OPINION ENTERED: AUGUST 23, 2012

CLAIM NO. 200900416

MELANIE TIPTON PETITIONER

VS. **APPEAL FROM HON. DOUGLAS W. GOTT, ADMINISTRATIVE LAW JUDGE**

WAFFLE HOUSE
and HON. DOUGLAS GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Melanie Tipton ("Tipton") appeals from the remand opinion rendered by Hon. Douglas W. Gott, Administrative Law Judge ("ALJ") on March 23, 2012, dismissing her claim against Waffle House of Nicholasville, Kentucky ("Waffle House") for failure to provide due and

timely notice of an alleged May 27, 2008 cumulative trauma injury. No petition for reconsideration was filed.

On appeal, Tipton argues, as she did in her previous appeal, the ALJ erred in finding the January 14, 2003 notice of work-related carpal tunnel syndrome manifesting in 2002 was insufficient notice for an alleged second manifestation of carpal tunnel syndrome on May 27, 2008 for which she filed a claim on April 2, 2009. We affirm.

Since this claim has previously been appealed to this Board, only a brief recitation of Tipton's injury and the procedural history of the claim will be provided. Tipton began working for Waffle House in 2000 as a waitress, cook, cashier and assistant manager. In 2002, she began experiencing arm pain, and was diagnosed with carpal tunnel syndrome. She continued to work for Waffle House, and on January 14, 2003, when her treating physician advised the condition was work-related, she provided notice to her employer both verbally and in writing. She continued to work for Waffle House until October 2003. She returned to work for Waffle House from January 2004 through March 2004. She then returned to work for Waffle House from October 2005 through May 27, 2008. She worked for other employers during the periods she did not work for

Waffle House. She also worked briefly for another employer after May 27, 2008. On April 20, 2009, Tipton filed a Form 101 alleging injuries to her neck, hands, wrists and arms. She testified she provided both written and verbal notice of the injuries on January 14, 2003.

The claim was assigned to the ALJ who ultimately dismissed it in an opinion and order rendered on October 21, 2010, finding she had failed to provide notice of a May 27, 2008 injury. The ALJ overruled Tipton's petition for reconsideration requesting he reconsider his determination of insufficient notice. Tipton then appealed to this Board arguing, as she does now, the notice provided in 2003 was sufficient for the May 27, 2008, date of injury she alleged in her Form 101. This Board affirmed the ALJ's determination in an opinion issued on April 21, 2011, finding as follows:

> Tipton's first argument is that notice in 2002 of a cumulative trauma injury- i.e. carpal tunnel syndrome- is sufficient for a claim for the same condition filed almost seven years later. We believe this argument has no merit. KRS 342.185(1) mandates notice of an accident must be provided to the employer "as soon as practicable after the happening thereof." In cumulative trauma or gradual injury claims such as a carpal tunnel syndrome claim, the date upon which the obligation to give notice is triggered is the date upon which there is a "manifestation of

disability." Special Fund v. Clark, 998 S.W.2d 487, 490 (Ky. 1999). In Special Fund v. Clark, supra, the Supreme Court of Kentucky defined "a manifestation of disability" as follows:

> In view of the foregoing, we construed the meaning of the term 'manifestation of disability,' as it was used in *Randall Co. v. Pendland,* as referring to physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained.
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> Id. at 490.

Pursuant to KRS 342.185(1), a claimant has two years "after the date of accident" or following the suspension of payment of income benefits to file a claim. In cumulative trauma injuries, claimants have two years after the "manifestation of disability" or the cessation of temporary total disability ("TTD") benefits to file a claim for income and medical benefits.

Certain medical records generated by Dr. Coburn reveal by June 14, 2002, Tipton received a diagnosis of carpal tunnel syndrome, and by January 14, 2003, Dr. Coburn indicated the carpal tunnel syndrome "appears to be work related." Thus, pursuant to applicable case law, Tipton's "manifestation of disability" took place on January 14, 2003, and, pursuant to KRS 342.185 and applicable case law, Tipton's notice requirement was triggered on that date. Since no income benefits were paid, her two-year statute of limitations period began running from that date.

