienced trial judge was

careful to adhere to the limitations on Page and Calloway's testimony and prevent Union Pacific from eliciting from them opinions under the guise of discussing their ergonomics (Page) and maintenance (Calloway) work for the railroad. The court recognized that due to each witness's area of expertise, they could properly be categorized as controlled expert witnesses under Rule 213(f)(3), but in light of the bar order, both would be limited to testifying to their respective personal knowledge of conditions in the Council Bluffs train yard.

¶ 38 Notwithstanding this limitation, nothing in the bar order precluded Union Pacific from eliciting from Page and Calloway's their background and experience, as a litigant is entitled to do with any witness. Page testified that he had an advanced degree in industrial engineering and extensive experience in the railroad industry. But he did not elaborate on his work experience outside Union Pacific, identify any materials in the field he has published or list the number of times he had been recognized as a testifying expert, all of which would have been elicited had he been called to render an expert opinion. As the trial court noted, "[i]f you [have] the President of the United States who witnessed an automobile accident, the fact that he's the President of the United States doesn't excuse him from saying who had the red light." The fact that Page and Calloway had longstanding experience in ergonomics and maintenance issues, respectively, was properly part of their testimony and was not objectionable as long as they did not purport to express opinions based on that experience and expertise.

¶ 39 Smith's contention that these witnesses were nonetheless permitted to render opinions is belied by the record. To address this contention, we discuss briefly the testimony of both witnesses.

¶ 40 After summarizing his background, Page's testimony focused on his work in ergonomics for Union Pacific. Page has been consulting on ergonomics issues for Union Pacific informally since 1992 and has been under contract as Union Pacific's manager of ergonomics since 2005. Page explained that ergonomics is the practice of applying scientific principles regarding human capabilities—mental or physical—to conditions in the workplace. As manager of ergonomics, Page works in Union Pacific's safety group whose focus is to ensure the safety of the workplace for Union Pacific's employees.

¶ 41 During his affiliation with Union Pacific, Page performed safety or "day in the life" evaluations for a variety of positions, including utility clerks. Page visited the Council Bluffs train yard on numerous occasions and, in particular, every other year from 2002 to 2008. During these visits, he observed utility clerks at Council Bluffs performing their job responsibilities. On each of these occasions he rode with utility clerks through the train yard and testified that although he observed potholes, they were not out of the ordinary and that clerks typically would "creep" over them.

¶ 42 The trial court allowed the jury to pose questions to all witnesses, including Page. Any question that could have elicited opinion testimony was eliminated. Page was not allowed to testify whether (i) the maintenance-of-way practices of the railroad were highly regulated, (ii) Union Pacific's safety department reached any conclusions about the risk of injury to utility clerks as a result of the performance of their normal job responsibilities or (iii) whether he thought potholes in the train yard posed a safety concern.

¶ 43 Calloway's testimony was similarly fact-based. At the time of trial, Calloway had been employed by Union Pacific since 1978 and beginning in 2001, he worked in the

Council Bluffs train yard. When he first came to Council Bluffs, he held the position of manager of track projects and was promoted in 2009 to director of track maintenance. In both positions, Calloway was responsible for the maintenance of track structures and roads within the train yard in a reasonably safe condition. Although certain of the roadways within the yard are paved with asphalt, Calloway explained that it is necessary for the roads in between tracks to be unpaved since they provide drainage from the elevated track beds. Asphalt surfaces would not drain water and standing water could eventually compromise the tracks.

¶ 44 Potholes occur periodically on both paved and unpaved surfaces. With respect to paved surfaces, depending on the season, they can either be temporarily repaired by Union Pacific employees using hot or cold asphalt filler or, if necessary, larger surfaces can be re-paved by outside contractors. On unpaved surfaces, when potholes appear, ballast or gravel can be used to even the surface or the surface can be graded, either by Union Pacific employees who pull a railroad tie behind a large vehicle or more extensively by an outside contractor. Ashpalt cannot be used to fill potholes in unpaved surfaces because it will not adhere to dirt or gravel. The unpaved surfaces in the Council Bluffs train yard were graded by an outside contractor in 2008.

¶ 45 Calloway (as well as other witnesses) explained that any safety concerns, including potholes, could be reported in a number of ways, including through a safety hotline maintained by Union Pacific for that purpose. During the time Smith worked in the Council Bluffs train yard, employees could either call the hotline and leave a voice message—either anonymously or identifying themselves—or later, type in messages on the system. All safety concerns reported on the hotline or directly to anyone else were

discussed at weekly meetings attended by the heads of all the Union Pacific departments responsible for safety in the train yard. Any reported safety concern remained on the weekly meeting agenda until it was addressed. We note that not once during Calloway's testimony did counsel for Smith object on the basis that he was expressing an opinion.

