Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 12, 2014

CLAIM NOS. 201294843 & 201273441

B. F. SOUTH, INC. D/B/A WENDY'S PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

GRECA ALEXANDER
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. B.F. South, Inc. D/B/A Wendy's ("Wendy's") appeals from the July 18, 2014 Opinion, Order and Award rendered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ") awarding Greca Alexander ("Alexander") permanent partial disability ("PPD") benefits as a result of two work-related injuries. Wendy's argues the award of PPD

benefits is not supported by substantial evidence and the ALJ provided only conclusory statements regarding the weight of the evidence. For the reasons set forth below, we affirm.

Alexander sustained three injuries while employed by Wendy's. The first occurred on June 23, 2010 when a container of cookie dough fell on her right foot. Surgery was performed and Alexander returned to work. She settled her claim for the 2010 injury in June 2012.

Alexander's second and third injuries are the basis of the present claim. She sustained an injury on September 22, 2011 when another employee stepped on her right foot. The third injury occurred on July 26, 2012 when a roll of plastic wrap fell from a table injuring her left ankle and foot.

Dr. Warren Bilkey performed an independent medical evaluation ("IME") on June 3, 2013. He opined Alexander sustained a contusion injury to her right foot on June 23, 2010. The September 22, 2011 injury resulted in a work-related contusion to the right foot causing painful neuroma, capsulitis, and synovitis. She was treated conservatively and has residual chronic pain. Alexander sustained a work-related contusion to the left foot on July 26, 2012. She has a painful neuroma involving the superficial peroneal

nerve and myofascial pain involving the gastroc and peroneal musculature with peroneal tendinitis. Dr. Bilkey noted Alexander had some level of impairment as a result of the first injury, but the September 2011 injury aggravated the painful neuroma and caused the capsulitis and synovitis, which he explained means inflammation of the joint structures over the dorsum of the ankle and foot. The second injury resulted in residual pain and a painful gait. Dr. Bilkey noted the third injury caused a painful neuroma and myofascial pain or muscle spasm with trigger points in the gastroc muscle and peroneal muscles. He assigned a 6% impairment rating for the right foot pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), attributing 2% to the 2010 injury and 4% to the 2011 injury. Although Dr. Bilkey did not believe Alexander had reached maximum medical improvement ("MMI") for the left lower extremity condition, he assigned a 3% impairment related to the 2012 injury. In a January 9, 2014 addendum, Dr. Bilkey indicated he reviewed an MRI of the left lower extremity which did not show structural pathology that is remediable. Therefore, he placed Alexander at MMI and reaffirmed the rating for the left foot.

Dr. Ellen Ballard performed an IME on April 25, 2012 and diagnosed a right foot contusion as a result of the September 2011 incident. Dr. Ballard felt Alexander could return to work without restrictions and did not require further treatment. She found no evidence of any additional impairment and stated there is no objective method of quantifying her continued complaints which would be related to her previous injury.

Dr. Ballard conducted a second IME on February 6, 2014 related to the 2012 left foot injury. She opined Alexander may have sustained a contusion of her ankle which has resolved. Dr. Ballard stated MRI findings in the left foot were not indicative of anything that happened in the work incident, but rather the findings were age-related. Dr. Ballard did not feel any further treatment was required and she assigned a 0% impairment rating.

Dr. Thomas Loeb performed a medical records review on April 23, 2012 and concluded pain management was not medically necessary. Dr. Loeb noted Alexander's subjective complaints did not correlate with the objective findings. She had no findings of complex regional pain syndrome or reflex sympathetic dystrophy. He recommended only occasional follow-up by Dr. Childress.

Wendy's submitted the November 23, 2011 office note of Dr. Frank Bonnarens, Alexander's treating physician. She complained of continuing foot pain that affected her activities of daily living. Dr. Bonnarens noted Alexander walked better on her toes or heels than she did with her foot flat which "indicates that we are dealing with a patient who is pain phobic for her tendonitis" as opposed to someone who has a more objective dysfunction.

