2016 IL App (1st) 142115-U

FIFTH DIVISION
March 18, 2016

No. 1-14-2115

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
FRANK W. STACHULAK,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10 L 2096
	)	
UNION PACIFIC RAILROAD,	)	
	)	Honorable
Defendant-Appellee.	)	Patrick Foran Lustig,
	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's orders entering judgment on a jury verdict in favor of defendant and denying plaintiff's posttrial motion for a new trial is affirmed.

¶ 2 Following a jury trial, the circuit court of Cook County entered judgment on a verdict in favor of defendant Union Pacific Railroad (defendant) and denied plaintiff's posttrial motion for a new trial. On appeal, plaintiff Frank W. Stachulak (plaintiff) argues the matter should be remanded for a new trial because: (1) the verdict was against the manifest weight of the

evidence; and (2) the cumulative effect of multiple errors during the trial were prejudicial to him warranting a new trial. For the following reasons, we affirm the judgment of the trial court.

¶ 3 I. BACKGROUND

¶ 4 On February 17, 2010, plaintiff filed a two-count count complaint in the circuit court of Cook County sounding in negligence and premises liability. Plaintiff alleged that on October 15, 2008, he was injured while working as a fuel driver employed by A.D. Conner, Inc. (A.D. Conner). Defendant had retained A.D. Conner to perform fueling operations on train engines at Global One Intermodal Hub (Global One). Plaintiff alleged that while fueling a train on defendant's premises, the train suddenly moved forward and he was struck on the head by a fuel hose. As a result, plaintiff claimed he sustained serious personal injuries and incurred damages. According to plaintiff, but for defendant's negligent operation of the train he would not have been injured.

¶ 5 On April 28, 2010, defendant filed its answer to the complaint, denying plaintiff's allegations and asserting the affirmative defenses of comparative and contributory negligence.

¶ 6 May 19, 2010, the trial court allowed American Family Insurance, A.D. Conner's insurer, to intervene.

¶ 7 A. Trial

¶ 8 Trial in this matter proceeded, from January 16 through January 24, 2014. The record contains the testimony of five live witnesses: (1) plaintiff; (2) Gabriel Diaz (Diaz), an employee of defendant; (3) Edward Thornton (Thornton), plaintiff's co-worker; (4) Kimberly Stachulak (Kimberly), plaintiff's wife; and (5) Misti Stachulak (Misti), plaintiff's daughter.[1] In addition,

[1] We initially acknowledge that the record provided by plaintiff is incomplete as it is missing the testimonies of three plaintiff's witnesses: (1) Dr. Samir Sharma, a pain medicine physician; (2) Arthur Eubank, Jr., an economic expert; and (3) Steven Blumenthal, a vocational

plaintiff presented the testimonies of three treating physicians by way of videotaped evidence deposition which were admitted into evidence and published to the jury: (1) Dr. Mark Lorenz (Dr. Lorenz), an orthopedic surgeon; (2) Dr. Ira Goodman (Dr. Goodman), a pain medicine specialist; and (3) Dr. Kathy Borchardt (Dr. Borchardt), a clinical psychologist.[2] The record also contains the testimony of two of defendant's witnesses: (1) Anthony Subatine (Subatine), an employee of defendant; and (2) Robert Zalenski (Zalenski), an employee of defendant.[3] Defendant additionally presented the videotaped testimonies of four physicians which were also admitted into evidence and published to the jury: (1) Dr. Roger Lichtenbaum (Dr. Lichtenbaum), a neurosurgeon; (2) Dr. Srdjan Mirkovic (Dr. Mirkovic), a spine surgeon; (3) Dr. Cary Templin (Dr. Templin), an orthopedic surgeon; and (4) Dr. Avi Bernstein (Dr. Bernstein), an orthopedic surgeon.[4] Prior to trial, defendant stipulated that the train moved forward as a result of its negligence.

¶ 9 1. Plaintiff's Witnesses

¶ 10 a. Plaintiff

¶ 11 Frank Stachulak testified that at the time of trial he had been a truck driver for 27 years and had been delivering fuel on behalf of A.D. Conner to defendant for the past six years. On October 15, 2008, at 8:30 p.m. he arrived at defendant's Global One station located at 14th Street

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rehabilitation expert.

[2] Our recitation of the testimony of these physicians derives from transcripts of their videotaped depositions, as the actual videotapes were not included in the record on appeal.

[3] The record also does not include the testimony of defendant's witness Scott Watson. From what can be gleaned from the record, Watson was in charge of investigating plaintiff's claim against A.D. Conner.

[4] Our recitation of the testimony of the physicians called by defendant derives from transcripts of their videotaped depositions, as the actual videotapes were not included in the record on appeal.

and Western Avenue in Chicago. After performing the full safety protocol, plaintiff began fueling the trains one engine at a time. The hose used to transfer fuel to the train engines was 10 inches wide, consisted of solid rubber with steel mesh, and transferred 250 gallons of fuel per minute. The fuel hose was attached to the passenger side of the truck. During the fueling process, plaintiff stood next to his truck with the door open and was approximately three feet away from the fuel hose. There was some slack in the hose, but it did not touch the ground.

¶ 12 At 9:10 p.m., plaintiff was facing the back of his truck when out of the corner of his eye he observed the train engine "shoot forward" 10 to 15 feet. According to plaintiff, "[w]hen it shot forward, I seen the hose coming directly at me. So, instantly, all I could do is duck. I ducked. And the hose hit me in the top of the head, pushing me down and back." The forward motion of the train engine caused the fuel hose to become taut and had snapped the passenger door of his truck off of its hinges.

¶ 13 Plaintiff looked around to see if anyone was outside. He observed Diaz, the mechanic in charge (MIC), coming out of the train that had just moved. Plaintiff asked him what had happened and Diaz replied, "I don't know." Plaintiff then spoke to the foreman, Subatine. According to plaintiff, Subatine requested a written report regarding the damage to the truck. Plaintiff's written statement provided in full:

> "AD Conner Driver
>
> I Frank W[.] Stachulak was working on KG1LA I had Eng. Flaged [*sic*] I was working on Train Eng. UP8350 The time was about 9:10 PM When The Train started To move I Turn off Fuel Pump and ducked under Fuel Hose as it was moveing [*sic*] At Me it Pulled My Door open and Damage [*sic*] The Door Fram [*sic*] I am Happy I am Alert on The Job It was A close call[.]"

Plaintiff did not discuss his statement with Subatine.

¶ 14 Within an hour after the incident and before he left the site, plaintiff called his wife, but he did not speak with her for very long because he felt pressure to continue fueling the train engines. He told his wife that one of the trains had "jumped forward" and he was "hit in the head with the hose." Plaintiff continued working and was able to fuel the remaining trains on his route. Later that evening, plaintiff also called Thornton, another driver for A.D. Conner, and told him he had been injured.

¶ 15 Plaintiff started to get a headache a "little before" he arrived home at 4 a.m. He discussed what had occurred with his wife and, later, his two children. He tried to sleep, but could not. His arms felt weak and he was stiff.

¶ 16 The following afternoon he still had a headache and took some aspirin. He knew that his employer would ask questions about the accident, so he had his wife help him write a report. This written report was longer than the first one because plaintiff "felt as though AD Conner [*sic*] needed a full explanation." The second written statement provided in full:

> "On October 15th 2008 around 9 PM I was fueling engines location Global one 14th + Western Chicago Ill. I had the engines flagged with a flashing red light and all my safety equipment out, one white flashing light on my trailer and yellow rotating light which indicates fueling in process. Train engines are not supposed to move at all[.] I was fueling the trail engine when the engines started moving[.] I reached up and shut the flow of fuel off and immediately started to duck under the fuel hose coming at me Being Pulled by the train engines Pulling away I was not able to clear ducking the hose and was hit in the Back of the hardhat [*sic*] it pushed my head down[.] I saw the MIC getting off the center engine and I asked him what the hell happened he replied I don't know. MIC

called appropriate People to investigate the situation. Damage to truck muffler stack Bent and door hinge Bent, will not close[.]"

Plaintiff gave the second written statement to his dispatch co-worker, Kevin Clancy when he went to work for his next shift.

