NO. COA04-1614

NORTH CAROLINA COURT OF APPEALS

Filed: 17 January 2006

JOHN WILLIAMS,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 041688

COLONY TIRE CORPORATION,
Employer,

MICHIGAN MUTUAL INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by plaintiff and defendants from an opinion and award entered 13 October 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 September 2005.

Law Offices of George W. Lennon, by George W. Lennon for plaintiff.

Cranfill, Sumner & Hartzog, LLP, by J. Gregory Newton and Meredith T. Black for defendants.

LEVINSON, Judge.

Plaintiff (John Williams) appeals from an award and opinion of the North Carolina Industrial Commission concluding plaintiff suffered a compensable back injury. Defendants (Colony Tire Corp. and Michigan Mutual Insurance Co.) also appeal. We affirm.

The evidence presented in the record to the Full Commission may be summarized as follows:

In the spring of 2000 plaintiff (John Williams) was employed by defendant Colony Tire Co. as a truck tire changer. By the spring of 2000, plaintiff had worked intermittently as a tire changer for Colony Tire for ten years. Plaintiff's duties included lifting truck tires weighing up to 125 pounds. In mid-April 2000 plaintiff was assaulted by a co-worker. The co-worker approached plaintiff from behind, lifted him off the ground by his neck, and threw him to the concrete floor. Plaintiff landed on his back. Following this incident, plaintiff returned to work for a few weeks. Sometime thereafter, plaintiff began experiencing increasingly severe pain in his lower back. He stopped working on 8 May 2000 and sought medical treatment. Plaintiff did not return to work at Colony Tire, and his employment with Colony Tire was terminated 1 July 2000. On 12 September 2000 plaintiff returned to work as a tire changer for a different company, White's Tire Service. Plaintiff worked intermittently for White's Tire Service and for various other employers until October 2001.

Plaintiff was treated by a chiropractor and various doctors during an eighteen month period for a number of different complaints, including lower back pain. He was treated by Dr. Mark Jensen, a chiropractor; and Drs. Hardy, Rosenblum, Bloem, Rand, and Nelson, all medical doctors of varying specialities. In November 2001, Dr. Leonard Nelson surgically fused portions of plaintiff's spine. On 29 August 2002, Dr. Nelson released plaintiff from care at maximum medical improvement with a 30% permanent partial disability rating to his back.

Plaintiff filed a Form 18, dated 21 August 2000, initiating his claim against defendants for benefits pursuant to the Workers' Compensation Act alleging an injury to his back, neck and arm. No Form 21 or Form 60 agreement appears in the record. Plaintiff's claim was denied by defendants. On 31 December 2002 a deputy commissioner issued an opinion and award denying plaintiff's claim. Plaintiff's claim was reviewed by the Full Commission on 2 June 2003.

In an opinion and award entered 13 October 2003, the Full Commission found as fact:

1. Plaintiff was 45 years old at the time of the hearing before the Deputy Commissioner. He worked intermittently as a truck tire changer over the course of a ten-year period for defendant-employer at its service center in Rocky Mount. Plaintiff was most recently hired by defendant-employer in October 1999. Plaintiff worked as a truck tire changer until 8 May 2000, at which time he left his employment with defendant-employer due to back pain and never returned to work there.

2. In his capacity as a truck tire changer, plaintiff was required to perform various duties. These included making roadside service calls, mounting and dismounting tires in the truck tire shop at defendant-employer's service facility, and various other inventory and cleaning duties. The truck tires that plaintiff was required to lift weighed up to 125 pounds. During the course of his employment with defendant-employer, plaintiff obtained a certification as a truck tire changer.

