OPINION ENTERED: June 28, 2013

CLAIM NO. 201193629

ZAPPOS.COM, INC. PETITIONER

VS. **APPEAL FROM HON. JOHN B. COLEMAN, ADMINISTRATIVE LAW JUDGE**

SONIA S. MULL
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART,
REVERSING IN PART
AND REMANDING

* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

ALVEY, Chairman. Zappos.Com, Inc. ("Zappos") appeals from the November 5, 2012 Opinion, Award and Order rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"), and from the November 30, 2012 Order on Reconsideration. The ALJ awarded Sonia S. Mull ("Mull") temporary total

disability ("TTD") benefits, permanent partial disability benefits and medical benefits.

On appeal, Zappos argues the ALJ erred in awarding TTD benefits since Mull ceased working for reasons unrelated to her injury. Zappos also argues the ALJ erred in finding Mull properly gave notice. Because the award of TTD benefits is not supported by substantial evidence, we reverse in part, affirm in part and remand.

Mull filed a Form 101 on August 17, 2011 alleging a repetitive motion injury to the middle finger of her right hand during the course and scope of her employment on February 5, 2011. She indicated she gave notice of her injury to her manager, Sarah Bella, on March 11, 2011.

Mull testified by deposition on November 3, 2011 and at the hearing held September 17, 2012. Mull worked primarily in the finance sector as a credit investigator and internal audit clerk. She came to the United States from the Philippines in 2007 and has worked as a W-2 verifier, quality assurance clerk, sales clerk and cashier. She began working for Travelex Currency Services in March 2009 as a currency exchange clerk, earning $23,575.00 per year. She began her employment with Zappos in August 2010, working ten hour shifts on weekends earning $11.00 per hour. Her work at Zappos required her to engage in prolonged standing while

retrieving boxes from a conveyor, scanning the boxes, and putting them into Zappos boxes for shipping. She testified her work was fast paced and repetitive, often requiring her to handle 300 boxes per hour.

Mull testified she first noticed numbness and stiffness in her hands in January 2011. On February 5, 2011, she had difficulty lifting her middle finger from a closed fist and had a snapping or flicking sensation in the finger. She continued to work and, after her condition failed to improve, sought treatment with her family physician, Dr. Dennis Allen Sparks, on March 4, 2011. Mull testified she spoke with her manager, Ms. Bella, on March 5, 2011 after Dr. Sparks stated the problem was more than likely work-related. She requested time off from work, but instead was sent for a drug test and assigned a light duty job. Mull continued working on light duty scanning items until her employment at Zappos ended on May 15, 2011, when she ceased working to spend more time with her family. She later stopped working at Travelex on May 31, 2012 following the death of her son. Mull indicated she was capable of performing the light duty work at Zappos, but ceased working due to reasons unrelated to her work injury.

Mull submitted treatment notes from Dr. Sparks who saw her on March 10, 2011 for complaints of pain in the

third digit of her right hand. Dr. Sparks diagnosed a trigger finger and recommended an injection. Mull did not wish to pursue the injection and requested to be taken off work for one month to allow her hand to rest. Dr. Sparks indicated he would provide an off work slip but did not believe time off would help. Mull was seen for follow-up on May 20, 2011. She reported persistent problems with the third finger. Dr. Sparks offered injections, but Mull decided she wanted to see a hand surgeon.

Dr. Richard DuBou examined Mull on November 22, 2011. He diagnosed trigger finger of the right middle finger. Dr. DuBou noted Mull sustained no actual accident, leading him to opine the etiology of her complaints was idiopathic. Dr. DuBou noted medical literature outlined three risk factors for trigger finger including force, repetition and posture. Dr. DuBou noted Mull did not engage in repetitive bending nor twisting of the hand and therefore he did not feel simply picking up boxes of shoes caused the trigger finger. Dr. Dubou stated Mull had not reached maximum medical improvement ("MMI"), but he did not anticipate she would have any permanent impairment. Dr. DuBou indicated proposed surgery was appropriate but was unrelated to Mull's work at Zappos. Dr. DuBou noted he

would attempt two injections one month apart before proceeding with surgery.