¶ 17 Plaintiff testified that despite having a headache, stiff shoulders, and weak arms, he did not seek medical treatment the day after the accident because he needed to take care of his family. At his wife's urging, plaintiff was examined by Dr. Yatin Shah (Dr. Shah), his general physician, the following Friday, October 24, 2008. Dr. Shah diagnosed plaintiff with "a slight case of whiplash" and prescribed him pain medicine and muscle relaxants. Plaintiff was also told not to return to work and to obtain a magnetic resonance imaging test (MRI). After receiving the results of the MRI, plaintiff's doctor referred him to Dr. Lichtenbaum, a neurosurgeon. Dr. Lichtenbaum did not make a recommendation, but referred plaintiff to Dr. George DePhillips (Dr. DePhillips) for a second opinion.

¶ 18 Almost two months after the accident, plaintiff began treatment with Dr. Samir Sharma (Dr. Sharma), a pain medicine doctor. He was prescribed Vicodin and received four separate pain injections, which did not relieve his pain.

¶ 19 In March 2009, plaintiff was examined by Dr. Templin, an orthopedic surgeon, who referred him to physical therapy at Pro-Motion. The physical therapy, however, increased plaintiff's pain. By his third treatment of physical therapy, plaintiff testified he did feel "a little bit of relief," but it did not last.

¶ 20 In the beginning of 2010, plaintiff was examined by Dr. Lorenz, an orthopedist. Although Dr. Lorenz suggested surgery, he referred plaintiff to Dr. Stanley Fronczak (Dr. Fronczak) for a second opinion. After being examined by him, Dr. Fronczak also recommended

surgery. In May 2010, plaintiff had surgery on his neck to fuse two discs, C5 to C6 and C6 to C7. After the surgery, his pain decreased and he was prescribed physical therapy. He began "feeling very good" and "did not have the radiating pain down through [his] arms, [his] shoulders, or anything. [His] headaches subsided."

¶ 21 After plaintiff completed the additional physical therapy, he began "work hardening." Plaintiff explained that "work hardening" was a physical therapy program designed to condition him to be strong enough to return to work. After performing one of the work hardening exercises his pain returned. Plaintiff was thereafter examined by Dr. Lorenz who performed a myelogram and directed plaintiff to discontinue all his physical therapy. Plaintiff also took a functional capacity test and learned that he could no longer hold anything weighing more than 32 pounds. According to plaintiff, Dr. Lorenz informed him that he "would never return to work."

¶ 22 Thereafter, plaintiff began treatment with Dr. Borchardt, a psychologist, to help with his anxiety and depression. Plaintiff testified his injury has negatively affected his relationship with his wife and children. He could no longer participate in physical activities with them, has trouble walking up and down stairs, and has not had a day free of pain since the accident occurred.

¶ 23 In 2011 plaintiff began treatment with Dr. Goodman, a pain medicine specialist. Plaintiff began a series of pain injections, which did not remediate his pain. Plaintiff testified that Dr. Goodman also prescribed pain medicine that he was still taking at the time of trial. According to plaintiff, he was physically fit and had no issues with his neck prior to the accident.

¶ 24 On cross-examination, plaintiff initially testified that he had made only two statements regarding the accident; however, he later admitted he had made a total of four written statements. These statements are set forth in order testified to by Plaintiff: (1) the initial October 15, 2008, written statement to Subatine; (2) the October 16, 2008, oral statement dictated to his wife who

placed it in writing for A.D. Conner (second statement); (3) a November 3, 2008, statement to his employer written by his wife and signed by plaintiff; and (4) a October 30, 2008, recorded oral statement to American Family Insurance claims adjuster Sara Freiberg (Freiberg statement).[5] Regarding the second statement, plaintiff acknowledged that it was undated and not addressed to anyone. As for the November 3, 2008, statement, plaintiff acknowledged that the statement indicated his soreness began on October 23, 2008, but clarified that it was filled out by his wife and he "just signed it."

¶ 25 When plaintiff was cross-examined regarding the Freiberg statement, plaintiff's counsel objected claiming the defense had not laid the proper foundation. Plaintiff's counsel argued that plaintiff did not recall what was in the statement; however, plaintiff had testified that he did not "recall everything" he discussed with Freiberg and the trial court allowed defense counsel to cross-examine plaintiff regarding the Freiberg statement. The trial court's decision was also premised on defense counsel's representation that Freiberg had been subpoenaed and defense counsel expected to have her testify and provide the foundation for the document. The following testimony was elicited by defense counsel regarding plaintiff's statements to Freiberg:

> "Q. You were asked by [Freiberg] did you report that to your employer the same day, and do you remember telling her that you didn't realize you were hurt at the time?
>
> A. I recall making a statement to Sarah [*sic*] Freiberg on the phone. I do not recall much of anything that I said. This was a long time ago. This is the very first time I'm seeing this. I have never seen this report before.
>
> * * *
>
> Q. Did you tell Miss Freiberg that you didn't report this injury to your employer

[5] The November 3, 2008, statement is not included in the record on appeal.

till a week later on the 23rd of October?

A. I made the report to my employer the 16th.

Q. Did you tell Miss Freiberg that you didn't report it to your employer until the 23rd?

A. I may have, but I know I presented my one copy to my employer on the 16th.

Q. Do you remember discussing with Miss Freiberg, this is two weeks after the accident, Freiberg that—did you remember discussing with her this statement that you made?

A. I don't recall the specifics, but I do recall speaking with Miss Freiberg.

Q. Do you remember telling her that in your statement that you said you ducked under the hose and then you told her that, well, you didn't really completely duck under it because it hit you in the back of the head, do you remember telling her that?

A. I do know I told her I was hit in the head.

Q. Do you remember talking to her about the other part about, you know, I already said I wasn't hit in the head, and by the way, though, I was?

[Plaintiff's counsel]: Objection, your Honor.

THE COURT: Sustained. Sustained.

[Plaintiff's counsel]: And move to strike and disregard.

THE COURT: Please disregard the last question. It will be stricken.

Q. [Defense counsel:] Do you remember telling Miss Freiberg that after the accident you didn't link together your complaints of pain to the accident until the 23rd of October?

A. I honestly do not remember what I spoke with Miss Freiberg. I know I answered questions on the phone. For what I answered, I do not remember."

¶ 26 Plaintiff further testified that he only remembered talking to Diaz and Subatine after the accident. Plaintiff also acknowledged that in his October 19, 2010, deposition he did not mention that his initial statement to Subatine was limited to property damage. In addition, plaintiff testified on cross-examination that none of defendant's employees encouraged him to finish quickly; however, an A.D. Conner dispatcher did instruct him to hurry.

¶ 27 On cross-examination, in reference to his safety helmet, plaintiff testified he never looked at his helmet to determine if there was any damage to it. Plaintiff also testified he had to bend down six to eight inches to clear the hose, which exited the side of the truck at shoulder height. Defense counsel asked plaintiff, why, if he had been hit on the top of the head, did he state in his November 3, 2008, statement that he was struck in the back of the head. Plaintiff replied that, "no matter what, the bottom line is I get hit in the head, bottom line, hit in the head. Some of the paperwork might say I got hit in the back of the head, some of it may say side of the head, I got hit in the head. I can't say specifically the exact spot I got hit, but I did get hit in the head."

¶ 28 Plaintiff also testified he did not go to the emergency room on the day of the incident because "[a]t the time I did not feel as though I was injured that bad" and he was expecting to be able to relieve the pain with over-the-counter medication.

¶ 29 On redirect examination, the trial court allowed plaintiff's counsel to rehabilitate plaintiff with the Freiberg statement. In doing so, plaintiff testified that he remembered telling Freiberg that he had to duck under the fuel hose, but did not completely duck underneath it because he was hit in the back of the head with the hose.

¶ 30 Regarding the November 3, 2008, statement, plaintiff testified he reported the train moved while he was fueling, he was unable to duck, and the fuel hose hit him in the back of the safety helmet. The statement also indicated that the morning following the accident he had neck

pain and soreness. Plaintiff further testified that on November 3, 2008, he relayed that this pain increased each day.

¶ 31 On the next day of trial, January 21, 2014, counsel for American Family Insurance, presented a motion to quash the subpoena served on Freiberg. American Family Insurance asserted that the subpoena was invalid because Freiberg resided in Wisconsin. The trial court granted the motion to quash the subpoena and as a result Freiberg never appeared in court to testify. Plaintiff did not move to strike the portion of plaintiff's cross-examination regarding the Freiberg statement.

