2014 IL App (5th) 130390-U

NO. 5-13-0390

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

DONALD CURRIE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 10-L-206
	)	
UNION PACIFIC RAILROAD COMPANY,	)	Honorable
	)	Vincent J. Lopinot,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justice Stewart concurred in the judgment.
Justice Spomer dissented.

ORDER

¶ 1 *Held*: (1) The circuit court correctly determined that the statute of limitations found in FELA did not bar the plaintiff's action, (2) the circuit court properly determined that the plaintiff made submissible claims in counts I and III of his first amended complaint, (3) the circuit court's rulings regarding the plaintiff's medical expert were not prejudicial, (4) the circuit court did not err in denying Union Pacific's request for special interrogatories, (5) the jury's verdict was not inherently inconsistent, and (6) the jury's verdict for past and future medical expenses and for loss of earnings was supported by the evidence regarding count III of the plaintiff's first amended complaint.

¶ 2 The plaintiff, Donald Currie, filed in the circuit court of St. Clair County a negligence action pursuant to the Federal Employers' Liability Act (FELA) (45 U.S.C. §

51 *et seq.* (2000)) against the defendant, Union Pacific Railroad Company (Union Pacific), a rail carrier engaged in interstate commerce. After a jury trial, the jury entered verdicts in favor of the plaintiff on counts I and III and in favor of the defendant on count II of the plaintiff's first amended complaint. The circuit court entered judgment on the jury's verdicts. Union Pacific appeals from the jury verdicts and the circuit court's order denying Union Pacific's motion for judgment notwithstanding the verdict, or in the alternative, a new trial. For the reasons set forth below, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 The plaintiff began working as a track laborer, and later as a welder, for Union Pacific in its track maintenance department in 1989. On April 28, 2010, the plaintiff filed his action pursuant to FELA (45 U.S.C. § 51 *et seq.* (2000)), asserting that he suffered injuries to his lower back as a result of Union Pacific's negligence. 45 U.S.C. §§ 51-60 (2000). Specifically, in the plaintiff's first amended complaint, the plaintiff alleged in count I that he sustained injuries to his lower back while lifting heavy equipment on the main line track in Springfield, Illinois, on or about January 28, 2010. The plaintiff alleged that Union Pacific was negligent for failing to provide safe equipment, including a truck with a working mechanical lifting device; for failing to maintain the equipment in a reasonably safe condition; and for failing to provide adequate assistance, reasonably safe work methods, and reasonably safe work conditions. In count II of his first amended complaint, the plaintiff alleged that on or about May 14, 2007, he sustained lower back injuries while working as a welder on the main line track in Ina, Illinois, because Union

Pacific failed to provide adequate assistance, reasonably safe work methods, reasonably safe work conditions, and reasonably safe work equipment. In count III, the plaintiff alleged that he suffered lower back injuries caused cumulatively, over time, while performing track maintenance duties for Union Pacific. The plaintiff alleged that Union Pacific failed to provide him with a reasonably safe place to work, including adequate and sufficient assistance; minimization of his work place exposure to excessive risk factors for development of cumulative spine trauma; reasonably safe work methods; adequate administrative controls to minimize risk of cumulative trauma injuries; periodic testing; evaluation for the potential to develop cumulative trauma disorders; warnings or education; protective equipment; adequate safety rules; adequate collections of data; proper ergonomic practices; and engineering controls. The plaintiff also alleged that Union Pacific failed to provide him with reasonably safe and suitable tools. On January 28, 2013, the cause proceeded to a jury trial on the three claims.

¶ 5 At trial, the plaintiff testified that while employed by Union Pacific, he was required to work irregular and overtime hours, perform activities in a bent position, lift heavy tools and equipment, and utilize a truck with worn shocks and seats, and he was often exposed to vibration in his spine. The plaintiff testified that in the early 1990s, he worked with four-men crews but that those crew sizes were reduced to two-men crews, which included a welder and a welder's helper. The plaintiff testified that the two-men crews were required to complete the same amount of work as the four-men crews. The plaintiff testified that many times, the railroad failed to assign a qualified welder's helper to him but provided instead a laborer who merely watched for trains and did not weld or

grind. During these times, the plaintiff was required to complete the same amount of welding as was required from a two-men crew that included a welder and a welder's helper.

¶ 6 The plaintiff testified that in 1997, he experienced back pain and sought treatment from Dr. Franklin Dowler, a chiropractor. The plaintiff testified that at that time, he believed his back pain resulted from his work with Union Pacific. The plaintiff testified that after he finished with chiropractic treatment, his back pain subsided considerably. The plaintiff testified that Dr. Dowler did not diagnose him with a herniated disc.

¶ 7 Dr. Dowler's testimony corroborated the plaintiff's. Dr. Dowler testified that he first treated the plaintiff on November 5, 1997, when the plaintiff reported pain in his lower and mid-back, shoulder, and chest, two to three times a year. After examining the plaintiff and reviewing X-rays, Dr. Dowler determined that there was normal disc height in between the bones and lumbar spine and no spondylolisthesis.[1] Dr. Dowler determined that the plaintiff did not have any structural damage or disc problems in his lower back and no symptoms of a herniated disc or radiculopathy.[2] Dr. Dowler

[1]Spondylolisthesis is defined as "forward displacement of a lumbar vertebra on the one below it and esp. of the fifth lumbar vertebra on the sacrum producing pain by compression of nerve roots." Merriam Webster's Medical Desk Dictionary 762 (1996).

[2]Radiculopathy is defined as "any pathological condition of the nerve roots." Merriam Webster's Medical Desk Dictionary 681 (1996).

determined that the plaintiff's spine was out of alignment, and his condition improved after a few chiropractic adjustment treatments.

¶ 8 The plaintiff acknowledged that over the course of his railroad career, back stiffness and soreness continued to come and go. The plaintiff testified that he experienced soreness, stiffness, or pain in his lower back at the end of a long day's work, that he would continue working, and that the pain would usually go away within a couple of days. The plaintiff testified that in May 2007, however, he experienced a lower back injury that caused a significant change in his back pain. During this time, he was not assigned a welder's helper but only a lookout-laborer. The plaintiff testified that he felt pain in the afternoon and reported his symptoms to his manager, who later requested, for the first time, that the plaintiff complete an occupational injury form. The plaintiff testified that over the next couple of weeks, the pain continued. The plaintiff testified that at the end of May 2007, he acquired X-rays and an appointment for magnetic resonance imaging (MRI). The plaintiff testified that his manager continued to assign him heavy physical manual labor without a welder's helper.

¶ 9 The plaintiff testified that he thereafter met with two Indiana University physicians, Dr. Sabatino and Dr. Shah, who performed a discogram diagnostic test and determined that the plaintiff had suffered a torn disc that was leaking spinal fluid in his lower back. The plaintiff testified that Dr. Shah recommended a fusion surgery. The plaintiff testified that in 2008, he sought a second surgical opinion from Dr. Matthew Gornet, who rendered the same diagnosis.

¶ 10 The plaintiff testified that he continued to work after the May 2007 incident, even though he experienced consistent lower back pain and numbness, along with tingling down his right leg and across his lower back. The plaintiff testified, however, that on January 28, 2010, while in the process of welding one side of a rail, he and his partner, Bradley Bischoff, emptied their oxygen cylinder. The plaintiff testified that he and Bischoff planned to carry the empty oxygen cylinder, which was approximately 6 feet tall and weighed 125 to 150 pounds, from their work truck to within reaching-distance of a local crew's work truck. The plaintiff acknowledged that he and his partner had chosen not to utilize their work truck's boom function, which uses a boom winch to transport heavy items to inaccessible areas. The plaintiff testified that their work truck's boom function had been working erratically. The plaintiff testified that he had used the truck since August 2009, but from August 2009 until January 28, 2010, he had not used any type of truck hoisting device, including the boom, to lift bottles out of the compartment. The plaintiff and Bischoff had lifted the cylinder from the compartment of the truck and had taken a few steps when the plaintiff felt pain and had to release the cylinder. The plaintiff testified that he was unable to bend over thereafter and before leaving the job site that day, he notified his manager that he had aggravated his back injury. The plaintiff testified that after this injury, his back pain so intensified that he could no longer continue working and he returned to Dr. Gornet, who scheduled two separate surgeries for April 14, 2010, and April 16, 2010. The plaintiff acknowledged that, throughout the time he was seeking medical care, he believed that his lower back problems were caused by his work for Union Pacific.