Dr. Anthony McEldowney examined Mull on December 29, 2011. He diagnosed middle trigger finger directly related to the cumulative repetitive activities of her right hand with the onset of triggering and locking symptoms on or about February 5, 2011. He assigned a 2% impairment rating for mild constrictive tenosynovitis pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition. Dr. McEldowney recommended restrictions of no repetitive gripping, grabbing or lifting activities with the right hand. He opined Mull did not retain the physical capacity to return to the work she was performing at the time of her injury. He recommended a re-evaluation by an orthopedic hand surgeon for consideration of an additional steroid injection in her right middle finger at the A-1 pulley and/or surgical decompression.

In an April 4, 2012 supplemental report, Dr. McEldowney indicated he reviewed DuBou's report which did not alter his previous opinions on causation, impairment or restrictions. Dr. McEldowney disagreed with Dr. DuBou's opinion of an idiopathic cause of the trigger finger.

The ALJ's findings relevant to this appeal in his decision rendered on November 5, 2012, are as follows:

Next, the defendant disputes whether the plaintiff gave due and timely notice of the work related condition. The plaintiff's condition is a mild obstructive tenosynovitus resulting in mild right trigger finger which is causally related to plaintiff's repetitive work activities with the defendant. In *Randall Co. v. Pendland, 770 SW2d 687 (Ky. App. 1989)*, The Court concluded that in cases where the injury is a result of many mini-traumas, the date for giving notice and the date for clocking a statute of limitations begins when the disabling reality of the injuries becomes manifest. In *Hill v. Sextet Mining Corporation, 65 SW3d 503 (Ky. 2001)*, the Court clarified that a claimant cannot reasonably give notice of a cumulative trauma condition prior to the manifestation of the disabling reality and being informed by medical opinion that the condition is work related. Here, the plaintiff credibly testified that she informed her manager, Sarah Bella, upon being informed by her physician that her condition was likely related to her work. It was at that time she was placed on light duty and sent for a drug test. The medical records confirm the plaintiff first saw a physician in early March who related her symptoms to beginning in February of 2011. Therefore, the notice given to the manager in early March was soon as practicable under the circumstances.

The plaintiff requests temporary total disability benefits beginning on the date she left her employment with the defendant on May 15, 2011, but she continued in her concurrent employment as a currency exchange clerk. The plaintiff agrees that she continued working for the employer at light duty through that date. The plaintiff was evaluated by Dr. Dubou on November 22,

2011, at which time he noted her to not be at maximum medical improvement. Dr. McEldowney placed the plaintiff at maximum medical improvement and placed her under restrictions on December 29, 2011. Temporary total disability 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 which would permit a return to employment. Temporary total disability is a two pronged test and temporary total disability benefits are payable so long as: (1) maximum medical improvement has not been reached, and (2) the injury has not reached a level of improvement that would permit a return to employment. *Magellan Health v. Helms, 140 SW3d 579 (Ky. App. 2004)*. Further, it would not be reasonable to terminate temporary total disability benefits for a claimant when he is released to perform minimal work, but not the type of work that is customary or that he was performing at the time of his injury. *Central Kentucky Steel v. Wise, 19 SW3d 657 (Ky. 2000)*. A worker is entitled to temporary total disability during the performance of minimal work as long as the worker is unable to return to the employment performed at the time of the injury. *See Double L Construction, Inc. v. Mitchell, 182 S.W. 3d 509 (Ky. 2006)*, wherein the Court noted that a worker is entitled to temporary total disability benefits if a work related injury results in a temporary inability to perform the job in which it occurred. If the injury also causes an inability to perform a concurrent job of which the employer has knowledge, income benefits are based on the wages of both employments by operation of KRS *342.140(5)*. If the injury does not cause an inability to perform a

> concurrent job, *KRS 342.140(5)* is inapplicable and income benefits are based solely on the wages from the job in which the injury occurred. Therefore, plaintiff is entitled to temporary total disability benefits from May 15, 2011 through December 29, 2011.

Zappos filed a petition for reconsideration making the same arguments it now raises on appeal. In the November 30, 2012 Order on Reconsideration, the ALJ found as follows:

> . . . The ALJ sympathizes with the defendant's argument on temporary total disability. However, the ALJ believes the law provides that temporary total disability benefits are payable so long as maximum medical improvement has not been reached and the injury has not reached a level of improvement that would permit a return to regular and customary employment. In this instance the plaintiff was not placed at maximum medical improvement until December 29, 2011 and was on light duty work restrictions. Therefore, she met the two pronged test and her ability to do light duty work is irrelevant. Additionally, the ALJ found due and timely notice under the circumstances of this repetitive trauma case as she informed her manager after being informed by a physician that her condition was likely related to her work.