¶ 32 b. Gabriel Diaz

¶ 33 Gabriel Diaz testified that in October of 2008 he was employed by defendant as a MIC. His duties as a MIC included maintaining the train engines. On October 15, 2008, he was attempting to jump start one of the train engines. He was aware that the train he was working on was being fueled. The train then jerked forward, although he could not recall how far it moved forward. Diaz testified that plaintiff asked him why he moved the train and he responded that he did not move the train.

¶ 34 On cross-examination, Diaz testified that it was not a "violent jerk" and that plaintiff did not tell him that he had been injured or struck by the fuel hose. Diaz further testified that plaintiff did not appear to be injured.

¶ 35 c. Edward Thornton

¶ 36 Edward Thornton, a fuel truck driver for A.D. Conner, testified he and plaintiff worked together for 15 years. On October 15, 2008, plaintiff contacted him over the radio and said he had an accident. According to Thornton, plaintiff stated "[t]he train engine had moved, and he was fueling at the time, and the fuel hose lifted up off the ground and hit him, hit him in the

head." When Thornton observed plaintiff at the end of his shift, Thornton testified "[t]he way he was moving, he was in pain, and he was mad." Thornton testified that the following week, when he observed Plaintiff, he appeared to be "uncomfortable" and "acted like somebody that was in pain and just trying to deal with it[.]"

¶ 37 On cross-examination, Thornton testified that on the night of the accident plaintiff called him, but did not say that the trains "shot forward." According to Thornton, the train engines do not shoot forward. Thornton further testified that plaintiff told him that the hard hat he was wearing was knocked off when the fuel hose hit him in the head. Thornton could not recall where plaintiff said he was hit in the head. Thornton acknowledged that at a prior deposition, he testified that the hose hit plaintiff on the side of the head, however, according to Thornton, he "assumed that it hit [plaintiff] in the side of the head" because he "[did not] actually remember [plaintiff] telling me that after I thought about it later."

¶ 38 d. Kimberly Stachulak

¶ 39 Kimberly Stachulak, plaintiff's wife, testified to the following. At the time of trial, she had been married to plaintiff for 27 years and they had two children together. In October of 2008, plaintiff had worked for A.D. Conner for seven or eight years. On the evening of October 15, 2008, she received a phone call from plaintiff. He told her there was an incident at work while he was fueling a train. According to Kimberly, plaintiff informed her that "[a]n engine had surged forward and he was in the middle of fueling. He wasn't able to clear the hose, it had struck him on top of the head, and he—he was anxious to see us at home, that he was okay."

¶ 40 At 4 a.m. on October 16, 2008, plaintiff arrived home. Plaintiff had a headache and could not fall asleep. According to Kimberly, plaintiff told her that "his neck was tense and he took some Tylenol and he tried to lay down, and he wasn't able to." Later that morning, he told

Kimberly that he could hear buzzing in the room, which she could not hear. Kimberly was "very concerned" because she could "see that he was in pain, he was tense and he wasn't focused on our conversation." She asked him if he wanted to go to the doctor and plaintiff "exploded" at her saying he did not want to go to the hospital.

¶ 41 Before plaintiff left for work, Kimberly testified that she helped him write the report for his employer. According to Kimberly, "They wanted a little more information in his own words about what had happened to him the night before." Plaintiff dictated and she wrote the report.

¶ 42 Later that week, plaintiff "was starting to appear to be having more physical problems walking, getting up, tying his shoes. He had to start putting his feet up on the chairs. He was having trouble getting himself ready. He would grimace in pain, and he was just even more quieter, [*sic*] more reserved, more—he just simply wanted to be left alone." That weekend, plaintiff asked her to make him a doctor's appointment. Kimberly made the first available appointment, which was for the following Friday.

¶ 43 On cross-examination, Kimberly testified that when plaintiff returned home on the night of the accident he told her that he had written a "personal short statement but he didn't have time to draft this letter for the employer because there wasn't enough time. They asked him to bring it to work the next day[.]" Kimberly additionally testified that when assisting plaintiff with his second written statement, he told her he was struck on the top of his hard hat.

¶ 44 Kimberly further testified that on November 3, 2008, she assisted plaintiff by filling out a form regarding the accident, which he signed. Kimberly testified that headaches were not mentioned on the form because, "[h]is headaches were just constant. I think other symptoms started to take more prevalence." Kimberly acknowledged that the form also indicated that

plaintiff's soreness started on October 23, 2008.[6]

¶ 45 e. Misti Stachulak

¶ 46 Misti Stachulak, plaintiff's 18 year-old daughter, testified to the following. The morning of October 16, 2008, her father told her that he was struck in the back of the head with a fuel hose the night before. Since the accident, her father is "very careful with his movements. He carries himself in a gingerly manner. *** And it's just harder for him to communicate with us." According to Misti, she can tell her father is in pain most of the time based on his body language.

¶ 47 f. Dr. Mark Lorenz

¶ 48 Dr. Lorenz testified he is a board-certified orthopedic surgeon with a specialty in spinal surgery. Dr. Lorenz first examined plaintiff on January 7, 2010, for "ongoing pain in his neck that didn't resolve in spite of significant conservative care." Plaintiff told him he was in good health prior to being struck on top of the head with a fuel hose and had his head flex forward. Plaintiff also indicated no prior history of issues with his neck.

¶ 49 Dr. Lorenz testified plaintiff's medical history was consistent in all of the medical records he reviewed which consisted of records from Dr. Shah, Dr. Paramjit Sikand (Dr. Shah's partner), Dr. Templin, Dr. Marie Kirincic (a physical medicine and rehabilitation physician), and Dr. Sharma. Dr. Lorenz further testified he reviewed plaintiff's: (1) November 2008 MRI film; (2) April 2009 MRI film; (3) June 2009 single-photon emission computerized tomography (SPECT) scan; and (4) September 2009 cervical myelogram. Based on his examination, plaintiff's medical history, and testing, Dr. Lorenz recommended surgical intervention at C5-6 and C6-7.

¶ 50 Dr. Lorenz testified he referred plaintiff to Dr. Fronczak for a second opinion. Dr.

[6] The record on appeal is missing pages from Kimberly's testimony on cross-examination and does not contain any redirect.

Fronczak recommended surgery consisting of a C5-6 and C6-7 anterior discectomy and fusion.

¶ 51 On May 28, 2010, Dr. Lorenz performed the recommended surgery on plaintiff. While performing the surgery, Dr. Lorenz was able to observe with the aid of a microscope that plaintiff's nerves were being compressed in the C5-6 and C6-7 area. He also observed a small disc herniation at C5-6 on the left side "along with some narrowing and compression at that level."

¶ 52 After surgery, on June 9, 2010, plaintiff had close to normal range of motion on his neck, but experienced some discomfort on extension and some tightness when he flexed forward. Dr. Lorenz recommended plaintiff start physical therapy. At a September 22, 2010, visit, plaintiff reported that he had a burning sensation in his neck from time to time, which was increased with physical therapy. Dr. Lorenz recommended plaintiff discontinue physical therapy and did not refer plaintiff for any treatment related to his neck injury. Dr. Lorenz testified that in December of 2010, plaintiff had reached his maximum medical improvement.

¶ 53 Regarding the cause of plaintiff's injury, Dr. Lorenz opined:

> "Based on his history and based on my experience of 30 years with these kind of things along with biomechanical data and testing, in this particular patient it is my opinion that the striking of the hose on top his head is a competent cause of creating these issues and creating pain-generators at C5-6 and C6-7."

¶ 54 On cross-examination, Dr. Lorenz testified that being hit on the back of the head would not cause an axial load but "can cause a translational load" and thus it "could be a competent cause of really the same type of injury by the sheer force that was applied. But it was consistent really with what he said and told Templin and everybody else that took care of him."

¶ 55 g. Dr. Ira Goodman

¶ 56 Dr. Goodman, a physician practicing interventional pain management, testified as follows. In March 2011, he first began treating plaintiff for injuries resulting from the accident. Plaintiff provided a history of having pain in his neck as well as in both shoulders and arms. Plaintiff told him that a fuel hose hit him in the head. Plaintiff indicated he did not have any problems before the incident. Upon examination of plaintiff, Dr. Goodman discovered "significant evidence of facet joint inflammation in the back of the spine as well as muscle spasm as a secondary or tertiary problem." Plaintiff had "some disc bulging" at C4-5 as indicated by a September 2010 CT scan.

