

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>JOHN NUNNELEY JR.</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>LANEY, INC.</b>	)	
Respondent	)	Docket No. 1,002,983
	)	
AND	)	
	)	
<b>COMMERCE &amp; INDUSTRY INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier request review of the December 9, 2003 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on April 13, 2004.

**APPEARANCES**

Jeff K. Cooper of Topeka, Kansas, appeared for the claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

It was stipulated claimant suffered accidental injury arising out of and in the course of his employment with respondent on October 18, 2001. The issues litigated before the Administrative Law Judge (ALJ) included the nature and extent of claimant's disability as well as claimant's entitlement to future and unauthorized medical compensation. The

respondent also alleged an overpayment of temporary total disability compensation for the week of November 15, 2002, through November 21, 2002, which raised the issue of the amount of temporary total disability compensation due claimant.

The ALJ found the claimant suffered a 61.5 percent work disability based on a 56 percent wage loss and a 67 percent task loss. The ALJ further determined there was no evidence of an overpayment of temporary total disability compensation. Lastly, the ALJ granted claimant future medical upon proper application and unauthorized medical compensation subject to the statutory maximum.

At the time the ALJ issued the Award, the evidentiary record did not contain Dr. Chris Fevurly's deposition. The ALJ, in a footnote in the Award, indicated that although the file contained a notice to take the doctor's deposition, it was scheduled one day beyond respondent's established terminal date and the ALJ had not received a copy of the deposition transcript, if it had been taken.

The respondent requests review of the following: (1) the nature and extent of claimant's disability; (2) whether there was an overpayment of temporary total disability compensation; and, (3) whether the ALJ erred in issuing an Award without considering Dr. Fevurly's deposition transcript. Respondent argues the claimant is only entitled to a functional impairment less an off-set for an overpayment of temporary total disability compensation.

Respondent specifically argues claimant did not meet his burden of proof to establish he suffered either a functional or work disability. In the alternative, respondent argues claimant suffered an approximate 30 percent work disability based upon a 13 percent task loss and a 48 percent wage loss. Respondent further argues there was no evidence claimant was entitled to temporary total disability compensation before June 28, 2002. Accordingly, respondent argues temporary total disability compensation was overpaid from February 23, 2002, through June 28, 2002, or a period of 18 weeks. Lastly, respondent argues its terminal date was extended to November 16, 2002, but because that was a Sunday, Dr. Fevurly's deposition taken the following day should be considered part of the evidentiary record.

Claimant argues the ALJ's Award should be affirmed in all respects. Claimant further argues that because Dr. Fevurly's deposition was taken outside of respondent's terminal date it is not part of the evidentiary record and should not be considered by the Board. Lastly, claimant notes the respondent argued to the ALJ that the overpayment of temporary total disability compensation was for the time period November 15, 2002, through November 21, 2002, accordingly, claimant argues the temporary total disability compensation payments ceased on November 13, 2002, which was before the overpayment dates alleged by respondent.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ did not consider the evidentiary deposition of Dr. Chris Fevurly taken on November 17, 2003. The ALJ noted the date of the deposition was scheduled one day after the respondent's extended terminal date and, if taken, the ALJ did not receive a copy. Consequently, the ALJ issued the Award dated December 9, 2003, without waiting for the deposition, if it had been taken. The respondent argues the deposition was taken within the established terminal dates and should be considered by the Board as a part of the evidentiary record.

Respondent's original terminal date was set for September 24, 2003. On September 16, 2003, respondent filed a motion to extend its terminal date through October 15, 2003. Because claimant was unable to keep a scheduled appointment with Dr. Fevurly, the appointment was rescheduled and consequently the doctor's deposition regarding his examination of claimant had to be rescheduled to October 15, 2003. The claimant objected to the extension. On October 6, 2003, the ALJ entered an Order Extending Terminal Dates which established an October 15, 2003 terminal date for respondent.

On October 14, 2003, respondent again filed for a motion to extend its terminal date alleging claimant had not kept his appointment for examination by Dr. Fevurly. Consequently, respondent requested its terminal date be extended until Dr. Fevurly's deposition could be scheduled and taken. Claimant again objected and argued he did not attend the appointment because respondent never provided mileage and per diem in order for claimant to attend the examination.

On October 16, 2003, the ALJ signed the proposed Order To Extend Terminal Date which respondent had submitted with its motion. But the ALJ crossed out the proposed terminal date of a "date when Dr. Fevurly's deposition can be taken" and wrote November 16, 2003. On Monday, November 17, 2003, Dr. Fevurly's deposition was taken over claimant's objection that it was being taken outside the terminal date.