Despite numerous inconsistencies in the record, the ALJ found credible Tipton's hearing testimony she gave Waffle House notice of her carpal tunnel syndrome sometime in 2002. Significantly, Tipton's Form 101, filed on April 2, 2009, did not allege an injury date in 2002 or 2003 but, instead, an injury date of *May 27, 2008*, for the same injury Tipton knew was work-related carpal tunnel syndrome manifesting on January 14, 2003. Thus, while Waffle House management might have received notice of a diagnosis of carpal tunnel syndrome in 2002 or 2003, there simply cannot be two, legally viable "manifestations of disability" as a result of the same *continuously symptomatic* carpal tunnel injury. Special Fund v. Clark, supra. Thus, an injury date of May 27, 2008, must be for either a *different* work-related injury or a second manifestation of carpal tunnel syndrome occurring *only* after the initial manifestation on January 14, 2003, became asymptomatic. However, Tipton testified her carpal tunnel syndrome remained symptomatic throughout the entire period of time she worked at Waffle House following the January 14, 2003, manifestation of disability. Likewise, the ALJ specifically found Tipton's carpal tunnel syndrome remained symptomatic. In fact, Tipton testified that during her second hiatus from Waffle House from March, 2004, through October, 2005, her symptoms were "progressively getting worse," but she returned to Waffle House in October, 2005, because she needed employment.

We agree notice of an injury may be given prior to the manifestation date. American Printing House for the Blind as Insured by Mutual Insurance Corporation of America v. Janet Brown,

142 S.W. 3d 145 (Ky. 2004). Further, we also acknowledge while a portion of a cumulative trauma claim may be barred in part by the statute of limitations, that claim may also be viable as to any impairment attributable to the two-year period immediate before the filing of the claim. (*See* Special Fund v. Clark, supra, and Tanks v. Roark, 104 S.W. 3d 753 (Ky. 2003)). That said, the facts in the case *sub judice* make it distinguishable from Special Fund v. Clark, supra, Tanks, supra, and American Printing House, supra.

In the case *sub judice*, there were two periods after 2003 during which Tipton's employment with Waffle House was interrupted. Indeed, the record reveals that for a total of one year and ten months between 2002 and 2008, Tipton did not work for Waffle House. Given the fact that after Tipton provided notice in either 2002 or 2003 of her carpal tunnel syndrome, Tipton had no further discussions with Waffle House about her carpal tunnel syndrome and was not employed by Waffle House for one year and ten months, the employer's ability to place Tipton under the care of a competent physician in order to minimize her disability and its liability, to investigate the facts pertaining to the injury, and to prevent the filing of a fictitious claim was severely hampered. *See* Harlan Fuel Co. v. Burkhart, 296 S.W. 2d 722, 723 (Ky. 1956). Testimony clearly establishes after Tipton advised the company of her work-related carpal tunnel condition, there was no further discussion about the extent of her condition or her problems. Thus, it is reasonable to conclude the company was lulled into a belief Tipton's carpal tunnel condition of which she provided notice in 2002 or

2003 had resolved. However, Tipton's testimony indicates her carpal tunnel syndrome remained symptomatic. Thus, we conclude any notice given by Tipton in 2002 or 2003 for the injury she alleged manifested on May, 2008, was not timely. Therefore, we believe the ALJ did not err in dismissing her claim for a carpal tunnel condition manifesting on May 27, 2008, based on the fact she failed to give notice of that injury. Additionally, there cannot be two legally viable manifestations of the same continuously symptomatic injury. Given her breaks in employment and the fact Tipton was not in constant contact with Waffle House from 2002 or 2003 until she filed her claim mandates she must give notice of the carpal tunnel condition she alleges manifested on May 27, 2008.

Tipton's secondary argument is the case *sub judice* involves a statute of limitations issue and her entitlement to benefits for the two years prior to the filing of her claim pursuant Special Fund v. Clark, supra.

This argument is without merit. Assuming, *arguendo*, Clark, supra, is applicable here, Tipton would only be entitled to benefits only for that impairment attributable to her employment during the two year period immediately prior to the filing of her claim on April 2, 2009. However, as stated throughout this opinion, Clark, supra, is not applicable in this case. Tipton's carpal tunnel syndrome manifested on January 14, 2003. Tipton allowed the statute of limitations to run on her carpal tunnel syndrome claim by failing to file a Form 101 within two years after January 14, 2003. **The case *sub judice* would only involve a statute of limitations issue had**

Tipton's April 2, 2009, Form 101 alleged a cumulative trauma injury manifesting in 2002 or 2003 which continued to be symptomatic due to multiple injuries occurring through May 27, 2008. Significantly, this case only involves an alleged injury date of May 27, 2008. For that reason, Clark, supra, is not applicable.