¶ 57 Dr. Goodman testified that, given the history plaintiff provided, it was possible that being struck on the top of the head could cause facet inflammation. Dr. Goodman opined that plaintiff's facet inflammation was caused either by the initial accident or by the follow-up treatment and subsequent surgery. Dr. Goodman prescribed him a long-acting pain medicine and a medication used to treat nerve pain.

¶ 58 On December 5, 2011, plaintiff reported to Dr. Goodman that he was experiencing "increasing difficulty in dealing with the loss of function and livelihood and he did acknowledge that this was having an impact on his personality and his family life." Dr. Goodman referred plaintiff to a psychologist, Dr. Borchardt.

¶ 59 Regarding the cause of plaintiff's pain, Dr. Goodman testified "the work accident of October 2008 was the proximate cause of his injuries and his ongoing pain complaints."

¶ 60 On cross-examination, Dr. Goodman testified that plaintiff's facet joints and degenerative disc disease were contributing factors to plaintiff's pain as well as scar tissue and a "muscular component." Regarding the cause of plaintiff's pain, Dr. Goodman opined:

> "part of—you know being a physician as you know is you have to take a history. And you know part of the history especially when, you know, there's a—there's a sentinel event like this involved is whether or not there is a history of similar symptoms prior to that event. Because it allows you to determine if that event was in and of itself causative of the patient's problem and I did ask the patient at his initial visit had he had any history of neck problems prior to that injury and he told me no and I took him at his word."

According to Dr. Goodman, he has had other patients with the same complaints as plaintiff who did not have a single event which was the cause of their pain. Typically, patients do not have a sentinel event the way plaintiff did and their trauma usually occurs from repetitive trauma or a chronic degenerative process that occurs over time.

¶ 61 h. Dr. Kathy Borchardt

¶ 62 Dr. Borchardt, a clinical psychologist, neuropsychologist, and a behavioral medicine specialist, testified she specializes in treating individuals suffering from chronic pain conditions, chronic medical illnesses, brain injuries, neurological disorders, and developmental disorders. According to Dr. Borchardt, plaintiff began his treatment with her in March of 2012. Initially, Dr. Borchardt took a full history of plaintiff. He told her that on October 15, 2008, he was fueling a train engine when a heavy fueling hose "came loose and blew towards him." Plaintiff told her he could not duck out of the way in time and the fuel hose hit the top of his head. After examining him, Dr. Borchardt diagnosed plaintiff with a chronic pain condition, major depressive disorder, and generalized anxiety. Dr. Borchardt subsequently diagnosed plaintiff with post-concussive syndrome and testified that plaintiff incurred this syndrome as a result of the accident. According to Dr. Borchardt, the affects of this mild traumatic brain injury were not going to resolve.

¶ 63 On cross-examination, Dr. Borchardt acknowledged that in her October 2013 neuropsychological evaluation she stated that plaintiff "is significantly weak in his verbal reasoning, abstract thinking, auditory, working memory and mental arithmetic, which most likely were deficits prior to his head injury in October of 2008."

¶ 64 During Dr. Borchardt's testimony, a report authored by her was admitted into evidence.[7] According to the report, plaintiff "was referred by Dr. Ira Goodman and by his attorney Jim Coyne for a neuropsychological evaluation to assist in determining whether [defendant's] work-related accident of October 15th, 2008 resulted in any cognitive changes."

¶ 65 2. Defendant's Witnesses

¶ 66 a. Anthony Subatine

¶ 67 Anthony Subatine testified he is the shop manager for Union Pacific Railroad's Chicago location. As shop manager, he oversees the daily operation of the maintenance facilities and the train repairs. In October of 2008, he held the position of "Foreman General 1." Based on his experience working for defendant, he testified that he is intimately familiar with how trains operate. When a train begins its operation it has a "slow movement going forward" they cannot "shoot out." If a train had moved forward seven to 15 feet, it likely would have been moving at one mile per hour.

¶ 68 On October 15, 2008, he was informed about an accident at Global One. At that time, he was not advised that an injury was involved. He went to Global One and spoke with Diaz and plaintiff. He asked plaintiff "to write a statement of what occurred and I was never told that there was any—he was injured or felt bad or anything of that sort." Subatine denied that he told

[7] Dr. Borchardt's report is undated, but indicates she tested defendant on May 7 and May 17, 2012. In addition, the copy of the report provided in the record on appeal is incomplete and consists of only four pages.

plaintiff to only mention the property damage to the fuel truck in the statement. Subatine was only informed that there was minor property damage to plaintiff's truck. Plaintiff did not inform him that he was hit on the head by the fuel hose and plaintiff did not appear to be injured. Plaintiff also did not appear to be rushed and Subatine did not notice any marks or dents on plaintiff's hard hat.

¶ 69 b. Robert Zalenski

¶ 70 Robert Zalenski, director of intermodal operations in the motor region for defendant, testified to the following. He has been employed by defendant since 1995 and has worked in the railroad industry for 23 years. In October of 2008 he was a "[s]enior manager intermodal operations in Global 1." On October 15, 2008, he was not on site when the incident occurred, but was notified by his on-site manager by telephone.[8] The on-site manager informed him that there "was an incident with a switch engine, with a road engine moving with a fuel truck, nobody was hurt." Zalenski drove to Global One and parked behind the fuel truck, arriving 25 minutes after the accident. He asked the manager what had happened and was informed that the engine had moved while it was being fueled. He asked the manager if anyone was hurt, and the manager informed him no one had been injured. Zalenski testified that plaintiff did not tell him that he was hurt and did not appear to be injured. Plaintiff, however, was angry because his truck was damaged. Zalenski observed the door of the fuel truck opened all the way and a "little dent in the heat shield of the exhaust stack." Plaintiff did not inform him that he was being rushed by his employer. Zalenski did not observe any dents or marks on plaintiff's hard hat. Zalenski told plaintiff to write a statement of what had happened. He did not tell Plaintiff to "just talk about property damage" in the statement. Plaintiff never indicated he wanted to amend

[8] The on-site manager is not named in Zalenski's testimony.

or revise the statement submitted.

¶ 71 c. Dr. Roger Lichtenbaum

¶ 72 Dr. Lichtenbaum, a neurosurgeon, testified he examined plaintiff on two occasions, November 19, 2008, and March 4, 2009. At his first visit, plaintiff reported that he had neck pain resulting from an accident that occurred on October 15, 2008, where he was hit on the back of the head and neck. Dr. Lichtenbaum performed a physical examination of plaintiff. Plaintiff's neck was stiff, but plaintiff had "full strength throughout the upper and lower extremities" and a normal neurologic exam. After reviewing plaintiff's MRI film, Dr. Lichtenbaum concluded plaintiff had mild degenerative disease with "some mild disk protrusions predominantly on the left at C3-4 and C4-5." Dr. Lichtenbaum explained that "mild degenerative disease" is "normal wear and tear that humans experience" and it is not typically brought on by any acute onset. Similarly, mild disk protrusions can also occur without a traumatic onset.

¶ 73 On March 4, 2009, plaintiff informed Dr. Lichtenbaum that he had undergone nonoperative treatment but was still experiencing neck pain. Dr. Lichtenbaum referred plaintiff to Dr. Templin for a second opinion.

¶ 74 Dr. Lichtenbaum further testified he did not have an opinion as to whether plaintiff's pain complaints were related to the accident.

¶ 75 On cross-examination, Dr. Lichtenbaum testified that, "If you get hit on your head or your neck, and then you have pain in your head and your neck, that would be a reasonable cause." Dr. Lichtenbaum testified that he would defer any of his opinions regarding any surgery performed on plaintiff to the surgeon who performed the surgery.

¶ 76 d. Dr. Srdjan Mirkovic

¶ 77 Dr. Mirkovic testified he performed an independent evaluation of plaintiff on December

1, 2009. He also reviewed plaintiff's medical records and various imaging scans up to that point including: (1) a November 2008 MRI; (2) an April 2009 MRI; (3) a September 3, 2009, CT scan; (4) a September 21, 2009, CT scan; and (5) a September 3, 2009, discogram.

¶ 78 In examining plaintiff, Dr. Mirkovic took his medical history. Plaintiff denied having any symptoms prior to the accident. When describing the accident, plaintiff stated a fuel hose struck him on the top of his head causing a cervical compression. Plaintiff informed Dr. Mirkovic that he had pain radiating to the bilateral shoulders, right more so than left, and to the right upper extremity and hand. Plaintiff further informed Dr. Mirkovic that when he remained immobilized for an extended period of time he would experience increased neck pain.