The respondent's extended terminal date was Sunday, November 16, 2003. It is presumed the ALJ merely intended to grant respondent a month extension and picked November 16, 2003, since the order was signed October 16, 2003, without resorting to a calendar to see which day of the week that date fell on.

Respondent argues that because the terminal date set was a Sunday, the actual terminal date extended through the following Monday. Conversely, claimant argues the ALJ established a terminal date for submission and the statutory as well as case law cited by respondent is not applicable because there is no need for computation of a fixed date.

An ALJ is required to set terminal dates for all parties after the first full hearing on the case. Extensions of terminal dates may be granted, if all parties agree, for certain situations where a medical evaluation of the claimant is unable to be obtained before the submission of the case, or for good cause shown.<sup>1</sup>

In this case, respondent had requested and received two extensions of its terminal date in order to take Dr. Fevurly's deposition. However, the respondent finally scheduled the deposition on the day after its extended terminal date. Respondent did not request an extension of its terminal date. Instead, respondent scheduled the deposition based upon its conclusion that because the established terminal date fell on a Sunday, the terminal date would extend to the next day. When the deposition was taken, the claimant objected because it was taken outside the established terminal date for respondent.

Dr. Fevurly examined the claimant on November 11, 2003, and issued his report that same date. The respondent had knowledge of the doctor's findings before its terminal date expired on November 16, 2003. Thus, the respondent had the opportunity to take Dr. Fevurly's deposition testimony before its terminal date expired or at least to request the extension of the terminal date and failed to do so.

The Board concludes claimant's objection to Dr. Fevurly's deposition testimony taken by respondent after its terminal date had expired should be sustained. Respondent argues that because the terminal date established by the ALJ fell on a Sunday its deposition of Dr. Fevurly was within the terminal dates. This argument is premised upon cases which establish that in counting the days within which to file an appeal or provide notice the general rule is that if the date falls on a Saturday, Sunday or legal holiday, then the time is extended to the next day which is not a Saturday, Sunday or legal holiday.<sup>2</sup> But in this case there were no days to count. The terminal date was fixed, it was not uncertain nor dependent upon counting interim days in order to establish the last day within which action should be taken. The terminal date for respondent was November 16, 2003, and the fact that day was a Sunday does not operate to extend the terminal date to the next day.

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<sup>1</sup> K.S.A. 44-523(b) (Furse 2000).

<sup>2</sup> *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996); See also, *Bain v. Cormack Enterprises, Inc.*, 267 Kan. 754, 986 P.2d 373 (1999).

The Board finds respondent had knowledge of Dr. Fevurly's findings and conclusions before its terminal date expired. If respondent wanted to take the deposition of Dr. Fevurly, it should have either taken it before its terminal date expired or requested an extension of the terminal date. The ALJ is required to set terminal dates and extensions should not be granted unless the party requesting the extension meets one of the conditions set forth in the statute.<sup>3</sup> In this case, respondent failed to take the deposition before its terminal date expired and also failed to request an extension of its terminal date. Good cause was never shown. The objection to the admission of Dr. Fevurly's testimony is, therefore, sustained. The Board will not consider the testimony for this review and Order.

Respondent next argues that after claimant was injured he received limited medical treatment which consisted of physical therapy. Claimant then obtained a truck driving job where he noted that his neck pain worsened. Respondent implies that claimant's medical condition was caused by his subsequent activities driving a truck hauling livestock.

The claimant received medical treatment after his automobile accident while working for respondent. Claimant then obtained employment as a truck driver hauling livestock but suffered continuing symptoms in his neck and shoulder. Claimant was examined by Dr. Steven C. Anagnost, a board certified orthopedic surgeon. Dr. Anagnost concluded that claimant's herniated cervical disk was caused by the automobile accident on October 18, 2001. Dr. Anagnost was provided claimant's work history after the accident and noted that such activity would likely increase claimant's symptoms but did not indicate a permanent worsening of his condition. Instead, as claimant continued to work his neck pain steadily worsened. Dr. Sergio Delgado also opined that claimant's condition was caused by the October 18, 2001 automobile accident.

The Board affirms the ALJ's determination that claimant has met his burden of proof that his need for medical treatment and resulting disability was caused by the October 18, 2001 work-related accident.

Because the claimant's wage loss and task loss evidence is uncontradicted, the Board further adopts the ALJ's determination that claimant suffered a 61.5 percent work disability. Finally, the Board adopts the ALJ's finding that respondent failed to meet its burden of proof to establish an overpayment of temporary total disability compensation and affirms the ALJ's Award in all respects.

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<sup>3</sup> K.S.A. 44-523(b) (Furse 2000).

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 9, 2003, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of May 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: Jeff K. Cooper, Attorney for Claimant  
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director