¶ 46 Smith was afforded the relief he was entitled to under the rules as a result of Union Pacific's failure to timely disclose expert opinion witnesses: Union Pacific was barred from calling its retained experts and its in-house experts were prohibited from offering opinion testimony on any topic, including the relationship between Smith's job duties and his injury. Weames' report—which Union Pacific was precluded from using—illustrates the substantial epidemiological data—which the jury did not hear—supporting the lack of any relationship between Smith's duties as a utility clerk and the condition of his cervical spine. But Page and Calloway's status as in-house experts did not preclude Union Pacific from calling them as fact witnesses since each possessed knowledge of facts relevant to Smith's claims and their testimony was appropriately circumscribed. Thus, we find no error in these evidentiary rulings.

¶ 47 3. Dr. Luken's Cross-Examination

¶ 48 Smith's final issue on appeal relates to what he characterizes as the "incomplete impeachment" of Dr. Luken on cross-examination. Through his evidence deposition testimony, Dr. Luken provided the necessary causal link between Smith's spinal condition and the duties of his utility clerk position.

¶ 49 Smith's claim of error focuses on questions asked of Dr. Luken relating to the bases for his causation opinion. Specifically, counsel for Union Pacific ascertained that Dr. Luken's causation opinion was based entirely on information he obtained from Smith

and that his opinion could change if the information Smith provided to him regarding the repetitive stresses experienced on his job was incorrect. Union Pacific's counsel also ascertained from Dr. Luken that he had not reviewed any information about the type of vehicle Smith drove for Union Pacific to determine whether it was capable of generating the level of vertical acceleration that would have impacted his cervical spine and that he had not consulted any epidemiological studies regarding mechanical stresses of the type described by Smith to determine if they supported his causation opinion.

¶ 50 Citing *Green v. Cook County Hospital*, 156 Ill. App. 3d 826 (1987), Smith contends that this cross-examination, which was not later supported (and could not have been given the bar order) by any expert testimony on behalf of Union Pacific, constituted improper impeachment. We disagree. In *Green*, plaintiff's expert testified that he suffered severe and permanent neurological impairments, including the inability to walk, as a result of defendant's medical negligence. On cross-examination, defense counsel asked whether the expert would be surprised if he learned that plaintiff was capable of standing, walking and other activities, but never called a witness to testify to those facts. Noting that "innuendo through incomplete impeachment is highly prejudicial," the court found that once a foundation for impeachment is laid, counsel has an obligation to produce the impeaching evidence and that without such evidence, the testimony must be stricken or a mistrial declared. *Id*. at 833-34.

¶ 51 Here, defense counsel's cross-examination of Dr. Luken properly tested the bases for his opinions by establishing that his knowledge of Smith's work activities and the "repetitive jouncing" over uneven surfaces came entirely from Smith. Union Pacific introduced substantial evidence at trial that contradicted Smith's contention that potholes

in unpaved roadways were allowed to persist for long periods of time and were not repaired despite complaints.

¶ 52 Further, Dr. Luken admitted that he was aware of studies regarding the force necessary to produce injuries of the type sustained by Smith, but that he had not consulted any of them in forming his opinion. This, too, is a proper method of testing the bases of any expert's opinion. See *Stapleton ex rel. Clark v. Moore*, 403 Ill. App. 3d 147, 156-57 (2010) (cross-examination of plaintiff's expert with articles not included in Rule 213 disclosures not improper); *Maffett v. Bliss*, 329 Ill. App. 3d 562, 577 (2002) ("Supreme Court Rule 231(g) does not require that a party disclose journal articles that the party intends to use in cross-examining the opposing party's opinion witness.").

¶ 53 Finally, any error in connection with Dr. Luken's testimony is manifestly harmless given the jury's affirmative finding that Union Pacific exercised ordinary care to provide Smith a safe workplace. See *Cetera*, 404 Ill. App. 3d at 36. Because the jury specifically found that Union Pacific was not negligent, it necessarily did not reach the causation issue to which Dr. Luken's testimony pertained. Thus, any error in this regard could not have affected the outcome of the trial.

¶ 54 CONCLUSION

¶ 55 In addition to the evidence summarized above, there was substantial other evidence presented at trial regarding safety policies at Union Pacific and safety training provided to its employees, the prompt response to hotline complaints or other complaints about road conditions in the train yard and lowered speed limits (5-10 miles per hour) for vehicles traversing unpaved roadways. All of this evidence supports the jury's determination that Union Pacific did not breach its duty to Smith to provide him a

reasonably safe workplace. None of the evidentiary rulings complained of by Smith were erroneous and thus do not warrant a new trial. We therefore affirm the judgment of the circuit court of Cook County.

¶ 56 Affirmed.