In Clark, supra, the Kentucky Supreme Court clearly indicated benefits may be awarded for the occupational disability caused during the two-year period immediately prior to the filing of the claim *in the event "a claim is not filed until more than two years after the worker's discovery of an injury and the fact that it was caused by work."* Id. at 490. **Therefore, this very narrow allowance articulated in Clark, supra, is only applicable in a case where the statute of limitations may bar a portion of a worker's claim.** In the case *sub judice*, Tipton did not file a claim within two years of the January 14, 2003, manifestation date. The Form 101 Tipton did file on April 2, 2009, asserted a manifestation date of injury of **May 27, 2008**. Thus, since the statute of limitations is not relevant in the case *sub judice*, Clark, supra, is not applicable.

Tipton's final argument is as follows:

> The Supreme Court in Clark also indicated that Chapter 342 provides that a delay in giving notice may be excusable. Petitioner submits that should the Workers Compensation Board find that Petitioner's notice in 2002 was insufficient, the delay in notice from the day of

> Petitioner's last work [sic], May 27, 2008, to the day of filing of [sic] her claim, April 2, 2009, which is prima facie notice, should be excused given that the Petitioner already provided notice in 2002 and that the employer was certainly not prejudiced by any delay. It simply is unfair to punish the Petitioner by dismissing her claim for failure to give notice when she gave notice in 2002. The employer was aware of her allegation of a work injury from 2002 on and the employer was absolutely not prejudiced in any way.

In Blue Diamond Coal Co. v. Blair, 445 S.W.2d 869 (Ky. 1969), the Court of Appeals of Kentucky held a mere lack of prejudice to an employer does not excuse a claimant's delay in providing notice of an injury. Second, while Special Fund v. Clark, supra, offers some leeway for "excusable" delay in providing notice, Tipton would have this Board hold the filing of her Form 101 on April 2, 2009, is notice of an alleged injury date of May 27, 2008. This argument is also without merit.

Waffle House was entitled to notice of an injury manifesting on May 27, 2008, for the reasons previously discussed herein. *See* Harlan Fuel Co. v. Burkhart, supra. The ALJ determined Tipton failed to provide *any* notice of an alleged injury manifesting on May 27, 2008, the injury date indicated in Tipton's Form 101. While Tipton alleges the May 27, 2008, injury is the same injury she provided notice of in 2002 or 2003, she did not allege in her Form 101 an injury manifesting in either 2002 or 2003. The ALJ, as fact-finder, determined Tipton failed to

> provide notice to her employer, "as soon as practicable after the happening thereof," of an injury manifesting on May 27, 2008, and the record fails to compel a different result than that reached by the ALJ.
>
> [footnotes omitted]

Tipton appealed to the Kentucky Court of Appeals. In its decision rendered December 22, 2011, reversing the Board, and the ALJ, the Court of Appeals stated as follows:

> On appeal, Tipton argues that her notice in 2003 was sufficient to encompass the alleged injury date of May 27, 2008. We cannot address that issue because, as set forth below, the ALJ must make additional findings of fact.
>
> Kentucky Revised Statute (KRS) 342.185 provides that "no proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof . . . ." In cases involving repetitive trauma, a claimant is not obligated to give notice until she is informed that she has sustained a work-related injury. *Hill v. Sextet Mining Corp.*, 65 S.W.3d 503, 507 (Ky. 2001).
>
> In this case, Dr. Coburn advised Tipton that she had suffered a work related "over-use" injury in the spring of 2002. Therefore, she was obliged to notify Waffle House of that injury within a reasonable period of time thereafter. Tipton testified at one point that she informed her supervisor of her injury in 2002 and at another point that she gave notice in 2003. A

representative from Waffle House, Pat Collins (Collins), testified that she had no recollection of receiving any such notice and that she had no documentation indicating Tipton had suffered a work-related injury at any time. The ALJ found Tipton's testimony that she gave notice in 2003 to be credible. However, he found that notice in 2003 did "not establish notice for an injury on May 27, 2008." Furthermore, the ALJ found that Tipton "failed to give notice of an injury in 2008." We find fault with this last finding by the ALJ because Tipton gave notice of the May 27, 2008, alleged injury when she filed her application for resolution of injury claim.