Dr. Bart Goldman performed a records review on April 4, 2012. Dr. Goldman recommended denial of pain management, explaining as follows:

> This lady, as far as I can tell, had someone step on her foot. She has absolutely no findings other than complaints of pain and an entirely normal MRI of her foot. [S]he's had a trial of injection of the subtalar joint and the ankle joint, neither one of which were involved in the contusion type injury and did not improve. She does not have any findings consistent with a CRPS and therefore I can find no indication for pain management.

After reviewing the evidence and noting the arguments of the parties, the ALJ determined the opinions of Dr. Bilkey constitute substantial evidence and were most persuasive. The ALJ noted Dr. Bilkey's opinions were based upon observations, physical examination and review of diagnostic testing. He further characterized Alexander as a

credible witness. The ALJ explained he did not find Drs. Ballard, Loeb, Goldman or Bonnarens persuasive, noting Drs. Loeb and Goldman had not examined Alexander and Dr. Ballard's opinion reflected a simple disagreement with the opinions of Dr. Bilkey. The ALJ concluded Dr. Bilkey's opinion more accurately depicted Alexander's current situation. Therefore he found she met her burden of proving the bilateral foot conditions were causally related to the work injuries and she suffered an injury as defined by the Act. Accordingly, the ALJ awarded PPD benefits based upon the impairment rating assessed by Dr. Bilkey.

On appeal, Wendy's argues the award of PPD benefits is not supported by substantial evidence. Wendy's contends the only objective medical findings relate to degenerative conditions, including arthritis and tendonitis, which are consistent with the normal aging process and not consistent with the type of trauma claimed to be sustained in the work incidents. It also claims the ALJ did not provide any meaningful discussion of the issue of causation, but merely found persuasive and relied upon the opinion of Dr. Bilkey without affording fair consideration of the great weight of the testimony supporting a denial of benefits.

We begin by noting Wendy's did not file a petition for reconsideration and appealed directly to the Board.

When no petition for reconsideration is filed, the ALJ's award or order is conclusive and binding as to all questions of fact. KRS 342.285(1). Absent a petition for reconsideration, the issue is narrowed to whether the ALJ's decision is supported by substantial evidence in the record. Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

Although Wendy's complains the ALJ provided no explanation why the opinions of Dr. Bilkey were more persuasive than those of Drs. Ballard, Loeb, Goldman and Bonnarens, Wendy's never asked the ALJ for additional findings of facts or to explain why he found the opinions of Dr. Bilkey mst persuasive. Wendy's cannot now be heard to complain about the ALJ's findings of fact or reliance on the opinions of Dr. Bilkey in reaching his decision. *See* Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

Contrary to Wendy's argument, the opinions of Dr. Bilkey constitute substantial evidence supporting the ALJ's award of PPD benefits. Based upon his observations, physical examination, and review of diagnostic testing, Dr. Bilkey determined Alexander had impairment ratable conditions as a result of the 2011 and 2012 work injuries. The ALJ was faced with conflicting medical opinions and, as was his prerogative, found the opinion of Dr. Bilkey most

accurately reflected Alexander's condition. Although a party may note evidence that would have supported a different outcome than that reached by ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). It must be shown that there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). There being substantial evidence to support the ALJ's finding, we may not reverse.

Accordingly, the July 18, 2014 Opinion, Order and Award rendered by Hon. R. Scott Borders, Administrative Law Judge is hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON LYNSIE GADDIS RUST
100 MALLARD CREEK ROAD SUITE 250
LOUISVILLE, KY 40207

COUNSEL FOR RESPONDENT:

HON WAYNE C DAUB
600 W MAIN ST # 300
LOUISVILLE, KY 40202

ADMINISTRATIVE LAW JUDGE:

HON. R. SCOTT BORDERS
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601