¶ 79 According to Dr. Mirkovic, the various imaging scans demonstrated that plaintiff had a left-sided disk herniation at C3-C4, C5-C6, and C6-C7, with mild to moderate right foraminal stenosis present at C3-C4 and C5-C6. Degenerative disk changes were also apparent at C5-C6, but were consistent with the aging process. Plaintiff's CT scan demonstrated bulging disks, mild degeneration at C4-5 and C5-6, and minimal bone spurs at C5-6.

¶ 80 Dr. Mirkovic further testified that plaintiff's physical examination revealed he had "full flexion and extension of the cervical spine," meaning plaintiff could bring his head completely forward and completely back, but that plaintiff's symptoms were worse when the neck was brought in extremes of rotation. Upon examining plaintiff, Dr. Mirkovic "could not elicit any objective findings that were consistent with [plaintiff's] complaints."

¶ 81 Dr. Mirkovic further testified that plaintiff told him his symptoms on his left side started two weeks after the accident. According to Dr. Mirkovic, "When somebody gets injured, usually you see an onset of symptoms either immediately at that time or usually within 24 or 48 hours." Thus, there was no correlation between the onset of symptoms two weeks later and the event of

October 15, 2008. Moreover, Dr. Mirkovic noted that plaintiff "had been seen by other surgeons and neurosurgeons without again any specific neurologic findings to explain objectively the complaints that [plaintiff] had." Dr. Mirkovic testified that his opinions were consistent with plaintiff's other examining physicians; specifically, that there was no clear correlation between the findings of plaintiff's physical examination and his subjective complaints.

¶ 82 Overall, Dr. Mirkovic could not ascertain from where plaintiff's pain was emanating. Dr. Mirkovic opined that when people have discogenic pain, rest improves their symptoms. Plaintiff, however, indicated that his pain increased with rest which goes against the symptoms being predominantly emanating from the disk. Dr. Mirkovic opined that plaintiff's pain could be psychological.

¶ 83 On cross-examination, Dr. Mirkovic testified that it is possible that being struck on the top of the head can cause herniations. Disk bulges, however, are mostly degenerative. According to Dr. Mirkovic, "I don't expect this type of event to cause a bulge because that is a degenerative condition generally speaking. Most likely than not, it can certainly cause an acute disk herniation."

¶ 84 e. Dr. Cary Templin

¶ 85 Dr. Templin, an orthopedic surgeon, testified he initially examined plaintiff on March 24, 2009. Plaintiff informed him that he was hit in the back of the head and knocked forward by a fuel hose. Since that time plaintiff complained of neck and hand pain. Dr. Templin testified that the impact applied an "axial load flexion movement" meaning that it "sort of pushed his head down and pushed it forward." After performing a physical examination on plaintiff, Dr. Templin discovered a "Sperling's sign" on the left side which indicated that "there could be some impingement of the nerves in the cervical spine." His review of plaintiff's x-ray also revealed

degenerative changes to C5-6, which Dr. Templin testified were most likely not caused by the accident. Dr. Templin also reviewed plaintiff's MRI film. He could not point to any specific finding based on the film as to what was causing plaintiff's pain as of this date.

¶ 86 On May 7, 2009, Dr. Templin examined plaintiff and reviewed a second MRI, which did not reveal any severe neurocompression. The MRI demonstrated that there was "some disk bulge at C5-C6 eccentric to the right and at 6-7 diffusely as well as 3-4." Dr. Templin could not say with any degree of certainty that those protrusions were the cause of plaintiff's pain at that time. Dr. Templin believed plaintiff had a cervical strain, degenerative disk disease, or arthritis.

¶ 87 Regarding the cause of plaintiff's injury, Dr. Templin testified that he believed the accident caused the bulging disks to become symptomatic. Dr. Templin acknowledged that at the time of his deposition he did not have an opinion as to whether the accident caused the bulging disk to become symptomatic.

¶ 88 On cross-examination, Dr. Templin testified that his initial examination of plaintiff revealed impingement of the spinal cord at C5-C6 and that plaintiff's initial MRI demonstrated a herniation and bulging disk. In addition, Dr. Templin testified that an axial load pushing one's head forward would be consistent with plaintiff's account of being struck on the top of the head after trying to duck underneath a fuel hose. Dr. Templin further testified that the treatment he provided plaintiff was a direct result of the injuries he sustained in the accident.

¶ 89 f. Dr. Avi Bernstein

¶ 90 Dr. Bernstein, an orthopedic surgeon specializing in spine surgery, testified that he was retained as an expert by defendant. In June 2009, he performed an independent medical evaluation of plaintiff and reviewed his MRI films, CT scan, and medical records.

¶ 91 Plaintiff informed Dr. Bernstein that he had been injured on the job on October 15, 2008,

when a hose struck him on top of his head causing his head to sink down into his shoulders. During plaintiff's physical examination, he was able to demonstrate a "full range of motion of the cervical spine" and had "no restrictions." His neurologic exam "was normal, meaning that with resistance testing he had normal strength. He had normal sensation. He had normal reflexes ***." There was no evidence of spinal cord compression or some other injury above the neck. According to Dr. Bernstein, plaintiff had a "[n]ormal examination."

¶ 92 Dr. Bernstein's review of plaintiff's CT scan demonstrated some bone spurring at C1-2, which suggested plaintiff had arthritis. Plaintiff's MRI scans demonstrated "age appropriate degenerative changes at C5-6" and "some mild bulging of the disk at C3-4." Dr. Bernstein's assessment was that these findings were consistent with the patient's age, not the result of an injury, and "typical."

¶ 93 Dr. Bernstein ordered an x-ray and a SPECT scan be taken of plaintiff. After reviewing these tests, Dr. Bernstein testified he was not able to objectively identify anything that was consistent with plaintiff's subjective complaints of pain. According to Dr. Bernstein, "all the radiographic stud[ies] w[ere] normal and did not support his pain complaints."

¶ 94 At a second visit to Dr. Bernstein, plaintiff told him that he completed the physical therapy and had a variety of injections to his neck, but did not have any improvement in his symptoms. By the time of the second visit, plaintiff had also undergone spinal surgery. According to Dr. Bernstein, the results of plaintiff's exam were "very normal" and consistent with plaintiff's prior surgery. Dr. Bernstein still could not explain plaintiff's continued pain complaints.

¶ 95 Dr. Bernstein testified that his review of plaintiff's medical records demonstrated that plaintiff's accounts of how he was struck on the head were inconsistent as they "describe[ed]

different mechanisms."

¶ 96 On cross-examination, Dr. Bernstein testified that he was paid by law offices to examine plaintiff and review his records.

¶ 97 3. Closing Arguments and Verdict

¶ 98 In his closing, plaintiff's counsel argued that the train engine shot forward, causing the fuel hose to hit plaintiff on the top and back of his head, "shoving his head forward and down into his shoulders." Plaintiff, feeling pressure to quickly complete his job, authored a short, incomplete statement and continued on to the next train yard. Plaintiff, however, did call his wife and Thornton, and informed them he was struck in the head with the fuel hose. Despite feeling pain, plaintiff continued to work the following week because he wanted to provide for his family. Plaintiff's counsel further argued that the treating physicians, particularly Dr. Lorenz, opined plaintiff's neck injury was caused by the October 15, 2008, accident.

¶ 99 Defense counsel argued plaintiff failed to prove he was injured as a result of the train moving forward. Defense counsel pointed out plaintiff's own inconsistent statements; that plaintiff initially stated he had cleared the fuel hose by ducking underneath it, but then later stated he was actually hit in the head with the fuel hose. Defense counsel further drew the jury's attention to plaintiff's inconsistent recitations of where the fuel hose struck him in the head. Defense counsel noted plaintiff, at times, stated he was struck on the top of the head, on the back of the head, or on the side of the head. Defense counsel also argued the treating physician's testimony, that plaintiff's neck pain was caused by being struck on the head by the fuel hose, was based on plaintiff's own retelling of his history and, therefore, the physicians' testimony regarding the cause of the injury was not accurate.

¶ 100 The trial court then instructed the jury on the law. The jury instructions included an

admission from defendant that it was negligent in its operation of the train. The instructions also included Illinois Pattern Jury Instruction, Civil, No. 5.01 (4th ed. 2000) (hereinafter IPI 5.01), which provided generally that the jury could make an adverse inference against a party for its failure to produce evidence in certain circumstances. Following deliberations, the jury returned a verdict in favor of defendant.