An ALJ must support his opinion "with a statement of the findings of fact, rulings of law, and any other matters pertinent to the question at issue[.]" KRS 342.275. We recognize that the ALJ is not required to provide "a discussion and analysis of either the evidence or the law." *Big Sandy Community Action Program v. Chaffins*, 502 S.W.2d 526 (Ky. 1973). However, the ALJ is required to base his opinion on an accurate recitation of the facts. See *Whitaker v. Peabody Coal Co.*, 788 S.W.2d 269, 269 (Ky. 1990). The ALJ's finding that Tipton did not give notice of her alleged 2008 injury is not accurate. Therefore, we must remand this matter to the ALJ so that he can determine whether Tipton's filing of her application for injury claim constituted due and timely notice of her alleged May 27, 2008, injury.

Additionally, we note that the Board's opinion contains one significant inaccuracy. The Board held that "[t]estimony clearly establishes after Tipton advised the company of her

work-related carpal tunnel condition [in 2003], there was no further discussion about the extent of her condition or her problems." In fact, Tipton testified as follows:

> Q: Did you notify the Waffle House that you were claiming a work-related injury, a carpal tunnel injury, on May 27, 2008?
>
> A: That I was claiming one?
>
> Q: Yes.
>
> A: No.
>
> Q: Have you ever given notice to the Waffle House that you had a work injury and you are claiming your carpal tunnel as work related other than in 2003?
>
> A: No. 2003 is when it began, when I went to the doctor.
>
> Q: Okay.
>
> A: I had talked to her, but not . . .
>
> Q: You said "her." You talked to who?
>
> A: Pat Collins.
>
> Q: Had talked to her when?
>
> A: I think it was 2008 that I talked to her that I was still having problems -- 2008.
>
> Q: 2008 still having problems?
>
> A: Yes.

> Q: What did you talk about?
>
> A: The fact that I needed to go back to the doctor, and it was ongoing, and I was having a lot of problems and I couldn't work . . . . I couldn't work. I could not work. I couldn't perform my duties like I should.

Collins denied the preceding conversation with Tipton took place; however, Collins admitted she may have heard from Tipton's immediate supervisor that Tipton was having problems with her hands. Therefore, the Board's statement that "there was no further discussion about the extent of [Tipton's] condition or her problems" is not accurate.

We note that the ALJ recognized the above testimony, stating that Tipton "told Pat Collins in 2008 that she was still having problems and could not work." This testimony is arguably inconsistent with the ALJ's finding that Tipton did not notify Waffle House she was "claiming an injury" in May 2008. However, it could also be construed in the context of the record to constitute notice. Therefore, on remand, the ALJ should address whether he found Tipton's testimony regarding the alleged 2008 conversation with Collins to be credible. If so, he must then determine whether, in the context of all of the evidence, Tipton's statements to Collins constituted notice.

We are not making a finding whether Tipton's filing of her application of injury claim was as soon as practicable, as such a factual finding is for the ALJ. Nor are we instructing the ALJ how to rule on this

> issue. We are simply remanding this matter to the ALJ for a finding based on a correct recitation of the evidence.

In compliance with the instructions from the Court of Appeals, the ALJ rendered a remand opinion on March 23, 2012. In that opinion, the ALJ found as follows:

> The Court of Appeals reversed and remanded. The Court noted that the ALJ separately stated in his Opinion and Order that Tipton did "not establish notice for an injury on May 27, 2008," and that she "failed to give notice of an injury in 2008." (p. 4, citing pp. 7-8 of Opinion and Order). The Court found the latter statement to be inaccurate because the filing of the Form 101 was itself notice of the May 27, 2008 injury claim. The claim was remanded for the ALJ to "determine whether Tipton's filing of her application for injury claim constituted due and timely notice of her alleged May 27, 2008 injury." (p. 4). The Court then noted Tipton's testimony that in 2008 she told Pat Collins at Waffle House that she was still having problems with her hands, and further directed the ALJ to decide whether that testimony was credible, and, if so, whether such statements constituted notice. (p. 6).
>
> The applicable law on limitations is set forth in the ALJ's original Opinion. Having applied the law to the evidence to make the additional findings directed by the Court of Appeals on remand, the Administrative Law Judge finds that Tipton's filing of her Form 101 on April 2, 2009 was not timely notice of an injury on May 27, 2008. The ALJ further finds that

