

denying the request for extension of terminal dates and argues the ALJ did not have jurisdiction to enter the Award while the appeal was pending from the order denying the request for extension. If the Board affirms the decision to deny terminal dates, respondent argues claimant should not be awarded a work disability. Respondent asserts the decision should be controlled by principles stated in *Lowmaster v. Modine Manufacturing Co*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* ___ Kan. ___ (1998).

Claimant contends the extension should not be granted because, according to claimant's counsel, respondent made an improper objection in an earlier deposition in the case. Claimant also argues there was not cause for such an extension. Finally, claimant asks that the Award be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board concludes the ALJ's findings as to the nature and extent of disability should be affirmed. The Board also concludes the proffered evidence for which respondent requests the extension of time would not alter the award and the issues relating to that extension are therefore moot.

Findings of Fact

1. Claimant was injured on July 18, 1995, when the flagpole he was carrying at work slipped and fell onto his shoulder. Claimant went to Dr. David T. Beckley, a chiropractor, with complaints relating to his neck, upper back, right shoulder, and right arm. Claimant later saw a number of physicians, including Dr. Deborah T. Mowery, Dr. Andrew B. Kaufman, Dr. Scott M. Teeter, and Dr. Joseph W. Huston. Ultimately, Dr. David J. Clymer became the authorized treating physician, and Dr. Clymer performed surgery to excise a small loose bony fragment from the T-1 spinous process. But surgery was not done until January 30, 1998.
2. On January 3, 1996, claimant took a layoff from his employment with respondent and began drawing unemployment compensation. At that time, no physician had recommended restrictions. In April 1996, respondent notified claimant his position had been filled and he was terminated.
3. Claimant saw Dr. Glenn M. Amundson on November 12, 1996, at the request of claimant's counsel to determine what, if any, medical care Dr. Amundson would recommend. Dr. Amundson recommended a repeat MRI and saw claimant again April 24, 1997, and May 28, 1998. Dr. Amundson recommended claimant limit occasional lifting to 50 pounds and avoid sustained or awkward postures of the lumbar spine, as well as repetitive bending, pushing, pulling, twisting, and lifting activities. Dr. Amundson reviewed a list of the tasks prepared by Mr. Richard W. Santner. The list included the tasks claimant had performed at work in the 15 years before the current injury. Dr. Amundson testified

claimant cannot now do 9 of the 14 tasks. Included in the tasks Dr. Amundson believed claimant cannot now do were two tasks in the job claimant did for respondent.

4. Dr. Clymer did not recommend restrictions but did testify that claimant cannot now perform 7 of the 14 tasks on the list prepared by Mr. Santner. The list included four tasks claimant did in his work for respondent, and Dr. Clymer conceded claimant could not do one of those tasks, specifically the loading and unloading of trucks involving weights of 10 to over 70 pounds, unless the lifting were limited to less than 50 pounds.

5. The regular hearing was held in this case on July 30, 1998. At that hearing, the ALJ set September 1, 1998, as respondent's terminal date. Before the hearing, respondent's counsel advised he had scheduled only one deposition, the deposition of Dr. Clymer, which was set for August 31.

6. On July 24, 1998, before the regular hearing, respondent's counsel wrote to claimant's counsel asking claimant's counsel to stipulate to the introduction of the records of Dr. Mowery, Dr. Kaufman, and Dr. Beckley. On July 29, 1998, claimant's counsel responded that he would so stipulate upon the condition that respondent's counsel conduct himself in a professional manner. The litigation had included some acrimony between the attorneys. On August 12, 1998, after the regular hearing, respondent sent the written stipulation to claimant's counsel for his signature. Claimant's counsel did not sign the stipulation.

7. On August 28, 1998, before respondent's terminal date, respondent filed a motion for extension of the terminal date. As cause for extending the terminal date, respondent cited the above facts relating to the stipulation for records of Drs. Mowery, Kaufman, and Beckley. Respondent asked for time to take the depositions necessary to introduce those records. Respondent also asked for time to take the depositions of Dr. Huston and Herschel Katch. On September 4, 1998, respondent submitted the affidavit of his paralegal. The affidavit states that she had attempted to schedule both depositions before the terminal date but could not because claimant's counsel was not available.

8. The ALJ ruled that the parties had, in effect, stipulated to the admission of the records of Drs. Mowery, Kaufman, and Beckley, but the ALJ denied the request to extend the terminal date to take the depositions of Dr. Huston and Mr. Katch. Respondent's counsel proceeded to take deposition testimony of Mr. Katch after the terminal date as a proffer. Claimant's counsel was given notice but did not attend.

At the time of oral argument for this appeal, claimant's counsel stated he is not appealing from the ruling that the records of Drs. Mowery, Kaufman, and Beckley are admitted as evidence. In addition, respondent's counsel stated that upon further review he does not wish to take the deposition of Dr. Huston. Respondent does wish to admit the testimony of Mr. Katch.

9. The Board has reviewed the proffered testimony by Mr. Katch. Mr. Katch testifies, as claimant had, that claimant took a voluntary leave. Mr. Katch adds that claimant was told they hoped the leave would be temporary but that it could be permanent.

10. After leaving work for respondent, claimant first worked several temporary jobs and then in April 1997 found work with Thompson Ranch. The ALJ found claimant's average weekly wage at Thompson Ranch was \$263.71. Neither party disputes this finding.

11. The ALJ also found claimant has a 57 percent task loss and neither party disputes this finding.

Conclusions of Law

1. The central argument made by respondent is that the facts in this case are similar to those in *Lowmaster v. Modine Manufacturing Co*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* ___ Kan. ___ (1998). This is the reason respondent wants to add testimony from Mr. Katch and the reason respondent argues the award should be limited to functional impairment. In *Lowmaster*, the claimant voluntarily left employment at a time when she had no restrictions and did not advise her employer that her injury was the reason she was leaving. The evidence also established that the employer would have accommodated later restrictions. Under these circumstances, the Court of Appeals held that the wage in the job claimant did for the employer must be imputed to claimant and for that reason the claimant was not entitled to work disability.

The Board finds the facts here to be different in two key respects from those addressed in *Lowmaster*. First, the record here does not establish that respondent would accommodate the restrictions later recommended for claimant. Second, as we view the facts in this case, claimant was terminated. Even if the Board assumes as true the testimony of Mr. Katch, respondent ultimately terminated claimant's employment. At the time he accepted the voluntary leave, claimant was not agreeing, in our view, to termination even if he was told that the leave could turn out to be permanent.

2. The above findings make moot the request for additional time to take the deposition of Mr. Katch. The testimony of Mr. Katch would not, in our view, change the outcome of the litigation even if accepted as true. The Board notes that if Mr. Katch's testimony might have affected the outcome, the Board does believe there was good cause for an extension of time.

3. Based on a task loss of 57 percent and a wage loss of 53 percent, claimant has, and is entitled to benefits based on, a 55 percent work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict on October 2, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: George H. Pearson, Topeka, KS
- Kip A. Kubin, Overland Park, KS
- Bryce D. Benedict, Administrative Law Judge
- Philip S. Harness, Director