¶ 11 Bischoff corroborated the plaintiff's testimony that they lifted the heavy oxygen cylinder that day and that the plaintiff had injured his back during the move. Bischoff testified that he and the plaintiff did not use the boom to move the oxygen tank because they had experienced problems with it and because it had not worked properly "most of the time." Bischoff testified that "it would just take off in high gear" and that he "wasn't comfortable using it." Bischoff testified that they had reported that it had not worked properly and had attempted to have it repaired by the mechanic shop. Bischoff testified that he did not remember if or when it was repaired. Bischoff testified that during the time that the boom was not working properly, the manager nevertheless continued to assign them the truck to perform regular work activities. Bischoff testified that, regardless of the condition of the boom on the day of the incident, however, they would have been required to manually lift and carry the tank because the boom did not have the capacity to extend to a different truck.

¶ 12 Dr. Antonsen testified that she was the plaintiff's family physician from 2001 until 2010. Dr. Antonsen testified that on July 13, 2001, the plaintiff had reported that he had been experiencing pain in his lower back for a couple of weeks. Dr. Antonsen testified that she diagnosed the plaintiff with a mild lumbosacral strain and prescribed over-the-counter ibuprofen. Dr. Antonsen testified that an August 10, 2001, MRI revealed a degenerative condition of a mild central disc bulge at Lumbar5-Sacrum1 (L5-S1). Dr. Antonsen testified that this MRI revealed no evidence of disc pathology, compression fracture, spondylolisthesis, significant central spinal stenosis, or free-lying disc fragments. Dr. Antonsen testified that the plaintiff had had prior episodic back pain and

continued to experience periodic back pain in 2002 and 2003. Dr. Antonsen prescribed the plaintiff anti-inflammatory medicine as well as a muscle relaxer.

¶ 13 On November 16, 2004, Dr. Antonsen referred the plaintiff to a pain management specialist, Dr. Thatcher, who noted that the plaintiff performed heavy lifting for the railroad and had chronic lower back discomfort which had recently become more intense. Dr. Antonsen testified that a March 2005 MRI ordered by Dr. Thatcher revealed the degenerative condition of a mild central disc bulge at L5-S1, which had been revealed in the August 10, 2001, MRI. Dr. Antonsen testified that there was no significant interval change revealed on the March 2005 MRI, as compared to the previous 2001 MRI.

¶ 14 Dr. Antonsen testified that on September 11, 2006, she discussed with the plaintiff his chronic lower back pain issues and reviewed the March 2005 MRI. The plaintiff reported pain in the lower back, occasional radiation into the right lower leg, and some numbness and tingling. Dr. Antonsen diagnosed him with "chronic low back pain with slight disc bulging at L4-5, some radiculopathy." Dr. Antonsen testified that the radiculopathy was pretty low grade but constant. The plaintiff continued to work as a welder.

¶ 15 Dr. Antonsen testified that during these initial years that she treated the plaintiff, his lower back issues were relatively minor but had progressed. Dr. Antonsen testified that prior to May 2007, however, the plaintiff had not been referred to an orthopedic surgeon, and there had not been any kind of MRI finding that had diagnosed a herniated disc with nerve root impingement. Dr. Antonsen opined, however, that in May 2007, the plaintiff experienced a general increase in the frequency and severity of his symptoms,

with more persistent radiculopathy, pain, and numbness that traveled to his leg. Dr. Antonsen testified that Dr. Sabatino, the specialist to whom she had referred the plaintiff, noted that the plaintiff had experienced an increase in lower back pain, with right lower extremity pain, around May and June 2007. Dr. Antonsen testified that a May 31, 2007, MRI revealed a change from the 2001 and 2005 MRIs. Dr. Antonsen testified that the 2007 MRI revealed L2-3 circumferential disc bulging and central posterior disc bulging at L4-5 and L5-S1. Dr. Antonsen testified that there was disc bulging, not degeneration, which are different.

¶ 16 Dr. Antonsen testified that she did not have a narrative report that would provide more information as to why she ordered an MRI in May 2007. Dr. Antonsen testified, however, that if the plaintiff had reported working at the railroad in May 2007, without the assistance of a typical welder's helper, and experienced an aggravation of his low back problems, these facts would have provided justification to order an MRI.

¶ 17 Dr. Antonsen testified that on October 12, 2007, the plaintiff continued to experience pain in the right lower back with radiation of pain into the right lower extremity. Dr. Antonsen testified that by February 8, 2010, the plaintiff was doing a great deal of heavy maneuvering and lifting and felt the pain had intensified to the point that he could no longer work. Dr. Antonsen testified that despite the periodic aggravations of lower back problems prior to 2010, the plaintiff had been capable of working for the railroad. Dr. Antonsen testified that "[t]hroughout [her] acquaintance with [the plaintiff], it was evident *** that his work environment contributed to his low back pain."

¶ 18 Dr. Matthew Gornet, an orthopedic spine surgeon, testified that he first treated the plaintiff on January 24, 2008. Dr. Gornet testified that the plaintiff complained of lower back pain on both sides which radiated to his right hip, knee, and thigh. Dr. Gornet testified that the plaintiff associated his pain to the use of different welding grinders and to bending and lifting without assistance. Dr. Gornet testified that the plaintiff had reported that the pain had resulted from a May 7, 2007, incident, had been distinct from prior pain, and had not resolved. Dr. Gornet testified that the plaintiff had described the more recent pain as a constant pain that worsened with prolonged sitting, bending, and lifting.

¶ 19 Dr. Gornet testified that he also treated the plaintiff on March 6, 2008, and had reviewed the discogram that had been completed by Dr. Shah's group in June 2007, which revealed structural back pain emanating from L4-5 and L5-S1 and a tear in the annulus of those two discs. Dr. Gornet testified that he had also reviewed the 2007 MRI, which correlated with the plaintiff's pain and revealed structural changes not present in the previous MRIs taken in 2001 and 2005. Dr. Gornet noted that the 2001 MRI showed minimal issues, with some subtle changes in disc degeneration. Dr. Gornet considered the plaintiff's structural back pain discogenic pain, pain coming from the disc mechanisms itself, L4-5 and L5-S1. Dr. Gornet testified that he attributed the plaintiff's symptoms to the May 2007, incident, wherein the plaintiff was not provided a welder's helper. Dr. Gornet testified that the date was not necessarily relevant, but the activity was associated with the plaintiff's symptoms. Dr. Gornet also testified that the plaintiff's railroad work over the 20-year period was a contributing cause of his lower back pain.

¶ 20 Dr. Gornet also treated the plaintiff in September 2008, March 2009, and June 2009. Dr. Gornet testified that the plaintiff's work activities were increasing his symptoms. Dr. Gornet scheduled another MRI in September 2009, which confirmed continued structural damage to the lower part of the plaintiff's spine. In particular, the MRI showed a right-sided annular tear in the disc at L4-5. There was also a central structural protrusion, a low-level herniation, at L5-S1.

¶ 21 On January 14, 2010, Dr. Gornet ordered a second discogram and identified a tear on the right-sided L4-5 disc that he determined was the main cause of the plaintiff's structural back pain. Dr. Gornet testified that even though the plaintiff had the central structural problem at L5-S1, it did not seem to be associated with his pain. Dr. Gornet testified that the plaintiff had returned on February 25, 2010, indicating that his pain had increased while moving an oxygen cylinder during work on January 28, 2010. Dr. Gornet ordered another MRI, which did not reveal new structural changes in the disc or disc mechanisms.

¶ 22 In April 2010, Dr. Gornet performed two surgeries at the L4-5 level. During the first surgery, Dr. Gornet operated through the plaintiff's abdomen, removed his herniated disc, and placed cages between his L4 and L5 vertebrae to fuse them together. In the second surgery, performed two days later, Dr. Gornet operated through the plaintiff's back and placed screws in the plaintiff's spine to secure the new structures. Dr. Gornet testified that he treated the plaintiff's traumatic annular tear at L4-5, not disc degeneration, which Dr. Gornet opined, was a separate issue. Dr. Gornet testified that

during the first six months of recovery after the plaintiff's surgery, he was expected to feel significant pain and discomfort and was required to cease all work activities.

¶ 23 Dr. Gornet testified that after the surgeries, the plaintiff had reported improvement in his symptoms, but his lower back pain and other symptoms were expected to continue. Dr. Gornet testified that he had advised the plaintiff that he would be unable to return to work on the railroad as a track laborer. Dr. Gornet recommended that the plaintiff adhere to a permanent 25-pound lifting restriction with no repetitive bending and lifting. Dr. Gornet testified that when he treated the plaintiff two years after the surgery, the plaintiff had reported that he was doing moderately well, but, as expected, he had increasing pain with increased physical activities.

¶ 24 Dr. Gornet testified that the plaintiff would require ongoing follow-up medical visits, one additional MRI, and was at risk to wear out segments adjacent to the fusion site. Dr. Gornet opined that the plaintiff is reasonably certain to require a second fusion surgery, or disc surgery and fusion, at the level below and above the current fusion site. Dr. Gornet opined that it was reasonably certain that the plaintiff would require two additional surgeries at the cost of $100,000 each. Dr. Gornet acknowledged that the need for the additional surgeries "would be related to the May 2007 injury event and the surgery that [he] did for that."