3. At some point in Spring 2000, plaintiff was involved in an altercation with another co-worker, Johnnie King. On that morning, plaintiff was loading tires onto the back of a truck as part of his regular duties in the truck tire shop. As plaintiff walked to the rear of the shop, Johnnie King, a supervisor in defendant-employer's car tire shop, asked plaintiff to dismount and balance the tires on an ambulance that Mr. King had just backed into the rear of the truck tire shop. The tires had not been balanced properly by some employees in the car tire shop. Plaintiff refused to do so as he was not certified nor allowed by his direct supervisor, Randy Smith, to do this type of work. When plaintiff refused to comply with Mr. King's demand, Mr. King threatened "to whoop [plaintiff's] butt." Following the exchange, plaintiff started to walk away and Mr. King came up behind him. Plaintiff turned back towards Mr. King and Mr. King grabbed plaintiff by the throat and picked him up in the air. Plaintiff was unable to breathe and he began kicking Mr. King. Mr. King threw plaintiff to the concrete floor where plaintiff landed flat on his back.

4. After the attack, plaintiff reported the altercation to Jeff Foster, the manager on duty at the time, and later that day to Randall Smith, the service manager. According to plaintiff, the store's secretary was also present when he reported the incident to Jeff Foster. Plaintiff did not report having any injuries as a result of this incident at that time. After reporting the incident, plaintiff left

the store to calm down. He returned after a few hours and worked the remainder of his shift.

. . . .

7. Based upon the greater weight of the evidence, the Full Commission finds that the incident between Mr. King and plaintiff occurred in mid-April, between 14 April and 18 April[,] 2000.

8. After mid-April 2000, plaintiff continued to perform his normal duties as a truck tire changer. During the weeks following the incident at work, plaintiff was sore and had increasing pain in his neck and back. Plaintiff testified that he reported his pain to his supervisor, Randall Smith, on several occasions, and that Mr. Smith gave him "pain pills" and encouraged him to return to work. Plaintiff continued to work because he "had to." Mr. Smith testified that plaintiff did not appear to have any physical problems or be in any physical pain during this time and did not complain of any back pain; however, the Full Commission finds plaintiff's testimony to be more credible than that of Mr. Smith.

9. Mr. Smith also testified that on the morning of Friday, 5 May 2000, plaintiff requested and got permission to be off that afternoon in order to get a head start on remodeling a bathroom in his home. This work included replacing the flooring, tile, and fixtures in the bathroom. Plaintiff testified that he did leave work early on 5 May 2000, but the purpose was to take his son to the hospital for an appointment. Plaintiff specifically denied having done any remodeling work. The Full Commission finds plaintiff's testimony in this regard to be more credible than that of Mr. Smith.

10. On Monday, 8 May 2000, plaintiff reported to work with severe back pain. Mr. Smith recommended that plaintiff seek medical treatment if he needed to do so.

11. Plaintiff sought treatment with chiropractor Dr. Mark Jensen at Hammer Chiropractic that same day. Plaintiff complained of neck, arm, mid back, and low back pain as well as headaches. Plaintiff noted on the initial report that he was injured at work. Plaintiff related his injuries to his normal duties as a truck tire changer and specifically to the fact that he was required to lift heavy tires all day long. Plaintiff did not relate his injuries, and specifically his back pain, to his previous altercation with Mr. King

when he saw Dr. Jensen on 8 May 2000, but he did report an increase in pain over the last couple of weeks causing difficulty in performing his work duties. Dr. Jensen's examination revealed a decrease in plaintiff's range of motion in his neck and low back. He also found segmental dysfunction with pinched nerves and some neuritis, and misalignment at C2, C5, L5 and both iliums. Dr. Jensen opined that plaintiff's condition was not consistent with degenerative changes.

12. Dr. Jensen recommended conservative treatment modalities for plaintiff's symptoms, but plaintiff sought a second opinion. Dr. Jensen obtained an appointment for plaintiff with Dr. Nelson T. Macedo, a neurological surgeon. Dr. Jensen gave plaintiff an out-of-work note for 8 May 2000 through 10 May 2000, and provided plaintiff with a note which stated his opinion that the heavy lifting required by plaintiff's employment with defendant-employer was the cause of plaintiff's strain and neurological problems.