> although he believes Tipton's testimony that she voiced continued problems with her hands to Pat Collins in 2008, such were ongoing symptoms from a disability that had become manifest in 2003, and did not place Waffle House on notice of a new injury in 2008. Since Tipton's testimony was that she did not report an injury on or about May 27, 2008, the ALJ does not accept the argument that her complaints to Ms. Collins of ongoing problems with her hands in 2008 should somehow put Waffle House on notice of a new injury – notwithstanding the issue of establishing "two, legally viable manifestations of disability" as set forth above – when Tipton did not consider or present it as such.
>
> The ALJ reaffirms his original decision that Tipton's May 27, 2008 claim must be dismissed for want of notice. The Court of Appeals stated that its' remand was to ensure that a decision was based on "a correct recitation of the evidence." (p. 7). The Court left the ultimate factual finding to the ALJ. The ALJ has complied with the remand from the Court of Appeals, and in doing so finds that the same result is reached.

No petition for reconsideration was filed.

On appeal, Tipton asserts the same arguments advanced in her previous appeal. We again affirm the decision of the ALJ. In his remand opinion, the ALJ addressed the issues required by the Court of Appeals. The ALJ determined the notice of a May 27, 2008 injury provided in the Form 101 filed on April 2, 2009 was not due and

timely. Likewise, the ALJ determined Tipton's ongoing complaints of her previous problems did not constitute notice of a new manifestation or compensable injury.

In workers' compensation cases, the claimant bears the burden of proof and risk of non-persuasion with regard to every element of the claim, including proper and timely notice of injury. Durham v. Peabody Coal Co., 272 S.W.3d 192 (Ky. 2008). If the party with the burden of proof before the ALJ is unsuccessful, the issue on appeal is whether the evidence compels a different conclusion. In Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984), the Court of Appeals stated as follows:

> The claimant bears the burden of proof and risk of persuasion before the board. If he succeeds in his burden and an adverse party appeals to the circuit court, the question before the court is whether the decision of the board is supported by substantial evidence. On the other hand, if the claimant is unsuccessful before the board, and he himself appeals to the circuit court, the question before the court is whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.

Compelling evidence is defined as evidence so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). So long as evidence of

substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Indeed, for an unsuccessful party, this is a great hurdle to overcome. The Kentucky Supreme Court in Special Fund v. Francis, supra, stated as follows:

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made. Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

Id. at 643.

Here, Tipton, the party with the burden of proof on the issue of notice, was unsuccessful. The evidence of record does not compel a different result. On appeal, she again argues notice in 2003 of a work-related carpal tunnel syndrome is sufficient for a claim for the same condition

allegedly occurring in 2008, for which a claim was filed in 2009. We again conclude this argument has no merit. KRS 342.185(1) mandates notice of an accident must be provided to the employer "as soon as practicable after the happening thereof."

Contrary to our previous opinion, and as pointed out by the Court of Appeals, we note Tipton testified she had additional discussions with Waffle House personnel regarding her condition which manifested in 2003, but did not provide notice of a new injury manifesting on May 27, 2008.

In affirming the remand opinion, we note and specifically exclude the erroneous recitation of the facts pointed out by the Court of Appeals. Rather than stating, "there was no further discussion about the extent of her problems", we note she testified she discussed her ongoing problems beginning in 2002 with Waffle House personnel. We also note she testified she never provided notice of a May 27, 2008 injury until she filed the Form 101. We otherwise reassert and incorporate our previous findings from the opinion we issued on April 21, 2011, for the reasons previously enumerated.

Accordingly, the ALJ's October 21, 2010 opinion and order dismissing Tipton's claim for income and medical

benefits, and the November 23, 2010 order overruling Tipton's petition for reconsideration, are **AFFIRMED**.

ALL CONCUR.

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