Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 5, 2016

CLAIM NO. 201400991

BEST BUY MOTORS, LLC PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

JAVAD KAVOOSI
UNINSURED EMPLOYER'S FUND
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART
REVERSING IN PART
AND REMANDING

* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Best Buy Motors, LLC ("BBM") appeals from the September 14, 2015 Opinion, Award and Order and the October 19, 2015 Order on Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ") awarding Javad Kavoosi ("Kavoosi") a period of medical and temporary

total disability ("TTD") benefits. On appeal, BBM challenges the award of TTD benefits. For the reasons set forth herein, we reverse in part and remand.

Through a Farsi interpreter, Kavoosi testified at the hearing held July 29, 2015. On October 18, 2013, a metal fragment became lodged in his left index finger while working at BBM. He notified his supervisor who told him to continue to perform his normal duties, which he did. His condition worsened, leading him to seek medical attention at the emergency room on October 28, 2013. A fragment was found but was not removed because it was close to a nerve. Kavoosi was referred to Dr. Thomas Gabriel who removed the fragment. Relevant testimony concerning his ability to labor is as follows:

> Kavoosi (through interpreter): He said, when I got injured, I told the owner I got injured, I'm having problem, but he still made him to work. He said after ten day, it got so bad, I had to go to the emergency room.
>
> …
>
> He said he went through surgery and the doctor gave him one week off. He come back within a week so I can check your hand and see what's going on.
>
> He said when he came back, he was complaining about the pain and he was unable to work and he gave him another week off.

> He said you have to be very careful and then you have to go someplace else so they can check your nerves and see if it's been damaged or not.
>
> He said he went back to the owner and told him the situation and they said, you know, "I don't think there's anything wrong with it, you still have to work." He said he couldn't work with the pain.

The ALJ questioned Kavoosi as follows:

> Q. Mr. Kavoosi, between the time that you were hurt on October the 18th, 2013 up until the middle of November of that year you have testified that you continued – you missed a couple of weeks, but you continued to work in pain for ten days; is that right?
>
> A. Yes.
>
> Q. Were you doing all the same job duties or did the employer give you fewer duties to do?
>
> A. He said he was doing – he made him do the same thing, otherwise he wasn't going to get compensation, so he had to do what he had to do to survive.

Kavoosi was treated at Jewish Medical Center emergency room on October 28, 2013. A metallic foreign body was identified. Kavoosi was directed to see a hand surgeon.

Dr. Gabriel examined Kavoosi on October 29, 2013. Kavoosi provided a history of an injury to his left index finger on October 18, 2013 while working on a car. X-rays

revealed a small metallic foreign body in the soft tissue of the left index finger. Kavoosi had presented to an emergency room on October 28, 2013, but the metallic foreign body was not removed. Since then, he had worsening symptoms of stinging pain, swelling and a blister. Dr. Gabriel removed the foreign body and indicated Kavoosi had limited use of the left upper extremity and should not work until follow-up. On November 4, 2013, Dr. Gabriel removed stiches. Kavoosi had no signs of infection but reported soreness, numbness, and tingling at times. Dr. Gabriel maintained the upper extremity/hand restrictions and stated Kavoosi could not return to unrestricted duty before November 11, 2013.

In response to an August 26, 2014 letter from BBM's counsel, Dr. Gabriel stated Kavoosi was restricted from any work between October 29, 2013 until he reached maximum medical improvement ("MMI") on November 11, 2013. Kavoosi did not have permanent restrictions or impairment due to the injury.

In his Form 101, Kavoosi stated:

> I was working on a car and got something lodged into my left index finger. I could not get it out; it kept getting worse, and the employer said it was nothing, not cut, to keep working. I went to the JMCE emergency room on 10/28/13, the ER was

> unsuccesfful in removing the piece of metal.
> He also stated:
>
> October 18, 2013, the date of the injury, I immediately notified my employer, but the employer was ignoring me and kept telling me it was nothing, to keep working. It kept getting worse and worse and more painful and swelling. It was getting infected. My whole hand and wrist was hurting so I finally went to the Emergency Room by myself on 10/28/13 because my employer does not have any insurance and threatened me if I tried to file a workmen's comp.

Wage records filed with Kavoosi's application reflect he worked 56.03 hours in the week ending October 20, 2013; 40 hours in the week ending October 27, 2013; 53.38 hours in the week ending November 10, 2013, and 60.55 hours in the week ending November 17, 2013. He did not submit records for earnings in the week ending November 3, 2013. However, records submitted by BBM indicate he worked 28.5 hours that week.