13. Shortly after 8 May 2000, plaintiff attempted to file a written claim for his back injury with defendant-employer. Mr. Smith and Sarah Joyner attempted to take an Injury Investigative Report. After a few questions, plaintiff indicated that he wanted to take the paperwork home to complete. Plaintiff returned those documents to defendant-employer a couple of weeks later. Plaintiff noted on the report that the accident occurred when he was thrown on a concrete floor by a co-worker, Johnny King, and due to heavy lifting by himself.

14. Plaintiff did not return to work for defendant-employer after 8 May 2000. Plaintiff initially kept in contact with defendant-employer about his back condition and his ability to work. Defendant-employer offered to assist plaintiff in applying for short-term disability benefits, but plaintiff never followed up on doing so. Eventually, plaintiff was officially removed from defendant-employer's payroll on 1 July 2000.

15. Plaintiff did not work from 8 May 2000 until approximately 12 September 2000, at which time he returned to work at White's Tire Service as a tire changer. Plaintiff worked off and on for White's Tire Service until early January 2001. Plaintiff also worked intermittently for other employers, both during and after his employment with White's Tire, earning various wages. These included jobs as a sales clerk at a few convenience stores and a job as a backhoe operator for Turner Plumbing. Plaintiff worked until 11 October 2001.

16. After his visit with Dr. Jensen, plaintiff treated with several physicians and medical providers for his complaints of low back and bilateral leg pain over the course of the ensuing months. This included treatment with Dr. Ira M. Hardy at Center for Scoliosis and Spinal Surgery, Dr. Shepard Rosenblum at Boice-Willis Clinic, P.A., Dr. J. Th. Bloem at Bloem Orthopaedic Center, and Dr. Tom S. Rand at Wilson Orthopaedic Surgery and Neurology Center.

17. Under the direction of Dr. Hardy, MRIs were taken of plaintiff's cervical, thoracic and lumbar spine regions on 16 August 2000. Dr. Hardy reviewed the films and found no evidence of instability. Plaintiff's MRIs were normal, with some degenerative changes at the facet joints at L4-L5 and a small central disk bulge at L5-S1, with no evidence of nerve root compression. Dr. Hardy opined that plaintiff's pain was the result of a strain problem rather than a disk problem. A whole body bone scan was performed on 28 August 2000, and Dr. Hardy found no evidence of increased uptake in any of the vertebral bodies in the thoracic region. Dr. Hardy opined that operative treatment was not warranted and that plaintiff did not have a compression fracture.

18. On or about mid-April 2000, plaintiff suffered an injury by accident arising out of and in the course of his employment with defendant-employer. Plaintiff's injury resulted in multiple areas of muscle strain to his back. As of 28 August 2000, plaintiff was capable of returning to work earning the same or greater wages. Dr. Ira Hardy noted that plaintiff could return to work and no restrictions were given. Plaintiff did in fact find employment as a tire changer on 12 September 2000.

19. Plaintiff presented to Dr. Shepard Rosenblum on 11 December 2000. Dr. Rosenblum reviewed plaintiff's MRIs and found "no frank disk herniation." He diagnosed plaintiff with multiple areas of back strain. After continuing treatment of steroids, physical therapy and time, Dr. Rosenblum had nothing further to recommend to plaintiff except a referral to a spine surgeon. He released plaintiff from his care on 17 May 2001.

20. On 24 July 2001, plaintiff sought treatment with Dr. Leonard D. Nelson at Raleigh Orthopaedic Clinic for his complaints of lower back and bilateral leg pain. Dr. Nelson's examination was essentially unremarkable and he diagnosed plaintiff with mechanical low back pain and recommended a lumbar MRI to rule out spinal stenosis. The MRI returned within

normal limits and Dr. Nelson indicated on 2 August 2001, that he saw no evidence of any acute injury or neurologic impingement. Dr. Nelson also indicated that plaintiff could return to his job as a plumber.