¶ 25 Dr. Gornet testified that "[h]erniated discs are usually associated with a historical event and then an MRI is ordered, and if we see a structural change then we associate it with that event." Dr. Gornet also stated, however, that the plaintiff's repetitive bending played a role in his symptoms. Dr. Gornet acknowledged that patients can be injured

doing an activity previously performed, with possibly a different body position, and incur a disc injury and become symptomatic. Dr. Gornet testified that a herniated disc, structural issues, and disc degeneration are three different issues.

¶ 26 During Dr. Gornet's testimony, the plaintiff's attorney noted that direct examination had lasted approximately one hour, that cross-examination had extended over half an hour, and that Dr. Gornet was scheduled to leave by 12:15. The plaintiff's attorney noted that the testimony of the previous witness had lasted longer than expected. Union Pacific's attorney indicated he had 20 to 30 minutes of cross-examination remaining. The plaintiff's attorney indicated that he required an additional two minutes of questioning. The circuit court stated that it would limit the attorneys' examination of Dr. Gornet so that Dr. Gornet could leave as close to 12:15 as possible.

¶ 27 After additional cross-examination by Union Pacific, the circuit court stated:

> "We're well past time. I [will] release the doctor right now. If somebody chooses to call him back or can make arrangements–but I mean we started [direct] examination at 10:20; there was approximately an hour of maybe a little more of direct and then there's been about an hour of cross so I'm going to release him."

¶ 28 Professor Rebecca Summary, the plaintiff's expert in the field of economics, testified that the plaintiff's total past losses were $150,419, which represented what he had lost in earning capacity based upon what he actually earned in the past. With regard to future lost income or earning capacity, Dr. Summary testified that if the plaintiff would have retired at age 60, the present value, or the discounted value, of his future lost income was $475,371. Dr. Summary testified that if the plaintiff would have retired at the age of

65, the value increased to $662,424. Dr. Summary testified that if the plaintiff had offset earnings of $10,000 a year, the range of value would be $371,027 to $511,112. When considering the plaintiff's coworkers' elevated pay, Dr. Summary calculated discounted lost earnings, assuming no offset earnings for the retirement ages of 60 to 65, to be between $599,343 and $835,177. With an offset of $10,000 employment income, Dr. Summary calculated the range of future lost income as $493,937 to $688,789. Dr. Summary calculated the loss of fringe benefits, such as health insurance, dental insurance, and vision insurance, at $177,176 to $246,893. Dr. Summary testified that the value of the plaintiff's lost household services over the next 25 years equaled $65,830. Dr. Summary testified that the plaintiff's economic damages ranged from $764,452 to $1,298,319.

¶ 29 At the close of the plaintiff's case, Union Pacific moved to strike the testimony of Dr. Gornet on the basis that it was not allowed to complete its cross-examination. The court denied Union Pacific's motion. The court noted that the parties had known Dr. Gornet would be present at 9:30 and would need to leave by noon. The court also noted that the plaintiff and Union Pacific had an equal amount of time to examine Dr. Gornet. Union Pacific then requested the court to allow it to read portions of Dr. Gornet's discovery deposition to the jury. The circuit court denied Union Pacific's request. The circuit court further denied Union Pacific's motion for a directed verdict.

¶ 30 Union Pacific presented the video evidence deposition of Dr. Peter Mirkin. Dr. Mirkin testified that he evaluated the plaintiff on August 24, 2011. Dr. Mirkin reviewed the plaintiff's deposition and medical records. Dr. Mirkin reviewed the plaintiff's May

31, 2007, MRI and stated that there was no sign of any structural problem other than some mild desiccation or degenerative changes in the upper discs of the lumbar spine. Dr. Mirkin testified that there was no evidence whatsoever of a posttraumatic condition in the lumbar spine.

¶ 31 Dr. Mirkin testified that there was also no abnormality shown at the L4-5 level where Dr. Gornet performed surgery in 2010. Dr. Mirkin testified that the MRI performed just prior to the January 28, 2010, incident revealed only a mild increase in the degeneration, which was expected with aging and tobacco use. Dr. Mirkin testified that the plaintiff's work at Union Pacific did not cause the degenerative conditions shown.

¶ 32 On February 6, 2013, the jury returned its verdicts. On count I of the plaintiff's first amended complaint, regarding the incident occurring on or about January 28, 2010, the jury returned a verdict in favor of the plaintiff and against Union Pacific, assessed future pain and suffering damages of $1, found the plaintiff 50% at fault, and thereby rendered net recoverable damages at $0.50. On count II, regarding the incident occurring on May 14, 2007, the jury returned a verdict in favor of Union Pacific and against the plaintiff. On count III, regarding the plaintiff's cumulative spine trauma, the jury returned a verdict in favor of the plaintiff and against Union Pacific, assessed damages of $1,050,008.50, and itemized it as follows: $450,011.46 for past and future medical expenses, $700,000 for loss of earnings, and $250,000 for past and future pain and suffering, which the jury correctly totaled at $1,400,011.46. The jury reduced the total amount by 25%, which the jury found was negligence attributable solely to the plaintiff (1,400,011.46, reduced by 25%, is $1,050,008.595).

¶ 33 On March 5, 2013, Union Pacific filed a posttrial motion for judgment notwithstanding the verdict, or in the alternative, a new trial. On July 12, 2013, the circuit court denied Union Pacific's posttrial motion. On August 7, 2013, Union Pacific filed a notice of appeal.

¶ 34 II. ANALYSIS

¶ 35 The plaintiff brought the underlying action pursuant to FELA, which was enacted in 1908 to provide a federal remedy for railroad workers who suffer personal workplace injuries. *Wilson v. Norfolk & Western Ry. Co.*, 187 Ill. 2d 369, 372 (1999). State tort remedies are preempted by FELA's statutory cause of action sounding in negligence, but federal and state courts exercise concurrent jurisdiction under FELA. *Fennell v. Illinois Central R.R. Co.*, 2012 IL 113812 ¶ 10; 45 U.S.C. § 56 (2000).

¶ 36 FELA provides a federal cause of action against a railroad by any employee injured or killed as a result of the railroad's negligence. See 45 U.S.C. § 51 (2000). Specifically, FELA provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States *** shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce *** for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, *** or other equipment." 45 U.S.C. § 51 (2000).

Although FELA provides a remedy that parallels common law negligence cases, it has been "liberally construed *** to further Congress' remedial goal" of holding railroads responsible for the physical dangers to which their employees are exposed. *Consolidated R. Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) (citing previous FELA cases relaxing the standard of causation required and permitting recovery for latent occupational diseases); *Fonseca v. Consolidated R. Corp.*, 246 F.3d 585, 588 (6th Cir. 2001).

¶ 37 A. Statute of Limitations

¶ 38 In count III of the plaintiff's first-amended complaint, the plaintiff alleged that he incurred cumulative trauma injuries to his lower back over the course of his career with Union Pacific. At the close of the plaintiff's case, the circuit court denied Union Pacific's motion for directed verdict, in which Union Pacific argued that the plaintiff's claim was barred by FELA's statute of limitations. However, at the close of Union Pacific's evidence, the circuit court granted the plaintiff's motion for a directed verdict on the statute of limitations issue and determined that the plaintiff's claim was not time-barred. Union Pacific thereafter filed its motion for judgment notwithstanding the verdict, or in the alternative, new trial, on the issue. The circuit court denied Union Pacific's motion. Union Pacific argues that the circuit court's rulings were in error.

¶ 39 Union Pacific contends that the plaintiff's cumulative injury action, filed on April 28, 2010, is time-barred because he failed to file his lawsuit within the three-year statute of limitations provided by section 56 of FELA (45 U.S.C. § 56 (2000)). Union Pacific asserts that the plaintiff experienced lower back problems as early as 1997, sought treatment for his lower back problems from 1997 forward, was diagnosed with

degenerative disc disease and a bulging disc in 2001, started taking prescription pain medications for his lower back in 2001, and always believed his low back problems were causally related to his work.

¶ 40 The plaintiff counters that, although he suffered previous, transitory back problems, there was no evidence of structural damage to his spine until the MRI obtained on May 29, 2007. The plaintiff notes that he had no cause of action for his pre-2007 transient lower back pain because it did not affect his work and because his medical examination showed no herniated spinal discs.