¶ 101 B. Posttrial Proceedings

Plaintiff filed a posttrial motion for a new trial asserting: (1) the jury's verdict was against the manifest weight of the evidence; (2) defendant failed to offer proof perfecting impeachment with the Freiberg statement during plaintiff's cross-examination; (3) the trial court erred in allowing defendant to apply IPI 5.01 to the hard hat; (4) the trial court erroneously allowed defendant to argue plaintiff failed to call a witness from his employer in violation of a motion *in limine*; (5) the trial court erred in allowing defense counsel to ask leading questions during Dr. Mirkovic and Dr. Templin's testimonies; and (6) defendant falsely argued plaintiff was referred to Dr. Borchardt by plaintiff's counsel. After the matter was fully briefed and argued, the trial court denied plaintiff's motion and entered judgment on the verdict. In denying the motion, the trial court acknowledged that this matter essentially involved a credibility determination and the jury ultimately believed plaintiff was not injured in the accident based on his initial statement. Additionally, the trial court noted that plaintiff objected to the use of the Freiburg statement at trial, but did not move to strike the testimony after he heard the subpoena was quashed, nor did plaintiff ask the court to instruct the jury to disregard those questions. Moreover, the trial court found that the questions plaintiff was asked based on the Freiberg statement were regarding points that were already in evidence. Regarding the IPI 5.01 jury instruction, the trial court pointed out that it was plaintiff who requested that particular instruction. The trial court also

referenced Dr. Borchardt's evaluation, wherein she stated plaintiff was referred to her by Dr. Goodman and plaintiff's counsel. This appeal followed.

¶ 102 II. ANALYSIS

¶ 103 On appeal, plaintiff contends: (1) the jury verdict was against the manifest weight of the evidence; and (2) a new trial is warranted where (a) the trial court erred in failing to strike the portions of plaintiff's cross-examination because defendant failed to lay the proper foundation for plaintiff's impeachment and (b) defense counsel made numerous prejudicial comments to the jury during closing argument. We address each of plaintiff's arguments in turn.

¶ 104 A. Standard of Review

¶ 105 This appeal arises from the trial court's denial of plaintiff's posttrial motion for a new trial. A reviewing court will not reverse the trial court's ruling on a motion for a new trial unless it is affirmatively demonstrated that the trial court abused its discretion. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 38. "In determining whether the trial court abused its discretion, the reviewing court should consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial." *Maple v. Gustafson*, 151 Ill. 2d 445, 455 (1992). In addition, "it is important to keep in mind that the presiding judge in passing upon the motion for new trial has the benefit of his previous observation of the appearance of the witnesses, their manner in testifying, and of the circumstances aiding in the determination of credibility." (Internal quotation marks omitted.) *Id.* at 456 (quoting *Buer v. Hamilton*, 48 Ill. App. 2d 171, 173-74 (1964)).

¶ 106 B. Verdict was Against the Manifest Weight of the Evidence

¶ 107 Plaintiff contends the trial court's judgment should be reversed and the cause remanded for a new trial because the verdict in defendant's favor was against the manifest weight of the

evidence. On a motion for a new trial, the trial court will weigh the evidence and order a new trial if the verdict is contrary to the manifest weight of the evidence. *Lawlor*, 2012 IL 112530, ¶ 38 (citing *Maple*, 151 Ill. 2d at 454). "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." *Lawlor*, 2012 IL 112530, ¶ 38. The trial judge, when ruling on a motion for a new trial, "may not reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions, or because the court feels that other results are more reasonable. [Citation.] Thus, a trial court may not set aside a verdict merely to achieve more reasonable results." (Internal quotation marks omitted.) *Redmond v. Socha*, 216 Ill. 2d 622, 652 (2005) (quoting *Maple*, 151 Ill. 2d at 452).

¶ 108 Initially, we observe that plaintiff has failed to provide a complete record on appeal. The record does not include the testimonies of Dr. Sharma, Art Eubank, Steven Blumenthal, and Scott Watson. The parties closing statements touch on some of the testimony provided by these witnesses, but the record does not contain a transcript of the proceedings where these individuals testified. While we acknowledge that closing arguments are not evidence, in this case we find the missing testimony of Dr. Sharma, plaintiff's first pain medicine physician, to be particularly egregious where defendant's closing argument indicated that Dr. Sharma testified it was plaintiff who requested a note from Dr. Sharma stating that he (plaintiff) could not return to work and where plaintiff's counsel made no objection to this line of argument.

¶ 109 Regardless of the actual content of the missing testimony, it was nonetheless plaintiff's duty as appellant to submit a complete record on appeal. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984). Any doubts arising from an incomplete record are resolved against the plaintiff, as the appellant. *Id.* at 392. With this in mind, we turn to consider whether the trial court properly

determined that the jury's verdict was not against the manifest weight of the evidence.

¶ 110 Based on our review of the record, we find there was sufficient evidence to sustain the verdict. As there were no eyewitnesses to the accident, determining whether plaintiff was injured by the fuel hose as he alleged was purely a credibility determination. As the trier of fact, it is the jury's role to weigh the evidence and resolve inconsistencies and conflicts in testimony. *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 179 (2006). As the reviewing court, we cannot reweigh the evidence or substitute our judgment for that of the jury. *Snelson v. Kamm*, 204 Ill. 2d 1, 35 (2003).

¶ 111 The jury was also presented with evidence that plaintiff did not inform Diaz, Subatine, or Zalenski that he was hit in the head by the fuel hose or otherwise injured. In fact, Diaz, Subatine, and Zalenski each testified that they observed plaintiff within hours after the accident occurred and he appeared to be uninjured. Further, immediately after the accident occurred, plaintiff authored a statement wherein he described in detail the damage sustained by his vehicle, but did not state he was injured. In fact, plaintiff stated the accident was "a close call" because he "ducked under the fuel hose," thereby raising a strong implication that plaintiff was not injured. Although plaintiff testified he did not discuss his injuries in that statement because Subatine had instructed him to reference only property damage, Subatine testified he did not limit plaintiff's statement to property damage. This conflicting testimony involves a credibility determination that is for the jury to decide. *York*, 222 Ill. 2d at 179. Moreover, the following day, plaintiff issued a second statement that contradicted his first statement. Where plaintiff indicated in his first statement that he cleared the fuel hose, in his second statement plaintiff relayed that he was unable to clear the hose and was hit on the back of his hard hat. Based on the evidence presented, the jury may have concluded that plaintiff's initial statement, which was

authored within minutes after the incident occurred, was the most accurate version of what had actually occurred.

¶ 112 In addition, the jury was presented with evidence that plaintiff continued to work and did not seek medical treatment until nine days after the incident. The evidence also demonstrated that in the November 3, 2008, statement, plaintiff reported that his symptoms first began on October 23, 2008, the day before he visited Dr. Shah. Although plaintiff testified that his wife authored the statement and he just signed it, the November 3, 2008, statement contradicted his and Kimberly's testimony that he was symptomatic the day after the accident. We further observe that although each of the doctors indicated that plaintiff's injury could have been caused by being struck on the head with a fuel hose, they testified their opinions were based on plaintiff's recitations to them of the accident and his prior medical history. Thus, it was within the province of the jury to consider whether plaintiff was telling the truth regarding the cause of his injury. Based on the jury's ultimate verdict against plaintiff, it is apparent that the jury did not find plaintiff's version credible. See *Barth v. State Farm Fire and Casualty Co.*, 228 Ill. 2d 163, 180 (2008) ("The jury is free to accept some evidence and reject others, as well as to determine the credibility of the witnesses and weigh their testimony."). Accordingly, we conclude the evidence was sufficient for the jury to have concluded plaintiff failed to meet his burden of persuasion. Because the jury's verdict was not against the manifest weight of the evidence, we find the trial court did not abuse its discretion in refusing to grant a new trial.

¶ 113 C. Impeachment During Cross-Examination of Plaintiff

¶ 114 Plaintiff next asserts that defense counsel's cross-examination of him was improper because defense counsel impeached him with questions derived from a transcript of a recorded statement with Freiberg, but failed to produce Freiberg or lay the foundation for the document.