21. On 24 August 2001, plaintiff returned to Dr. Nelson with "fairly severe mechanical back pain." Dr. Nelson ordered discograms at L3-4, L4-5 and L5-S1. On 20 September 2001, Dr. Nelson informed plaintiff that the discograms revealed "L5-S1 HNP and degenerative disc disease." During his deposition testimony Dr. Nelson testified that plaintiff just had a painful disk at L5-S1; the disk was not herniated or bulging. Surgical options were discussed and plaintiff considered possible spinal fusion surgery. On 4 October 2001, plaintiff elected to proceed with the surgery. He was given an out-of-work note for an indefinite period of time. Decompression and fusion of L5-S1 with Steffee plate surgery was performed by Dr. Nelson on 6 November 2001.

22. Plaintiff continued to treat post-operatively with Dr. Nelson during which time Dr. Nelson ordered a lumbar myelogram and EMG/NCV studies, both of which returned negative. On 29 August 2002, Dr. Nelson released plaintiff at maximum medical improvement with a 30% permanent partial disability rating to his back and permanent work restrictions within the guidelines of a Functional Capacity Evaluation that was performed per his recommendation on 13 August 2002.

23. Plaintiff testified at the hearing before the Deputy Commissioner that since the surgery he remains unable to work and suffers debilitating pain 24 hours per day.

24. The results of the 13 August 2002 FCE indicate that plaintiff's activities should be limited as follows: no squatting, occasional stair climbing, 4.2 pounds carrying, 4.5 pounds pushing and pulling, and 9.3 pounds lifting from desk to chair.

25. Dr. Nelson opined that while it would be rare for an injury from the type of acute trauma that plaintiff described to produce long-term lower back pain, he also opined that plaintiff's mid-April 2000 injury might have caused the lower back pain for which he sought treatment in July 2000. Dr. Nelson also testified that the diagnostic studies and surgery did not provide information "one way or the other" as to whether plaintiff's condition was chronic in nature or the result of a work place injury. Based upon the prior MRIs and the whole body scan taken of plaintiff in August 2000, the medical records of Drs. Hardy and Rosenblum

> and other evidence presented, the Full Commission finds that plaintiff's surgery and resulting disability were not causally related to his mid-April 2000 injury by accident.
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> 26. Plaintiff testified that he earned $9.00 per hour while working for defendant-employer. Pursuant to the Form 19 filed by defendant-employer, the Full Commission finds that plaintiff's average weekly wage was $380.00, which yields a weekly compensation rate of $253.34.

The Full Commission concluded that:

> 1. Plaintiff sustained a compensable work-related injury due to a specific traumatic incident in mid-April 2000, when he was involved in a physical confrontation with a co-worker and suffered an injury to his back. Plaintiff's injury resulted in multiple areas of muscle strain to his back. N.C. Gen. Stat. §97-2(6).
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> 2. As of 28 August 2000, plaintiff was capable of returning to work earning the same or greater wages. Defendant-employer had terminated plaintiff's employment; however, plaintiff found employment elsewhere as a tire changer on 12 September 2000. *Russell v. Lowe's Prod. Distrib.*, 108 N.C. App. 762, 425 S.E.2d 454 (1993).
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> 3. As a result of his work place injury, plaintiff was disabled from 8 May 2000 until 12 September 2000. Plaintiff is entitled to temporary total disability compensation in the weekly amount of $253.34, beginning on 8 May 2000, and continuing until 12 September 2000. N.C. Gen. Stat. §97-29.
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> 4. Plaintiff is entitled to have defendants pay for all medical treatment incurred through 11 December 2000, which is related to his compensable injury. Plaintiff's treatment with Dr. Nelson and the resulting surgery were not related to his compensable injury. N.C. Gen. Stat. 97-25.