On appeal, Zappos argues the ALJ erred in awarding TTD benefits since Mull ceased working for non-work-related reasons. Zappos notes Mull clearly stated her reason for leaving Zappos was to spend more time with her family.

Further, she testified she was capable of continuing to perform the light duty work she had been performing from March through May, 2011. Additionally, Zappos notes Mull continued full time employment at Travelex after quitting her job at Zappos.

Zappos argues the ALJ erred as a matter of law in finding Mull gave due and timely notice. Zappos asserts the evidence is uncontroverted Mull was fully aware her work activities were causing problems associated with her third finger on or before February 5, 2011, yet she failed to tell anyone at the company until six weeks later. Zappos contends no expert medical opinion was required to establish causation in this instance since it was evident to Mull that the harm was resulting from her work activities.

Mull, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action, including notice and entitlement to TTD benefits. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Mull was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to

induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

KRS 342.0011(11)(a) defines TTD as follows:

> [T]he 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.

The above definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Const. Co., Inc. v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated:

> TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Supreme Court further explained:

> "[i]t would not be reasonable to terminate the benefits of an employee when she is released to perform minimal work but not the type that is customary

> or that she was performing at the time of his injury."

In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed 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 Helms, supra, stated:

> In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement and not have improved enough to return to work.
>
> Id. at 580-581.

Here, Zappos accommodated Mull's restrictions with a scanning position, which she testified was a normal part of her employment prior to the injury. Zappos correctly notes Mull acknowledges she was capable of continuing to perform the light duty work but ceased her employment with Zappos for personal reasons completely unrelated to the work injury. Nothing in the record

establishes the light duty work constituted “minimal” work and she worked regular shifts while under restrictions. She also was capable of performing, and continued to perform for more than one year post-injury, her primary full time employment with Travelex. Given Mull was capable of performing work for which she had training and experience, and voluntarily ceased her employment for reasons unrelated to her injury or the job duties, substantial evidence does not support the award of TTD benefits and we therefore reverse.

We affirm the ALJ’s finding that notice was timely. KRS 342.185(1) requires notice of an accident to be given to the employer as soon as practicable after the accident. Implicit in the finding of a gradual injury is a finding no single instance of workplace trauma caused an injury of appreciable proportion. Hill v. Sextet Mining Corp., 65 S.W.3d 503 (Ky. 2001). For that reason, in cumulative trauma claims, the date triggering the obligation to give notice is the “manifestation of disability,” which is the date a worker first learns he has sustained a gradual injury and knows it is due to his work. Alcan Foil Products v. Huff, 2 S.W.3d 96 (Ky. 1999). In an unbroken line of cases from Hill v. Sextet Mining Corp., supra, forward, our Appellate Courts have determined, in

claims involving cumulative trauma, a worker is not required to give notice until first informed by a "physician" the condition is work-related. An employee is not prohibited from giving notice of a gradual injury at an earlier date if he suspects the associated symptoms are the product of work activities. American Printing House for the Blind v. Brown, supra.

As pointed out in Hill v. Sextet Mining Corp., supra, Mull is not required to self-diagnose the cause of the trigger finger. Further, until informed of the diagnosis by Dr. Sparks, Mull did not have an obligation to notify her employer of a gradual work-related injury. Although she began experiencing symptoms in January or February of 2011, Mull testified she was not advised by a doctor she had a gradual work-related injury prior to March, 2011. Likewise, the medical records do not reflect a diagnosis of a gradual work-related injury or that Mull was ever advised she had sustained a gradual work-related injury prior to the time she was seen by Dr. Sparks.

Mull's testimony and the records of Dr. Sparks constitute substantial evidence supporting the ALJ's determination she was first advised she had a gradual work-related injury after Dr. Sparks diagnosed a cumulative trauma injury. The ALJ could reasonably conclude notice

given in March, 2011 was timely. Since the ALJ's finding concerning the issue of whether Mull gave due and timely notice is supported by substantial evidence, we are without authority to disturb his decision on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the November 5, 2012 Opinion, Award and Order rendered by Hon. John B. Coleman, Administrative Law Judge, and the November 30, 2012 Order on Reconsideration are **AFFIRMED IN PART and REVERSED IN PART**. This claim is **REMANDED** for entry of an amended decision denying TTD benefits.

STIVERS, MEMBER, CONCURS.

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