Plaintiff argues that because the required proof for impeachment was never admitted into evidence this line of questioning was highly prejudicial to him. Specifically, plaintiff maintains he was prejudiced by this line of questioning because it insinuated: (1) he did not report the incident until October 23, 2008; (2) he did not realize he was injured by the accident until October 23, 2008; and (3) he told conflicting stories to Freiberg regarding whether he was struck by the hose.

¶ 115 Defendant responds that plaintiff has failed to preserve this claim of error for appeal because he did not move to strike the testimony. Forfeiture aside, defendant asserts that plaintiff was not prejudiced by this line of questioning because plaintiff's counsel rehabilitated plaintiff using the Freiberg statement. Additionally, defendant maintains that aside from the Freiberg statement, substantial evidence was presented at trial demonstrating that plaintiff provided several inconsistent versions of the events at issue. Defendant further notes that "plenty of evidence was submitted aside from the Freiberg evidence, to call Plaintiff's credibility into question and support the jury's verdict."

¶ 116 "An appropriate method of testing the credibility of a witness is to demonstrate that on a prior occasion the witness made statements inconsistent with his or her trial testimony." *Tarin v. Pellonari*, 253 Ill. App. 3d 542, 556 (1993). In order to be used for impeachment, a witness's prior statement must be materially inconsistent with his or her trial testimony. *Thompson v. Abbott Laboratories*, 193 Ill. App. 3d 188, 205 (1990). Moreover, before a statement may be used for impeachment purposes, a proper foundation must be laid. *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 35. The foundation is laid by directing the witness's attention to the time, place and circumstances of the statement and its substance. *Id.* The purpose of the foundation is to alert the witness to the prior inconsistent statement in order to avoid unfair

surprise and to provide the witness with an opportunity to deny, correct, or explain the statement. *Boyce v. Risch*, 276 Ill. App. 3d 274, 278 (1995). In addition, a good faith basis is required on the part of examining counsel regarding a prior inconsistent statement: innuendoes or insinuations of a nonexistent statement are improper. *Id.*

¶ 117 "Once a defense counsel by cross-examination lays a foundation for impeachment, he is under an obligation to produce impeaching evidence. 'If he fails to meet this obligation, the trial court must strike any applicable cross-examination and instruct the jury to disregard it, or, at the insistence of the plaintiff, declare a mistrial.' [Citations.]" *Green v. Cook County Hospital*, 156 Ill. App. 3d 826, 833-34 (1987) (quoting *Danzico v. Kelly*, 112 Ill. App. 2d 14, 25-26 (1969)). "It is reversible error to fail to offer substantive proof of the impeaching statements due to the highly prejudicial innuendo created through the incomplete impeachment." *Hackett v. Equipment Specialists, Inc.*, 201 Ill. App. 3d 186, 197 (1990).

¶ 118 These rules, however, do not apply where counsel has failed to object and timely request a motion to strike the testimony. In this regard, we find *Morris v. Milby*, 301 Ill. App. 3d 224 (1998), to be instructive. There, the plaintiff complained she was improperly impeached as a witness where, during cross-examination, the defendant's attorney attempted to impeach her using statements that she purportedly made to her family physician years before the accident. *Id.* at 230-31. The plaintiff argued the defendant's counsel never completed the impeachment by offering the statements into evidence. *Id.* The reviewing court agreed this was improper impeachment, particularly where the plaintiff answered equivocally when she stated she did not remember what she had told her doctor and questioned the authenticity of the medical records. *Id.* at 231. Although the *Morris* court determined the attempted impeachment was improperly executed, it ultimately concluded the error "would not independently provide a basis for reversal

because [the plaintiff] forfeited her claim of error." *Id.* The *Morris* court noted that despite objecting when the prior inconsistent statements were first used, the plaintiff never moved to strike the testimony. *Id.* at 232.

¶ 119 Here, plaintiff answered equivocally when he stated he remembered providing a statement to Freiburg, but could not recall the statements he had made. The record, however, reveals that plaintiff's counsel never moved to strike the testimony in whole once it was apparent that Freiberg would not be testifying. Plaintiff asserts he preserved this issue for appeal because he moved to strike one question during his cross-examination. Our review of the record reveals that plaintiff's objection and subsequent motion to strike involved a single question by defense counsel that was not derived from the recorded statement and that the trial court properly sustained plaintiff's objection, thereby curing any prejudice. See *Nickon v. City of Princeton*, 376 Ill. App. 3d 1095, 1103 (2007) ("Generally, any prejudicial impact of an error may be cured if the trial judge sustains an objection and instructs the jury to disregard the objectionable testimony."). Because plaintiff failed to move to strike plaintiff's testimony regarding the recorded statement, we conclude plaintiff has forfeited this claim of error. See *Morris*, 301 Ill. App. 3d at 231-32; *Gillespie v. Chrysler Motors Corp.*, 135 Ill. 2d 363, 373-74 (1990) (a claim of prejudicial error is "waived" where the party did not object at the time the evidence is introduced and later renew that objection by making a timely motion to strike the evidence).

¶ 120 D. Statements of Counsel

¶ 121 Plaintiff next contends that a new trial is alternatively warranted as a result of improper comments made by defense counsel during closing arguments. Plaintiff claims the trial court erred when it allowed defendant to argue that: (1) the jury could apply IPI 5.01 to plaintiff's failure to produce his hard hat; (2) plaintiff called no witnesses from his employer to support his

testimony; and (3) that plaintiff was referred to Dr. Borchardt by his attorney.

¶ 122 The purpose of closing argument is to draw reasonable inferences from the evidence and to assist the jury in arriving at a fair verdict based on the evidence and the law. *Drakeford v. University of Chicago Hospitals*, 2013 IL App (1st) 111366, ¶ 50. Consequently, "counsel is afforded wide latitude during closing argument and may comment and argue on the evidence and any reasonable inferences that may be fairly drawn from the evidence." *Id.* "In determining whether a party has been denied a fair trial because of improper closing argument, [a] reviewing court gives considerable deference to the trial court because it is in a superior position to assess the accuracy and effect of counsel's statements." *Limanowski v. Ashland Oil Co., Inc*., 275 Ill. App. 3d 115, 118 (1995). Whether improper remarks of counsel are so prejudicial as to deprive an opposing party of its right to a fair trial is within the sound discretion of the circuit court. *Id.* (citing *Balzekas v. Looking El*k, 254 Ill. App. 3d 529, 535 (1993)). Determinations regarding such issues will not be reversed absent a clear abuse of discretion. *Zickuhr v. Ericsson, Inc*., 2011 IL App (1st) 103430, ¶ 73.

¶ 123 First, plaintiff maintains that defendant implied to the jury that plaintiff was hiding the hard hat, despite defendant never asking for the helmet at trial or confirming whether plaintiff ever had the hard hat in his possession. The statement at issue by defense counsel is as follows:

> "You know what I would have liked to have seen? Mr. Stachulak's hardhat [*sic*], the one he said he was wearing at the time, the one he said that his fuel hose struck. This giant 10 inch big[,] heavy steel-enforced black rubber hose. The hardhat [*sic*] he didn't really even look at after his head was almost sheared off, according to him. Use your common sense on that one, too. A thick rubber hose snaps up, slams into his head, almost kills him as he now states, and not one mark or dent or crack on it? It wasn't there. You can infer that it

would not support his version of his story."

According to plaintiff, this comment, in conjunction with IPI 5.01, allowed the jury to draw an adverse inference against plaintiff for his failure to produce evidence that was never requested at trial.

¶ 124 Defendant asserts that plaintiff has forfeited this issue on appeal because plaintiff failed to raise an objection at the time. Our review of the record reveals plaintiff did not, in fact, object to these statements. We apply the forfeiture rule strictly where, as here, the comment does not constitute flagrant misconduct and is not so egregious that it denied plaintiff a fair trial. See *Gillespie*, 135 Ill. 2d at 376-77. Plaintiff should not benefit by his failure to object and wait for a jury verdict, only to raise this issue in a posttrial motion and on appeal in hopes of a new trial. See *Simmons v. University of Chicago Hospitals and Clinics*, 162 Ill. 2d 1, 13 (1994).

¶ 125 We also note that in addition to forfeiting this argument, plaintiff failed to provide this court with a complete record on which to review this claim of error. Specifically, plaintiff did not include the transcript of the jury instruction conference when he submitted the appellate record. As previously discussed, any doubts arising from an incomplete record are resolved against the plaintiff. *Foutch*, 99 Ill. 2d at 392.