In its opinion and award entered 13 October 2003, the Full Commission awarded plaintiff $253.34 per week from 8 May 2000 until 12 September 2000 for temporary total disability compensation. It also ordered defendants to pay for plaintiff's medical treatment relating to his back muscle strain. From this award, plaintiff and defendants appeal.

We first address defendants' appeal. In their appeal, defendants contend the evidence presented to the Full Commission is insufficient to support the Commission's finding of fact number 18 and conclusion of law number 1. We disagree.

The scope of this Court's review of a workers' compensation award "is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000) (citation omitted). "The appellate court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Rogers v. Lowe's Home Improvement*, ___ N.C. App. ___, ___, 612 S.E.2d 143, 146 (2005) (quoting *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (internal quotation marks and citation omitted)). "The facts found by the Commission are conclusive upon appeal to this Court when they are supported by [any] competent evidence, even when there is evidence to support contrary findings." *Hodgin v. Hodgin*, 159 N.C. App. 635, 639, 583 S.E.2d 362, 365 (2003) (internal quotation marks and citations omitted). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citation omitted).

"The claimant in a workers' compensation case bears the burden of initially proving 'each and every element of compensability,' including a causal relationship between the injury and his employment." *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361 (quoting *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784

(2003)), *aff'd*, ___ N.C. ___, 619 S.E.2d 495 (2005). "There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, *i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question." *Click v. Freight Carriers*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). "The degree of proof required . . . is the 'greater weight' of the evidence or 'preponderance' of the evidence." *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541-42, 463 S.E.2d 259, 261 (1995) (citation omitted).

N.C. Gen. Stat. §97-2(6) (2003) provides in pertinent part:

> With respect to back injuries, . . . where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident. . . .

Where a case presents "complicated medical questions[,] . . . only an expert can give competent opinion evidence as to the cause of the injury." *Click*, 300 N.C. at 167, 265 S.E.2d at 391 (citations omitted). Recognizing "the continuing medical difficulty in determining the etiology of intervertebral diseases and injuries" our Supreme Court in *Click* noted, generally, such cases present complicated medical questions. *Id*. at 168, 265 S.E.2d at 391. "Although expert testimony as to the *possible* cause of a medical condition is admissible if helpful to the jury, it is insufficient to prove causation, particularly when there is additional evidence or testimony showing the expert's opinion to be a guess or mere speculation." *Holley v. ACTS, Inc.*, 357 N.C. 228, 233, 581 S.E.2d 750, 753 (2003) (internal quotation marks and citations omitted). While "[d]octors are trained not to rule out medical possibilities no matter how remote[,] . . . mere possibility has never been legally competent to prove causation." *Id.* at 234, 581 S.E.2d at 754 (citation omitted).

> Thus, the Court has held testimony that an event "could" or "might" be the cause of an injury to be insufficient to support a causal connection where there is further evidence tending to show that the expert's opinion is mere guess or speculation.

Hodgin, 159 N.C. App. at 641, 583 S.E.2d at 366.

In the instant case, the Commission found as a fact, in finding number 18, that the compensable injury plaintiff suffered was "multiple areas of muscle strain to his back." Defendants do not challenge the Commission's specific finding that the injury plaintiff suffered was muscle strain to his back. Instead, defendants challenge the sufficiency of the evidence to establish a causal link between plaintiff's having been thrown to the ground at work and this condition.

We next review the evidence presented to determine whether there was competent medical evidence to support the Commission's conclusion that plaintiff's condition was caused by the altercation at his employment. Defendants contend that neither the testimony of Dr. Jensen, nor the testimony of Dr. Nelson, establishes the necessary causal link between plaintiff's altercation at work and plaintiff's back muscle strain. In response, plaintiff argues it is the medical treatment notes of Dr. Rand which support the Commission's conclusion that there was sufficient evidence of causation. We agree with plaintiff in this regard.

Plaintiff's altercation at work occurred in mid-April 2000. On 11 May 2000, and again on 23 May 2000, plaintiff saw Dr. Tom Rand of the Wilson Orthopaedic Center.