Relying on the medical evidence from Dr. Gabriel, the ALJ found Kavoosi does not have an impairment rating and there is no need for additional medical treatment. Accordingly, the ALJ awarded only medical expenses already paid. Regarding TTD benefits, the ALJ found, "I am persuaded by Mr. Kavoosi's uncontradicted testimony that his employer forced him to work outside of his restrictions

until he reached MMI." The ALJ awarded TTD benefits from October 18, 2013 through November 29, 2013.

BBM filed a petition for reconsideration arguing Kavoosi is not entitled to TTD benefits. BBM noted Kavoosi continuously worked following the injury without interruption. Alternatively, BBM argued Kavoosi did not qualify for TTD benefits prior to October 29, 2013 or after November 11, 2013 because he was not under any restrictions prior to his visit with Dr. Gabriel on October 29, 2013. There is no evidence any physician assigned restrictions after November 11, 2013. Because this period does not exceed two weeks, Kavoosi could only be awarded a maximum of seven days of TTD pursuant to KRS 342.040(1).

The ALJ overruled BBM's petition for reconsideration. The ALJ noted Kavoosi was forced, in bad faith, by the employer to work outside of his restrictions. The ALJ stated working at the same job description and the same pay is no bar to receiving TTD benefits if the injured worker had limitations and was unfairly forced to work.

On appeal, BBM argues the ALJ erred in awarding TTD benefits during periods Kavoosi worked full-time in his customary employment. BBM notes Kavoosi worked continuously after the injury performing the same duties as he had prior to the injury, and earning the same or greater

wage. Notwithstanding this argument, BBM argues the period of the TTD benefits awarded was arbitrary and was not based upon any medical opinion in the record. There is no evidence indicating Kavoosi sought medical treatment or was under any restriction prior to the emergency room visit on October 28, 2013. Dr. Gabriel first placed temporary restrictions on Kavoosi on October 29, 2013. Despite the restriction, Kavoosi continued to work full-time. BBM contends the maximum period Kavoosi could qualify for TTD benefits is from October 29, 2013 when restrictions were assigned, until November 11, 2013. Because this period does not exceed two weeks, pursuant to KRS 342.040(1), Kavoosi could only receive seven days of TTD benefits.

Kavoosi bore the burden of proving entitlement to TTD benefits. Thus, the standard of review on appeal is whether substantial evidence supports the ALJ's finding. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Additionally, the ALJ must provide findings sufficient to apprise the parties of the basis for the decision. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991).

TTD is defined in KRS 342.0011(11)(a) as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a

level of improvement that would permit a return to employment[.]" In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that, until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The Court in Magellan Behavioral Health, stated:

> The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

We conclude an award of TTD benefits prior to October 29, 2013, the date Dr. Gabriel assigned restrictions, is supported by substantial evidence. It is true that, prior to October 29, 2013, no physician addressed Kavoosi's ability to perform his normal work duties. However, Kavoosi testified his condition was worsening from the date of injury until he sought medical

attention, and that he worked in significant pain during this period because his employer insisted. His statements in the Form 101 are consistent with this testimony.

The proof in this case was not well-developed, due to Kavoosi's status as a *pro se* claimant and the fact he testified through an interpreter. Nonetheless, given the particular circumstances of this claim, we believe the ALJ acted within his discretion in believing Kavoosi's testimony. A claimant's testimony concerning his ability to work is substantial evidence. Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979). The ALJ could reasonably conclude Kavoosi had no choice but to work and perform his normal duties, despite his pain and a worsening condition, lest he be fired.

Thus, we affirm the award of TTD benefits for the period between the date of injury, October 18, 2013, and the date Kavoosi first visited Dr. Gabriel, on October 28, 2013. Dr. Gabriel restricted Kavoosi from any work from October 28, 2013 until November 11, 2013. Dr. Gabriel's letter constitutes substantial evidence supporting the award of TTD benefits during this fourteen-day period. However, there is no evidence in the record to support an award of TTD benefits after November 11, 2013. Dr. Gabriel offered the only medical opinion regarding the date Kavoosi

reached MMI. Dr. Gabriel's opinion compels a finding Kavoosi was at MMI on November 11, 2013, which the ALJ adopted in his findings of fact. Kavoosi did not offer any testimony regarding his ability to labor after November 11, 2013.

Therefore, we reverse the award of TTD benefits beyond November 11, 2013 and remand this claim.

Accordingly, the award of TTD benefits from October 18, 2013 to November 11, 2013 if **AFFIRMED**. The award of TTD benefits from November 11, 2013 through November 29, 2013 is **REVERSED.** This matter is **REMANDED** to the ALJ for entry of an amended decision consistent with the views expressed herein.

ALL CONCUR.

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