¶ 126 Assuming *arguendo* that the argument was not forfeited, plaintiff fails to demonstrate he was sufficiently prejudiced. Plaintiff argues the trial court erred in allowing defense counsel to argue IPI 5.01 in regards to plaintiff's failure to produce the hard hat during trial. IPI 5.01 allows a jury to draw an adverse inference from a party's failure to offer evidence or to produce a witness. Illinois Pattern Jury Instructions, Civil, No. 5.01 (4th ed. 2000). The instruction should be given only when a foundation is presented suggesting: (1) the evidence was under the control of the party to be charged and could have been produced by reasonable diligence; (2) the

evidence was not equally available to the adverse party; (3) a reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed the evidence or the witness's testimony would have been favorable to him; and (4) no reasonable excuse for the failure to offer the evidence has been shown. Illinois Pattern Jury Instructions, Civil, No. 5.01 (4th ed. 2000); *Nassar v. County of Cook*, 333 Ill. App. 3d 289, 298 (2002).

¶ 127 First, our review of the record reveals that defense counsel did not articulate the elements of IPI 5.01 with regards to the hard hat in his closing argument. Second, the record indicates that this comment was brief in relation to the length of defense counsel's closing argument and was isolated in nature. See *Calloway v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 112746, ¶ 104. Third, when ruling on plaintiff's posttrial motion, the trial court stated, "As to the 501 [*sic*] instruction, it was actually the plaintiff who asked for the 501 [*sic*] instruction. That was your instruction, not the defendant. And it was given because of the failure to produce the black box I believe. So that is why I allowed it." Thus, the record discloses that it was actually plaintiff who requested IPI 5.01. Under the invited error doctrine, a party cannot acquiesce to the manner in which the trial court proceeds and later claim on appeal that the trial court's actions constituted error. *Bruntjen v. Bethalto Pizza, LLC*, 2014 IL App (5th) 120245, ¶ 154; *People v. Patrick*, 233 Ill. 2d 62, 76-77 (2009). Accordingly, we conclude these remarks did not substantially prejudice plaintiff and, therefore, decline to relax the forfeiture rule regarding this alleged error.

¶ 128 Plaintiff next asserts that defense counsel's remark during closing argument that plaintiff called no witnesses from A.D. Conner to support his testimony prejudiced his right to a fair trial. According to plaintiff, this argument "allow[ed] the jury to draw an unfair adverse inference from [plaintiff's] failure to produce a witness without demonstrating they were under his control." Plaintiff maintains this error is particularly egregious where the subject of defense

counsel's statement was part of a motion *in limine*.

¶ 129 Initially, we acknowledge that "[a]n improper insinuation during closing argument that violates an *in limine* order can be the basis for a new trial." *Boren v. The BOC Group, Inc.*, 385 Ill. App. 3d 248, 257 (2008). Plaintiff, however, has failed to provide us with a record of proceedings regarding the motion *in limine* or the order granting the motion. All that is included in the record is a copy of plaintiff's "Motion *In Limine*" with unidentified handwritten notations indicating whether the 23 enumerated motions were granted or denied. Without a proper order or transcript of the proceedings, we must construe any doubts from this incomplete record against plaintiff. *Foutch*, 99 Ill. 2d at 391-92.

¶ 130 Turning to plaintiff's claim on appeal, generally a party may not comment upon his opponent's failure to call a witness who is not under the opponent's control or who is equally available to both parties. *Kinzinger v. Tull*, 329 Ill. App. 3d 1119, 1127 (2002). The danger from such comments is the jury will presume the testimony would have been unfavorable to the noncalling party. *Lebrecht v. Tuli*, 130 Ill. App. 3d 457, 484 (1985). Nevertheless, counsel may argue the evidence and all reasonable inferences from it. *Kinzinger*, 329 Ill. App. 3d at 1127. Moreover, improper comments during closing argument are not reversible error unless "the argument clearly was improper, prejudicial and denied defendant a fair trial when that trial is viewed in its entirety." *LID Associates v. Dolan*, 324 Ill. App. 3d 1047, 1065 (2001).

¶ 131 During closing argument, defendant's counsel stated:

> "The only constant in this case are the inconsistencies in the Plaintiff's story. And you heard them over and over again. Depending on who he spoke with and when, the story changed. You heard explanation after explanation of why he did not mention the fact that he was hit on the head with a fuel hose, of why he didn't mention the fact that he

had been injured.

One of them, I was rushed by my boss. There's been no evidence of that. You didn't hear anybody from A.D. Conner come in here and testify and say we told him to get back to work –

MR. COYNE: Objection, your Honor.

THE COURT: Overruled."

The record discloses that although plaintiff's objection was overruled, defense counsel did not belabor the point and did not thereafter reference plaintiff's failure to present witnesses to support his testimony. See *Vanderhoof v. Berk*, 2015 IL App (1st) 132927, ¶ 95 (statements made during closing argument should not be taken in isolation, as that was not how the jury heard them). Additionally, defense counsel did not argue plaintiff failed to call a specific witness, but rather merely commented on the absence of a potential witness generally to substantiate his argument. See *Pharr v. Chicago Transit Authority*, 220 Ill. App. 3d 509, 515-16 (1991). We further note that prior to closing arguments the trial court informed the jury:

"what the attorneys say on their closing is not evidence, it's just their argument about what they believe the evidence has shown. So if there's anything that's inconsistent between what the attorneys say in their closing argument and what you remember from the evidence, you go with your recollection of the evidence, because that's what you are to consider in reaching your decision."

Any minor discrepancies in defense counsel's closing argument were cured by the court's admonishment to the jury that closing arguments are not evidence and should not be considered as such. See *Chavez v. Watts*, 161 Ill. App. 3d 664, 670 (1987) (finding any errors in closing argument were cured when the trial court "admonished the jury to disregard any personal attacks

on counsel; that arguments, statements and remarks of counsel were not evidence; and that the jury should disregard any of counsel's remarks which were not in evidence"). Accordingly, we find that defense counsel's comment was not so improper or prejudicial as to deprive plaintiff of a fair trial.

¶ 132 Lastly, plaintiff argues that the trial court erred when it allowed defense counsel to argue that plaintiff was referred to Dr. Borchardt by plaintiff's counsel. Plaintiff asserts he objected to this statement, however, the trial court did not rule on his objection, but instead indicated that plaintiff could address the comment in rebuttal closing argument. Plaintiff maintains this remark prejudiced him as it created an inference that "he sought treatment for the sake of a lawsuit."

¶ 133 In his closing argument, defense counsel made the following statement:

> "Dr. Borchart [*sic*], March 1st, 2012, the headaches are back. No other doctor, and I just read every single doctor he saw, mentioned anything about headaches. He didn't tell any other doctor anything about headaches. She diagnoses him, contrary to what Dr. Fronczak did, with postconcussive syndrome and a mild traumatic brain injury. This is the very first time we're hearing this. Oh, and Mr. Stachulak was referred to Dr. Borchart [*sic*] by Mr. Coyne, his attorney.
>
> MR. COYNE: I'll object. That's false.
>
> THE COURT: You can address that in rebuttal."

¶ 134 Plaintiff's argument on appeal is belied by the evidence presented at trial. The record discloses that Dr. Borchardt's neuropsychological evaluation of plaintiff indicated that Dr. Goodman and plaintiff's counsel recommended plaintiff obtain the evaluation in order to determine whether plaintiff had any loss of cognitive function as a result of the accident. Thus, we find the trial court did not abuse its discretion in allowing this remark.

¶ 135 In addition, we find plaintiff was not prejudiced by this remark. As previously discussed, the trial court admonished the jury to only consider statements in closing arguments that were based on the evidence presented. See *Vanderhoof*, 2015 IL App (1st) 132927, ¶ 101. Such admonishments cured any prejudice that could have occurred (*Chavez*, 161 Ill. App. 3d at 670), particularly where the evidence indicated plaintiff's counsel did, in fact, refer plaintiff to Dr. Borchardt. We further note that Dr. Borchardt's evaluation stated that such a referral was not for any nefarious purpose, but merely to examine plaintiff's cognitive function.

¶ 136 In sum, we conclude that none of defense counsel's comments, alone or collectively, provide a sufficient basis to reverse the trial court's decision denying plaintiff a new trial.

¶ 137 III. CONCLUSION

¶ 138 For the reasons stated above, the judgment of the circuit court of Cook County is affirmed.

¶ 139 Affirmed.