On 11 May 2000 Dr. Rand noted:

> Complicated problem related to an injury on the job about 2 months previously. . . . The [patient's] complaints are hurting all over from the head to the toes which makes him impossible to evaluate. He does have apparently some neck pain and some back pain but I am really not sure. It could be that he is developing some generalized degenerative arthritis.

Again on 23 May 2000 Dr. Rand noted:

> Condition is unchanged. I believe his pain symptomatology is a result of that event being beat up on the job or having a fight or whatever did happen and I doubt this is going to resolve until he has completed his legal aspects of his case. In the meantime, will start him on PT and see if this will help some. He really didn't benefit from [medications]. His lab work was [negative] for arthritis. His bone scan was normal and I found no significant orthopaedic pathology. He does, of course, continue to have pain. Further evaluation is difficult to decide what would be appropriate at this point.

Dr. Rand saw plaintiff within a few weeks of the altercation and found "no significant orthopaedic pathology" or arthritis. According to Dr. Rand, the "pain sypmtomatolgy" was a "result of" the altercation at work. This, in conjunction with the Commission's finding that plaintiff suffered a back muscle strain, the condition diagnosed by Dr. Hardy, helps establish causation. On these facts, Dr. Rand's notes establish a causal link between the altercation in the workplace and the back muscle strain.

This assignment of error is overruled.

We next address plaintiff's appeal. Plaintiff contends the Commission: (1) failed to shift the burden of proof to defendants to rebut both the presumption of continuing disability and the presumption that plaintiff's medical treatment with Dr. Nelson was related to his compensable injury, and (2) erred by concluding that plaintiff was capable of returning to work at the same time it concluded plaintiff was disabled.

Plaintiff argues first that, once the Commission determined plaintiff sustained a compensable injury, the presumption of continuing disability applied. Plaintiff contends the Commission failed to shift the burden of proof to defendants to prove both that plaintiff was no

longer disabled and that plaintiff's medical treatment with Dr. Nelson was not related to the altercation at his work. We disagree.

Our Supreme Court has recently held that a presumption of disability arises in only three limited situations: "(1) when there has been an executed Form 21, 'AGREEMENT FOR COMPENSATION FOR DISABILITY'; (2) when there has been an executed Form 26, 'SUPPLEMENTAL AGREEMENT AS TO PAYMENT OF COMPENSATION'; or (3) when there has been a prior disability award from the Industrial Commission." *Clark v. Wal-Mart*, ___ N.C. ___, ___, 619 S.E.2d 491, 493 (2005) (citation omitted). "[I]t is the plaintiff's burden to establish both temporary total disability and permanent disability." *Brice v. Sheraton Inn*, 137 N.C. App. 131, 137, 527 S.E.2d 323, 327 (2000).

In the instant case, there was no Form 21 Agreement, no Form 26 Supplemental Agreement, and no prior disability award. The burden of proof remained with the plaintiff to prove "the existence of his disability and its extent." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986) (citations omitted).

With respect to plaintiff's argument that the Commission failed to place the burden of proof on defendants to prove that plaintiff's treatment with Dr. Nelson was not causally related to his compensable injury, we observe that the Commission's order does not show that the Commission erred in this regard.

Plaintiff next argues the Commission erred by entering contradictory conclusions of law, conclusion of law number 2 and conclusion of law number 3, and that the conclusions were not supported by the evidence. While, in conclusion of law number 2, the Commission concluded that plaintiff was capable of returning to work as of 28 August 2000, in conclusion of law number 3, the Commission determined plaintiff's temporary total disability ended as of 12

September 2000. Conclusion of law number 3 establishes the time period during which plaintiff was temporarily disabled and entitled to compensation under the Act. Both conclusions of law are supported by the findings and neither conclusion contradicts the other.

The relevant assignments of error are overruled. In addition, we conclude plaintiff's remaining arguments are without merit.

Affirmed.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).