¶ 41 "A directed verdict will be upheld where 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Sullivan v. Edward Hospital*, 335 Ill. App. 3d 265, 272 (2002) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). Our "review of a directed verdict is *de novo*." *Id.*

¶ 42 Pursuant to section 56 of FELA, no action may be maintained "unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56 (2000). FELA does not define when a cause of action accrues, but generally, in traumatic injury cases, a cause of action accrues when the injury's effects are immediately apparent. *Hicks v. Hines Inc.*, 826 F.2d 1543, 1544 (6th Cir. 1987) (citing the Restatement (Second) of Torts § 899, cmts. *c* & *e* (1977)). The accrual issue is more problematic in cases involving latent injuries which cannot be discovered immediately, have an indefinite onset, or progress over many years unnoticed. *Tolston v. National R.R. Passenger Corp.*, 102 F.3d 863, 865-66 (7th Cir. 1996). Where plaintiff alleges an ongoing, continuous

exposure to an occupational condition which accumulates and ultimately creates the disability, the statute begins to run when the injury manifests itself. *Id.* (when exact date of injury cannot be determined because injury resulted from continuous exposure to harmful condition over time, plaintiff's cause of action accrues when injury manifests itself). Thus, the FELA claim for such an injury accrues when the plaintiff knows or should have known in the exercise of reasonable diligence the essential facts of the injury and the cause of the injury. *Fonseca*, 246 F.3d at 588; *Fries v. Chicago & Northwestern Transportation Co.*, 909 F.2d 1092, 1095 (7th Cir. 1990).

¶ 43 In holding that FELA reaches claims of occupational disease as well as workplace accidents, the United States Supreme Court determined in *Urie v. Thompson*, 337 U.S. 163, 170 (1949), that the claim of an employee exposed to silica dust over a 30-year period was not barred by FELA's statute of limitations. The Court in *Urie* determined that the employee could be held to be injured only when the accumulated effects of the deleterious substance manifested themselves, which was when his condition was diagnosed and he became incapacitated and too ill to work. *Id.*

¶ 44 The purpose of the statute of limitations in FELA is to protect the railroads from having to defend claims where evidence is lost, memories are not as reliable, or witnesses are unavailable. *Mickey v. BNSF Ry. Co.*, 358 S.W.3d 138, 141 (E.D. Mo. Ct. App. 2011). "At some point, persons with degenerative conditions have a duty to investigate cause." *Tolston*, 102 F.3d at 866. "[T]he fact that an injury 'has not reached its maximum severity … but continues to progress' does not relieve the plaintiff of the duty to use reasonable diligence to discover the original injury and its cause." *Campbell v.*

Grand Trunk Western R. Co., 238 F.3d 772, 777 (6th Cir. 2001) (quoting *Fries*, 909 F.2d at 1096); see also *Tolston*, 102 F.3d at 865-66 (plaintiff's history of extreme knee pain was sufficient to require investigation of the potential cause of condition more than three years prior to filing FELA claim); *Axe v. Norfolk Southern Ry. Co.*, 2012 IL App (5th) 110277, ¶ 15 (plaintiff had been treated for severe degenerative arthritis in both knees and should have known about the cause of his condition more than three years prior to filing FELA claim).

¶ 45 Nevertheless, FELA's purpose is not to foreclose claims of injury where the railroad worker reasonably believed his intermittent and transitory minor symptoms were instances of mild inflammation which would continue to resolve with no lasting effect. *Mickey*, 358 S.W.3d at 141; *Sabalka v. Burlington Northern & Sante Fe Ry. Co.*, 54 S.W.3d 605, 613 (W.D. Mo. Ct. App. 2001). "The [C]ourt [in *Urie*] did not rule that the employee is considered injured whenever the employee is aware of any symptom, even a temporary symptom." *Sabalka*, 54 S.W.3d at 611; *Urie*, 337 U.S. at 170. "Rather, it is a matter of when the employee should be aware that there is an injury of a compensable nature." *Sabalka*, 54 S.W.3d at 611. "[T]here is a difference between having an injury of the type for which a claim for compensation can be filed, and having intermittent pain which is presumed to be a temporary condition." *Id.* at 610.

¶ 46 In *Sabalka*, the railroad employee brought his FELA claim for injury to his wrists. The employee had previously experienced intermittent pain in his right hand, but he experienced increasing pain and was diagnosed as having a right wrist hemangioma within FELA's statute of limitations period. He underwent surgery and later began

experiencing pain in both of his hands, suffering damage in the form of bilateral "white finger vibration syndrome" and bilateral ulnar nerve injury. The court concluded that the employee could not have known that the prior intermittent pain was an injury for which a compensation claim could be filed, and thus, his FELA action was not time-barred. The court noted that it would have seemed foolish for the employee to have filed a FELA claim for temporary inflammation symptoms because he had no lingering symptoms and no substantiation of any injury. The court held that his "intermittent symptoms did not create awareness that he was suffering from a bodily condition causing incapacity." *Sabalka*, 54 S.W.3d at 612. The court concluded, as a matter of law, that there was no evidence to warrant the submission of the statute of limitations instruction to the jury because a reasonable person, experiencing intermittent, transitory pain would not have been aware of the injury. *Id.*

¶ 47 Likewise, in *Mickey*, 358 S.W.3d 138, the employee reported complaints of back pain outside the statute of limitations period. The court held that although there was evidence that the employee suffered intermittent back and knee pain more than three years prior to the filing of his claim, there was no reason for him to believe any permanent injury had occurred until he saw a physician who diagnosed him with degenerative disc disease. This permanent, work-related injury caused him to no longer be able to work. Thus, the court concluded, as a matter of law, that the employee's claim was not time-barred. *Mickey*, 358 S.W.3d at 142; c*f. Robinson v. BNSF Ry. Co.*, 412 Fed. Appx. 113 (10th Cir. 2011) (plaintiff's claims for degenerative disc disease and herniated disc were time-barred where the plaintiff complained of persistent back pain and was

diagnosed with permanent condition outside of limitations period and no discrete or acute event occurred within the statute of limitations period causing herniated disc).

¶ 48 Turning to the facts in the present case, we conclude that the plaintiff's cause of action is not time-barred. The evidence at trial revealed that the plaintiff suffered a permanent disc-herniation injury that manifested itself within three years of filing his FELA suit. Dr. Antonsen opined that in May 2007, the plaintiff experienced a general increase in the frequency and severity of his symptoms, with radiculopathy, pain, and numbness that traveled to his leg becoming more persistent. Dr. Antonsen testified that the May 31, 2007, MRI revealed a change from the 2001 and 2005 MRIs. Likewise, Dr. Gornet testified that the 2007 MRI correlated with the plaintiff's pain and revealed structural changes not present in the previous MRIs taken in 2001 and 2005. Dr. Gornet testified that he saw the plaintiff on March 6, 2008, and reviewed the discogram that had been completed by Dr. Shah's group in June 2007, which had revealed structural back pain emanating from L4-5 and L5-S1 and a tear in the annulus of those two discs. A subsequent MRI taken by Dr. Gornet in September 2009 confirmed continued structural damage to the lower part of the plaintiff's spine, showing a right-sided annular tear in the disc at L4-5, on which Dr. Gornet performed surgery. This permanent, work-related, disc-herniation injury, which manifested itself in May 2007, and ultimately caused the plaintiff to cease working, was the injury for which the plaintiff filed a claim against Union Pacific on April 28, 2010.

¶ 49 Although the evidence revealed that the plaintiff experienced back pain over the course of his job, this pain was intermittent and not permanent. In 1997, Dr. Dowler

examined the plaintiff over six weeks and noted no structural issues or permanent injury to the plaintiff's back, including no evidence of a herniated or damaged vertebral disc. Dr. Antonsen testified that the plaintiff had only a mild strain when she treated him for intermittent back pains in 2001. Although Dr. Antonsen previously detected slight disc bulging in 2001, she saw no evidence of disc herniation before May 2007. Dr. Antonsen confirmed that the plaintiff's symptoms did not become persistent until May 2007, when the plaintiff first reported to Union Pacific that he was suffering persistent lower back pain. The frequent but temporary back pain he experienced previously was distinct from the cumulative disc-hernation injury that resulted in continuous discomfort thereafter. See *Fonseca*, 246 F.3d at 590 (for the plaintiff's claim to survive, the court held that he must establish that the frequent but temporary hand pain he experienced for 27 years was distinct from the cumulative injury that resulted in continuous discomfort thereafter); *cf. Mounts v. Grand Trunk Western R.R.*, 198 F.3d 578 (6th Cir. 2000) (employee failed to produce evidence of a new or separate injury caused by the alleged continuing conduct of railroad employer).

