RENDERED: DECEMBER 22, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000900-WC

MELANIE TIPTON — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-09-00416

WAFFLE HOUSE; HON. DOUGLAS GOTT, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, COMBS, AND KELLER, JUDGES.

KELLER, JUDGE: Melanie Tipton (Tipton) appeals from the opinion of the Workers' Compensation Board (the Board) affirming the opinion and order of the Administrative Law Judge (ALJ) dismissing her claim. On appeal, Tipton argues

the ALJ erred when he found that she did not give due and timely notice of her injury. For the following reasons, we reverse and remand for additional findings by the ALJ.

FACTS

Tipton is forty-five years of age and has a 10th grade education. She has worked as a kitchen aide, cook, waitress, convenient store/gas station clerk, guide rider at the Kentucky Horse Park, and restaurant assistant manager. From 1995 to 2008, Tipton worked periodically at different Waffle House locations. While working for Waffle House in the spring of 2002, Tipton began to experience pain, numbness, weakness, and tingling in her hands. Because of these symptoms, Tipton left her job at Waffle House in October 2003. She returned to work at Waffle House for three months in early 2004, leaving in March 2004 because of her upper extremity symptoms. In October 2005, Tipton returned to work at Waffle House and continued to work there until May 27, 2008.

In March 2009, Tipton filed an application for resolution of injury claim, alleging repetitive injuries to her upper extremities as a result of her work activity at Waffle House. Tipton stated that she suffered those injuries on May 27, 2008, her last day of work, but that she gave notice of her injury on January 14, 2003. Following a hearing, the ALJ dismissed Tipton's claim, finding, in pertinent part, that she did not give notice of the alleged May 2008 injury. Following an unsuccessful petition for reconsideration, Tipton appealed to the Board, which affirmed in a divided opinion.

On appeal, Tipton argues that her notice in 2003[1] 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

[1] As did the Board, we note that Tiption stated in her application for resolution of injury claim that she provided written and verbal notice on January 14, 2003. In her deposition, Tipton stated that she provided notice in 2003 and, at the final hearing, she stated that she gave notice in 2002. In various pleadings and/or briefs, Tipton variously stated that she gave notice in 2002 or 2003. Because this date is not dispositive, we will use 2003, the date Tipton listed in her Form 101.

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.

CONCLUSION

For the foregoing reasons, we reverse the Board and remand this matter to the ALJ for additional findings as set forth herein.

ALL CONCUR.

BRIEF FOR APPELLANT:

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