¶ 50 As the court in *Sabalka* noted, an employee is not considered to be injured "whenever the employee is aware of any symptom, even a temporary symptom." *Sabalka*, 54 S.W.3d at 611. If we were to accept Union Pacific's argument, that the disc-herniation injury that developed in May 2007 was simply an aggravation of his earlier discomfort, then the plaintiff would have satisfied the statute of limitations only if he had filed suit prior to any evidence of disc herniation. If he had filed a FELA suit in 1997, for example, without medical evidence beyond his transient aches and pains after a long

day's work, the railroad would likely have claimed that his action lacked any evidentiary support. See *Fonseca*, 246 F.3d at 592. The evidence from the plaintiff's medical visits prior to 2007 was simply that he had suffered intermittent pain in his back and the MRIs taken at that time had indicated that it was not a permanent condition. See *Sabalka*, 54 S.W.3d at 611.

¶ 51 Accordingly, there simply was no evidence that the plaintiff suffered herniation of his L4-5 disc more than three years before filing suit. Thus, based upon the record, there was no evidence to indicate the plaintiff knew or reasonably should have known he was permanently injured before May 2007, even given his intermittent back pain complaints throughout the years. Accordingly, he was not on notice that he needed to sue his employer or forfeit his right to do so. Therefore, the circuit court properly entered a directed verdict on the issue of the statute of limitations. See *Sabalka*, 54 S.W.3d at 613 (claim was timely as a matter of law).

¶ 52 B. Negligence Allegations in Counts I and III

¶ 53 Union Pacific next argues that the circuit court erred in failing to direct a verdict or grant its motion for judgment notwithstanding the verdict on counts I and III of the plaintiff's first amended complaint. The plaintiff alleged in count I that he was injured on January 28, 2010, when he and Bischoff manually carried an oxygen cylinder to a nearby work truck. The jury rendered a verdict in the plaintiff's favor, found that Union Pacific's negligence caused 50% of the plaintiff's injury, and thereby awarded the plaintiff $0.50. In count III, the plaintiff alleged that he incurred cumulative trauma injuries to his lower

back over the course of his career with Union Pacific. The jury rendered a verdict in the plaintiff's favor and awarded $1,050,008.50 in damages.

¶ 54 "There are established standards to be used in determining whether a directed verdict, judgment *n.o.v.*, or a new trial should be granted." *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992). As noted above, "[a] directed verdict or a judgment *n.o.v.* is properly entered in those limited cases where 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Id.* (quoting *Pedrick*, 37 Ill. 2d at 510). "In ruling on a motion for a judgment *n.o.v.*, a court does not weigh the evidence, nor is it concerned with the credibility of the witnesses; rather it may only consider the evidence, and any inferences therefrom, in the light most favorable to the party resisting the motion." *Id.* "Most importantly, a judgment *n.o.v.* may not be granted merely because a verdict is against the manifest weight of the evidence." *Id*.

¶ 55 "Unquestionably, it is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide what weight should be given to the witnesses' testimony." *Id.* at 452. "A trial court cannot 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." *Id.* "Likewise, the appellate court should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way." *Id.* at 452-53.

¶ 56 The Supreme Court has observed that Congress, in enacting FELA, intended it to be a departure from common law principles of liability as a "response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety." *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 329 (1958). FELA has been characterized as a "remedial and humanitarian statute **** enacted by Congress to afford relief to employees from injury incurred in the railway industry." *Edsall v. Penn Central Transportation Co.*, 479 F.2d 33, 35 (6th Cir. 1973).

¶ 57 FELA renders a railroad liable for an employee's injuries "resulting in whole or in part from the [railroad's] negligence," 45 U.S.C. § 51 (2000). "Given the breadth of the phrase 'resulting in whole or in part from the [railroad's] negligence,' and Congress' 'humanitarian' and 'remedial goal[s],' [the United States Supreme Court has] recognized that, in comparison to tort litigation at common law, 'a relaxed standard of causation applies under FELA.' " *CSX Transportation, Inc. v. McBride*, __ U.S. __, __, 131 S. Ct. 2630, 2636 (2011) (quoting *Gottshall*, 512 U.S. at 542-43). Indeed, a railroad will be held liable where the proofs justify with reason the conclusion that the employer's negligence played any part, even the slightest, in producing the injury for which damages are sought. *Id.* The fact that a number of factors may have contributed to an injury is irrelevant " 'as long as one cause may be attributable to the railroad's negligence.' " *Coffey v. Northeast Illinois Regional Commuter R.R. Corp.*, 479 F.3d 472, 476 (7th Cir. 2007) (quoting *Heater v. Chesapeake & Ohio Ry. Co.*, 497 F.2d 1243, 1246-47 (7th Cir. 1974)). Thus, if negligence is proven and is shown to have played any part, even the

slightest, in producing the injury, then the railroad is liable in damages even if the extent of the injury or the manner in which it occurred was not probable or foreseeable. *McBride*, ___ U.S. at ___, 131 S. Ct. at 2641.

¶ 58 The plaintiff may prove proximate cause by either direct evidence or circumstantial evidence. *Hahn v. Union Pacific R.R. Co.*, 352 Ill. App. 3d 922, 930 (2004). "Circumstantial evidence is adequate when the fact finder may reasonably draw an inference from it." *Id.* "To be probative on the issue of causation, a medical expert is not required to give an opinion regarding a specific cause." (Emphasis omitted.) *Id.* "Rather, a medical expert is permitted to testify to what might or could have caused an injury ***." *Id.* " ' Proof of a change in health following an injury is competent as tending to establish that the impaired condition was due to the trauma.' " *Id.* at 932 (quoting *Plooy v. Paryani*, 275 Ill. App. 3d 1074, 1083 (1995)).

¶ 59 With regard to count I, Union Pacific argues that because the evidence revealed that the plaintiff had failed to use an available boom truck that could have lifted the oxygen cylinder and because Dr. Gornet testified that an MRI taken after the January 28, 2010, incident revealed no new structural damage to the plaintiff's back, there was no evidence of negligence on this claim.

¶ 60 The plaintiff counters that the evidence showed that while Union Pacific had trucks with booms that could have been provided to the plaintiff's crew to mechanically move the heavy oxygen cylinder, the boom on the plaintiff's truck was not working properly and Union Pacific had failed to repair or replace it, despite repeated requests.

The plaintiff thus argues that the evidence was sufficient for the jury to conclude that Union Pacific was negligent.

¶ 61 We agree with the plaintiff that the evidence at trial supported a finding that Union Pacific was negligent for failing to provide or maintain adequate work equipment or reasonably safe work methods for the plaintiff. Moreover, the evidence supported the jury's conclusion that the incident aggravated the plaintiff's spinal condition. The plaintiff indicated that he had injured his back on January 28, 2010, and he had returned to Dr. Gornet on February 25, 2010, indicating that his pain had increased while moving the oxygen cylinder during work. Although the subsequent MRI did not reveal new structural damage, Dr. Gornet testified that the January 28, 2010, incident aggravated the plaintiff's lower back pain. See *Hahn*, 352 Ill. App. 3d at 932 (proof of a change in health following an injury is competent to establish that impaired condition was due to the trauma). Thus, the evidence supported the jury's finding that Union Pacific was negligent and its damage award of $0.50.

¶ 62 With regard to count III, Union Pacific argues that the plaintiff failed to put forth evidence for the jury to conclude that its negligence caused the plaintiff to suffer cumulative trauma injuries. Union Pacific notes Dr. Gornet's testimony that the plaintiff's injury was caused by an incident that occurred in May 2007, and notes the jury's defense verdict with regard to the May 2007 incident. Union Pacific contends that there is no evidence that the cumulative trauma of its unsafe work conditions caused the plaintiff's L4-5 disc herniation.

¶ 63 The plaintiff testified that throughout his career he was required to perform additional physical labor due to the decrease in adequate and sufficient assistance and was exposed to excessive risk factors for the development of cumulative spine trauma. Although Dr. Gornet testified that he attributed the plaintiff's structural back pain to the May 2007 event, he explained that it was the activity that he associated with the symptoms. He also opined that the plaintiff's bending, awkward postures, heavy lifting, and increased workload due to reduced workforce and increasing work hours during his 20 years working for Union Pacific contributed to cause his back pain. Likewise, Dr. Antonsen testified that the plaintiff's work activities at the railroad were a contributing factor in the development of his lower back issues. The jury's verdict on count II, finding that Union Pacific was not liable for an incident which may have occurred in May 2007, did not preclude a finding that Union Pacific was liable for cumulative trauma that manifested itself at that time. Thus, the jury could have reasonably concluded based on the evidence that Union Pacific's negligence caused, "in whole or in part," the plaintiff's cumulative trauma injury to his lower back. See 45 U.S.C. § 51 (2000); *McBride*, ___ U.S. at ___, 131 S. Ct. at 2636.

¶ 64 C. Testimony of Dr. Gornet

¶ 65 Union Pacific argues that the circuit court erred in its rulings regarding the examination and testimony of Dr. Matthew Gornet. Union Pacific argues that it was denied its right to fully cross-examine Dr. Gornet and that the termination of its cross-examination was clearly prejudicial to the defense of the case and constituted reversible error.

¶ 66 "[C]ross-examination is generally a matter of right in all cases." *In re Click*, 196 Ill. App. 3d 413, 423 (1990); see also *Kurrack v. American District Telegraph Co.*, 252 Ill. App. 3d 885, 902 (1993) ("cross-examination is a matter of right and an important aspect of due process"); *Grundy County National Bank v. Myre*, 34 Ill. App. 3d 287, 288-89 (1975) ("[a]s a general rule, cross-examination of a witness is a matter of right"). It is well-settled, however, that the extent and scope of cross-examination are within the sound discretion of the trial court, whose rulings will not be disturbed absent an abuse of that discretion. *Iaccino v. Anderson*, 406 Ill. App. 3d 397, 408 (2010); *Anderson v. Human Rights Comm'n*, 314 Ill. App. 3d 35, 44 (2000); *Grundy County National Bank*, 34 Ill. App. 3d at 288-89. In reviewing whether the trial judge improperly limited cross-examination of a witness, we must review the record as a whole. *Bickham v. Selcke*, 216 Ill. App. 3d 453, 462 (1991).

¶ 67 Dr. Gornet is a board-certified orthopedic spine surgeon who practices medicine in the greater St. Louis metropolitan region and who performed surgery on the plaintiff's back. The plaintiff completed his direct examination of George Page near the end of the day of trial on January 31. At Union Pacific's request, the circuit court deferred cross-examination of Page until the next morning. Union Pacific indicated to the court that it would have 30 minutes of cross-examination remaining. The plaintiff informed the circuit court that Dr. Gornet would also appear the next morning and would be available "until noon to finish his testimony before the next surgeries come up." Union Pacific did not object to that limitation.

¶ 68 On the next morning, Union Pacific's cross-examination of Page extended past 30 minutes. The plaintiff objected to the prolonged examination, noting Dr. Gornet's limited time schedule. Union Pacific agreed to interrupt its cross-examination of Page, to allow Dr. Gornet to take the stand. Dr. Gornet's examination began at 10:15.

¶ 69 The plaintiff conducted his direct examination of Dr. Gornet for approximately one hour. Union Pacific then cross-examined Dr. Gornet. After about 30 minutes of cross-examination, the plaintiff noted that Dr. Gornet was required to leave at 12:15. The court later gave Union Pacific a five-minute warning, wherein Union Pacific indicated it had additional questions. When the court released Dr. Gornet, the court noted that direct examination had taken an hour and cross-examination had taken an hour. The court also noted that either party could recall Dr. Gornet. After the plaintiff rested his case, Union Pacific moved to strike Dr. Gornet's testimony, alleging it was precluded from completing its cross-examination. The circuit court denied Union Pacific's motion.

¶ 70 Initially, we note that at trial Union Pacific did not timely object to the plaintiff's and the circuit court's deadline to complete the examination of Dr. Gornet. "[F]ailure to object constitutes waiver." (Internal quotation marks omitted.) *In re Estate of Talty*, 376 Ill. App. 3d 1082, 1092 (2007). We also note that the circuit court's time limits were reasonably anchored to the plaintiff's allotted time and to the amount of time allotted to Union Pacific. Moreover, as noted by the plaintiff, Union Pacific fails to indicate what it would have asked Dr. Gornet had it been granted more time. A review of the record reveals that the jury had been made aware of the adequate factors concerning the relevant

areas of Dr. Gornet's impeachment. No reversible error occurred merely because Union Pacific was prohibited on cross-examination from pursuing other areas of inquiry.

¶ 71 Union Pacific further argues that the circuit court erred in denying it the opportunity to thereafter read and present to the jury Dr. Gornet's discovery deposition testimony, which, it argues, constituted impeachment.

¶ 72 After the circuit court denied Union Pacific's motion to strike Dr. Gornet's testimony, Union Pacific then requested to read into the record excerpts from Dr. Gornet's discovery deposition. The circuit court denied Union Pacific's request, and Union Pacific made an offer of proof that included portions of Dr. Gornet's discovery deposition.

¶ 73 In the highlighted portions of the proffered discovery deposition, Dr. Gornet testified that the changes at the L4-5 level of the plaintiff's back in the March 6, 2008, MRI would be consistent with degeneration that occurred over time, with his work activity as a whole being more of a contributing factor for further disc injuries. Dr. Gornet testified that the plaintiff's work activities were more associated with symptomatology than a causative factor of degeneration.

¶ 74 In the discovery deposition, Dr. Gornet also testified that the surgery that he performed on April 14, 2010, was not necessitated by the January 28, 2010, incident because the issues for which he was treating the plaintiff were well-defined prior to that incident. Dr. Gornet testified that the January 28, 2010, incident may have aggravated the plaintiff's previous symptoms and caused new symptoms but he did not find discrete, anatomic evidence of a new injury beyond what he had already defined. Dr. Gornet

testified that there could be changes within the disc that occurred to produce the left leg radiculopathy following the January 2010 incident but he did not see any new anatomic changes in the MRI. Dr. Gornet testified the plaintiff would benefit if he could find work within the medical restrictions.

¶ 75 In its reply brief, Union Pacific argues that it was prejudiced by the omission of the deposition testimony regarding the connection between disc herniations and disc degeneration, the causal link between the plaintiff's work activities and degeneration, the link between the January 28, 2010, incident and need for surgery, and the ability of the plaintiff to return to work after surgery. However, we have reviewed the relevant deposition testimony and find that Union Pacific was not prejudiced by its omission. Dr. Gornet's testimony before the jury reiterated much of his discovery deposition testimony. Dr. Gornet testified before the jury that he attributed the plaintiff's back pain to the May 2007 activities and that the MRI taken after the January 2010 incident revealed no new structural damage to the plaintiff's back. Accordingly, even if the circuit court erred in releasing Dr. Gornet and in thereafter denying Union Pacific's request to read his discovery deposition testimony to the jury, Union Pacific has not shown that it was prejudiced by these rulings. We will not reverse the court's judgment unless it abused its discretion and the rulings prejudiced Union Pacific. See *Morgan v. Department of Finance & Professional Regulation*, 388 Ill. App. 3d 633, 663 (2009); *Strino v. Premier Healthcare Associates, P.C.*, 365 Ill. App. 3d 895, 902 (2006). We conclude that the circuit court's rulings provide no basis for reversal.

¶ 76 Union Pacific next contends that the circuit court erred in allowing the plaintiff to present Dr. Gornet's opinions that were not properly disclosed pursuant to Supreme Court Rule 213. Specifically, Union Pacific argues that the court abused its discretion when it allowed Dr. Gornet to testify that the plaintiff would require two additional surgeries at the cost of $100,000 each.

¶ 77 Under Illinois Supreme Court Rule 213(f)(3), upon written interrogatory, each party must disclose the subject matter, conclusions, opinions, qualifications, and reports of a witness who will offer opinion testimony. Ill. S. Ct. R. 213(f)(3) (eff. Jan. 1, 2007); *Gee v. Treece*, 365 Ill. App. 3d 1029, 1035 (2006). "Rule 213(g) limits expert opinions at trial to '[t]he information disclosed in answer to a Rule 213(f) interrogatory, or at deposition.' " *Spaetzel v. Dillon*, 393 Ill. App. 3d 806, 812 (2009) (quoting Ill. S. Ct. R. 213(g) (eff. July 1, 2002)). " 'A witness may elaborate on a disclosed opinion as long as the testimony states logical corollaries to the opinion rather than new reasons for it.' " *Spaetzel*, 393 Ill. App. 3d at 812 (quoting *Foley v. Fletcher*, 361 Ill. App. 3d 39, 47 (2005)). " 'The testimony at trial must be encompassed by the original opinion.' " *Id.* (quoting *Foley*, 361 Ill. App. 3d at 47). The purpose of the rule is to avoid surprise and permit litigants to ascertain and rely upon the opinions of experts retained by their adversaries. *Brax v. Kennedy*, 363 Ill. App. 3d 343, 354 (2005). "[I]t is 'axiomatic that error in the exclusion or admission of evidence does not require reversal unless one party has been prejudiced or the result of the trial has been materially affected.' " *Spaetzel*, 393 Ill. App. 3d at 814 (quoting *Stricklin v. Chapman*, 197 Ill. App. 3d 385, 388 (1990)).

¶ 78 Whether an opinion has been adequately disclosed under Rule 213 is a matter within the trial court's discretion. *Lawler v. MacDuff*, 335 Ill. App. 3d 144, 147 (2002). A trial court's ruling concerning admission of evidence pursuant to Rule 213 will not be reversed absent an abuse of discretion. *Department of Transportation v. Crull*, 294 Ill. App. 3d 531, 537 (1998). The trial court abuses its discretion only if no reasonable person would take the view adopted by it. *Spaetzel*, 393 Ill. App. 3d at 812.

¶ 79 We agree with the plaintiff that Union Pacific has forfeited its objection to Dr. Gornet's testimony regarding future medical expenses. As noted by the plaintiff, Union Pacific failed to object on this basis at trial (see *Jones v. Consolidation Coal Co.*, 174 Ill. App. 3d 38, 43 (1988) ("[a]n objection to evidence based on a specific ground constitutes a waiver of objections on all grounds not so specified")), and it failed on appeal to cite the pages of the record relied on for this argument (Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on")). Union Pacific further fails to show that it was prejudiced or that the trial was materially affected by the admission of the evidence (*Spaetzel*, 393 Ill. App. 3d at 814 (allowing testimony despite lack of Rule 213 disclosure does not require reversal where plaintiffs are unable to show prejudice)). Accordingly, we find that the admission of this evidence does not require reversal.

¶ 80 D. Special Interrogatories

¶ 81 Union Pacific argues that the circuit court erred in denying its request for special interrogatories I, J, and K.

¶ 82 Union Pacific submitted the following special interrogatories to the circuit court:

I: "Was [the plaintiff] injured on January 28, 2010?"

J: "Was [the plaintiff] injured on May 14, 2007?"

K: "Did Union Pacific Railroad fail to implement an adequate ergonomics program?"

The circuit court refused to submit the instructions to the jury.

¶ 83 Section 2-1108 of the Illinois Code of Civil Procedure governs special interrogatories and states:

> "Unless the nature of the case requires otherwise, the jury shall render a general verdict. The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact submitted to the jury in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly." 735 ILCS 5/2-1108 (West 2010).

¶ 84 "A special interrogatory is in proper form if '(1) it relates to an ultimate issue of fact upon which the rights of the parties depend, and (2) an answer responsible thereto is inconsistent with some general verdict that might be returned.' " *Smart v. City of Chicago*, 2013 IL App (1st) 120901, ¶ 32 (quoting *Simmons v. Garces*, 198 Ill. 2d 541, 555 (2002)). "A special interrogatory's response is inconsistent with a general verdict

only where it is 'clearly and absolutely irreconcilable with the general verdict.' " *Id.* (quoting *Simmons*, 198 Ill. 2d at 555-56). "The purpose of a special interrogatory is not to instruct the jury, but to serve as a check on the jury's deliberation and to enable the jury to determine one or more specific issues of ultimate fact." *Id.* "Additionally, a special interrogatory: (1) should consist of a single direct question; (2) should not be prejudicial, repetitive, misleading, confusing or ambiguous; and (3) should use the same language or terms as the tendered instructions." *Id.* "We review a trial court's ruling regarding a request for a special interrogatory *de novo*." *Id.*

¶ 85 A trial court has no discretion to reject a special interrogatory that is submitted in proper form, but it may reject those it finds improper. *Brannen v. Seifert*, 2013 IL App (1st) 122067, ¶ 81. "Refusal to submit a proper special interrogatory to the jury is reversible error, so long as such an error is not harmless." *Id.* "In determining whether answers to special interrogatories are inconsistent with a general verdict, all reasonable presumptions are exercised in favor of the general verdict." *Simmons*, 198 Ill. 2d at 556.

¶ 86 Initially, we note that the jury returned a verdict in favor of Union Pacific on the plaintiff's claim regarding the May 14, 2007, incident. Thus, as noted by the plaintiff, any error in rejecting Union Pacific's special interrogatory J was harmless. *Brannen*, 2013 IL App (1st) 122067, ¶ 81.

¶ 87 We next consider whether special interrogatory I would have tested the general verdict. With regard to the incident referenced in interrogatory I, the jury returned verdict form D, finding in favor of the plaintiff "regarding the incident occurring *on or about* January 28, 2010" (emphasis added), and the jury assessed damages of $0.50. We

agree with the plaintiff that if the jury would have answered interrogatory I in the negative, its answer, that the plaintiff was not "injured on January 28, 2010," would not have been "clearly and absolutely irreconcilable" with its general verdict in favor of the plaintiff. Pursuant to its general verdict, the jury found that the plaintiff was injured "*on or about* January 28, 2010," which would include, for example, the day before or after. Moreover, a special interrogatory should not be confusing or ambiguous and should use the same language as the tendered instructions. See *Smart*, 2013 IL App (1st) 120901, ¶ 32.

¶ 88 Union Pacific's special interrogatory K asked the jury to determine whether Union Pacific "fail[ed] to implement an adequate ergonomics program." Again, as noted by the plaintiff, an affirmative answer to that question would not have been "clearly and absolutely irreconcilable" with its general verdict in favor of the plaintiff on his cumulative trauma claim. The failure to implement an adequate ergonomics program was only one of the five alleged violations of FELA on which the plaintiff based that claim. The jury was instructed of the plaintiff's claims that Union Pacific failed to provide him with a reasonably safe place to work, including failing to provide him with adequate assistance, failed to minimize his work place exposure to risk factors for cumulative spine trauma, failed to provide him with reasonably safe methods for work, failed to adequately warn, educate, or train the plaintiff, and failed to implement an adequate ergonomics program. The plaintiff claimed that his injuries resulted in whole or in part from one or more of these alleged violations of the act.

¶ 89 Only one of such violations was enough to support a verdict for the plaintiff. Thus, if the jury would have answered the special interrogatory in the negative, but returned a verdict in favor of the plaintiff on the basis that Union Pacific was negligent on another claimed basis, its answer to the question would not have been clearly and absolutely irreconcilable with its general verdict. Thus, the circuit court did not err in denying Union Pacific's request for special interrogatories.

¶ 90 E. Jury's Calculation

¶ 91 Union Pacific next argues that the jury's verdict on verdict form G was not properly calculated and was inherently inconsistent.

¶ 92 The jury's verdict stated the following:

> "As to the claim regarding cumulative spine trauma during the course of [the plaintiff's] career with Union Pacific Railroad Company, we, the jury, find for [the plaintiff] and against Union Pacific Railroad Company and further find the following:
>
> First: Without taking into consideration the question of contributory negligence, we assess the damages in the sum of $1,050.008.50, itemized as follows:
>
> Past and Future Medical Expenses $450,011.46
>
> Loss of Earnings $700,000.00
>
> Disfigurement $0
>
> Past and Future Pain and Suffering $250,000.00
>
> Past and Future Loss of a Normal Life $0

TOTAL: $1,400,011.46.

*** We determine the percentage of such negligence attributable solely to the plaintiff as 25%.

*** After reducing the total damages by the percentage of negligence attributable solely to [the plaintiff], we assess [the plaintiff's] recoverable damages in the sum of $1,050,008.50."

¶ 93 The jury's verdict revealed its total of itemized damages as $1,400,011.46 and Union Pacific's share of those damages (75%) as $1,050,008.50, the amount the jury correctly included as the net amount but mistakenly included as the gross amount. After the jury was polled, the plaintiff's counsel noted the discrepancy, giving Union Pacific the opportunity to seek clarification before the jury was discharged. We agree with the plaintiff that any valid objection that Union Pacific had to clarify the jury's verdict was waived by Union Pacific's failure to make contemporary objections at trial so that any defect could have been cured. *Snelson v. Kamm*, 204 Ill. 2d 1, 34 (2003). Thus, Union Pacific forfeited review of the error.

¶ 94 Notwithstanding forfeiture, we further find this error is clerical in nature and not a basis for reversal. See generally *Johnson v. Target Stores, Inc.*, 341 Ill. App. 3d 56, 66 (2003) (a court may modify judgment to correct clerical errors in written orders at any time). As noted by the plaintiff, the jury made the same scrivener's error on verdict D, regarding the incident on or about January 28, 2010, to which Union Pacific does not object. Accordingly, we find no reversible error.

¶ 95 F. Past and Future Medical Expenses

¶ 96 Union Pacific argues that the jury's verdict for past and future medical expenses is unsupported by the evidence regarding the plaintiff's cumulative trauma claim. Union Pacific notes Dr. Gornet's testimony that the cause of the plaintiff's herniated disc injuries was the May 14, 2007, incident, that the surgery he performed on the plaintiff's back was necessitated by the May 14, 2007, incident, and that the need for future surgeries can be attributed to the May 2007 incident. Union Pacific again notes that the jury rendered a verdict in Union Pacific's favor regarding the May 2007 incident. Union Pacific argues that the jury's award on the plaintiff's cumulative trauma claim was therefore not supported by the evidence, and the circuit court abused its discretion in denying its motion for judgment notwithstanding the verdict or a new trial.

¶ 97 We have previously reviewed the standards applicable to Union Pacific's motion for judgment notwithstanding the verdict. On a motion for a new trial, however, a court will weigh the evidence and set aside the verdict and order a new trial if the verdict is contrary to the manifest weight of the evidence. *Maple*, 151 Ill. 2d at 454. " 'A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence.' " *Maple*, 151 Ill. 2d at 454 (quoting *Villa v. Crown Cork & Seal Co.*, 202 Ill. App. 3d 1082, 1089 (1990)). "A court's ruling on a motion for a new trial will not be reversed except in those instances where it is affirmatively shown that it clearly abused its discretion." *Id.* at 455.

¶ 98 " 'The determination of damages is a question reserved to the trier of fact, and a reviewing court will not lightly substitute its opinion for the judgment rendered.' " *Blackburn v. Illinois Central R.R. Co.*, 379 Ill. App. 3d 426, 430 (2008) (quoting *Richardson v. Chapman*, 175 Ill. 2d 98, 113 (1997)). " 'An award of damages will be deemed excessive if it falls outside the range of fair and reasonable compensation or results from passion or prejudice, or if it is so large that it shocks the judicial conscience.' " *Id.* at 430-31 (quoting *Richardson*, 175 Ill. 2d at 113). " 'When reviewing an award of compensatory damages for a nonfatal injury, a court may consider, among other things, the permanency of the plaintiff's condition, the possibility of future deterioration, the extent of the plaintiff's medical expenses, and the restrictions imposed on the plaintiff by the injuries.' " *Id.* at 430 (quoting *Richardson*, 175 Ill. 2d at 113-14). " '[T]he trier of fact enjoys a certain degree of leeway in awarding compensation for medical costs that, as shown by the evidence, are likely to arise in the future but are not specifically itemized in the testimony.' " *Id.* at 432 (quoting *Richardson*, 175 Ill. 2d at 112).

¶ 99 Again, the jury's verdict on count II, finding that Union Pacific was not liable in negligence for an incident that occurred in May 2007 did not preclude a finding that Union Pacific's negligence caused the plaintiff to suffer a cumulative injury, which manifested itself at that time, required medical care, including two surgeries, and will require additional medical care in the future. Although Dr. Gornet testified that the plaintiff's symptoms were causally connected to the May 2007 event, he stated that the date was irrelevant because it was the activity that he associated with the symptoms.

Moreover, Dr. Gornet also testified that the plaintiff's railroad work over a 20-year period was a contributing cause for his lower back pain, which resulted in past and future medical expenses. Dr. Gornet performed two surgeries on the plaintiff and opined that the plaintiff was at risk to wear out segments adjacent to the fusion site. Dr. Gornet further opined that it was reasonably certain that the plaintiff would require ongoing follow-up medical visits, one additional MRI, and two additional surgeries at the cost of $100,000 each. The jury's award of $450,011.46 to cover past and future medical expenses was not the result of passion or prejudice, was not outside the range of reasonableness, and does not shock a reasonable judicial conscience. We cannot substitute the jury's judgment on questions tried and determined from the evidence, which did not greatly preponderate either way. *Maple*, 151 Ill. 2d at 452.

¶ 100 G. Loss of Earnings

¶ 101 Union Pacific argues that the plaintiff failed to prove that he incurred lost earnings as result of his cumulative trauma claim. Union Pacific contends that Dr. Summary's wage loss calculations were not supported by the evidence but on assumptions and scenarios provided by the plaintiff's counsel. Union Pacific thus argues that to the extent that the jury's verdict is based upon Dr. Summary's testimony, it is inconsistent with the evidence.

¶ 102 As noted by the plaintiff, Union Pacific did not object to the admissibility of this evidence and has therefore forfeited any sufficiency-of-the-evidence argument. *People v. Banks*, 378 Ill. App. 3d 856, 861-62 (2007). Notwithstanding forfeiture, however, "an award of future lost earnings includes consideration of the extent to which plaintiff's

capacity to earn has been impaired." *Antol v. Chavez-Pereda*, 284 Ill. App. 3d 561, 573 (1996). "Impairment of earning capacity is the difference between the amount the plaintiff was capable of earning prior to his injury, and the amount he is capable of earning after the injury." *Id.* at 573. "Plaintiff need not present expert testimony as to what employment opportunities are available to him." *Id.* at 574. "Loss of future earnings may be established through plaintiff's testimony alone." *Id.* The general rule is that the plaintiff's appearance on the witness stand and his testimony about the nature and duration of his injuries is sufficient to take the question of impaired earning capacity to the jury. *Id.* "Thus, evidence that plaintiff's injury was permanent and that it prevented him from continuing employment are generally sufficient to permit a jury to arrive at a calculation of lost future wages." *Id.*

¶ 103 In this case, Dr. Gornet testified that although the plaintiff reported improvement in his symptoms, he would continue to suffer lower back pain and other symptoms. Dr. Gornet imposed permanent lifting restrictions on the plaintiff and advised the plaintiff that he would be unable to return to his previous work. Dr. Summary explained that the plaintiff's lost future earnings capacity ranged from $599,343 to $835,177, depending when the plaintiff ultimately would have retired. That excluded consideration of lost fringe benefits, which Dr. Summary valued at up to $246,893. Dr. Summary testified that the plaintiff's economic loss ranged from $764,452 to $1,298,319. The jury had the benefit of the plaintiff's testimony, as well as the testimony of Dr. Gornet and Dr. Summary, and the jury may draw on its own experience in evaluating a plaintiff's future employment potential. See *Patel v. Brown Machine Co.*, 264 Ill. App. 3d 1039, 1061-62

(1994). The jury fixed the amount of lost earnings at $700,000. Under these circumstances, the jury's determination of lost future earnings was supported by the evidence.

¶ 104 III. CONCLUSION

¶ 105 For the reasons stated, we affirm the judgment of the circuit court of St. Clair County, entering judgment on the jury's verdict.

¶ 106 Affirmed.

¶ 107 JUSTICE SPOMER, dissenting:

¶ 108 I respectfully dissent. I believe the circuit court erred when it directed a verdict in favor of the plaintiff on the issue of whether the plaintiff brought his cumulative injury claim within the three-year statute of limitations imposed by section 56 of FELA (45 U.S.C. § 56 (2000)). I do not believe that " 'all of the evidence, when viewed in its aspect most favorable to the [defendant], so overwhelmingly favors [the plaintiff] that no contrary verdict based on that evidence could ever stand' " (*Sullivan v. Edward Hospital*, 335 Ill. App. 3d 265, 272 (2002) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967))). In a FELA action, compliance with the statute of limitations is a precedent to recovery, rather than an affirmative defense, and, as such, the plaintiff bears the burden of proving his cumulative injury claim was filed within the three-year statute

of limitations. See *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1112, 1117-18 (5th Cir. 1983).

¶ 109 My review of the record reveals evidence upon which a reasonable jury could conclude that the plaintiff's back injury manifested itself prior to 2007. Manifestation does not mean a plaintiff knows the precise nature or medical origin of an injury. *Gustavson v. United States*, 655 F.2d 1034, 1036 (10th Cir. 1981). The evidence reveals that the plaintiff was diagnosed with degenerative disc disease and bulging discs in his lower lumbar spine as early as 2001. Degenerative disc disease, by its definition, is permanent and progressive. The record is clear that at the time the plaintiff was diagnosed with degenerative disc disease, including bulging discs, he knew his injury was caused by his working conditions. With regard to a progressive disease such as degenerative disc disease, a plaintiff who knows the general nature of the injury cannot wait until it reaches maximum severity to make a FELA claim. *Fries v. Chicago & Northwestern Transportation Co.*, 909 F.2d 1092, 1096 (7th Cir. 1990).

¶ 110 While I recognize that the plaintiff's degenerative disc disease, bulging discs, and the ultimate herniation of his disc affected different vertebrae, all were located adjacent to one another in the plaintiff's lumbar and upper sacral spine. Although he had the burden of proof, the plaintiff did not introduce evidence that these disc problems were wholly unrelated. In fact, there is evidence in the record that suggests that over time, other parts of the plaintiff's spine will be affected, which suggests a possible relationship between the plaintiff's spinal conditions. In addition, the plaintiff's expert testified that the herniated disc was the result of a traumatic event, but the jury found against him on his

claim arising from a traumatic injury in May 2007. Because the plaintiff has the burden to prove his cumulative claim was filed within the statute of limitations, I would find that a jury question exists on this issue. See *Sabalka v. Burlington Northern & Santa Fe Ry. Co.*, 54 S.W.3d 605, 609-10 (W.D. Mo. Ct. App. 2001) (the question of the statute of limitations should be submitted to the jury when there is evidence bearing on the date of the accrual from which different inferences could be drawn). For these reasons, I would reverse the judgment of the circuit court and remand for a new trial.