DIVISION ONE
FILED: 12/20/2012
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ANGELA DUSTIN, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, US AIRWAYS, Respondent Employer, NEW HAMPSHIRE INSURANCE CO/CHARTIS CLAIMS INC, Respondent Carrier.	)	1 CA-IC 12-0026 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. IC 20103-350310

Carrier Claim No. 710728613

The Honorable Deborah A. Nye, Administrative Law Judge

AWARD AFFIRMED

Angela Dustin, Petitioner — Mesa
In Propria Persona

Andrew Wade, Chief Counsel — Phoenix
The Industrial Commission of Arizona
Attorney for Respondent

Klein, Doherty, Lundmark, Barberich & LaMont PC Phoenix
By Julie A. Doherty
Attorneys for Respondent Employer/Respondent Carrier

N O R R I S, Judge

¶1 In this special action review of an Industrial Commission of Arizona award and decision upon review, petitioner Angela Dustin argues the administrative law judge ("ALJ") should not have found the respondent employer and carrier (collectively, "Respondents") were only liable for benefits limited to a temporary aggravation of her pre-existing right knee condition, which the ALJ also found had become medically stationary effective May 13, 2011 without permanent impairment.

¶2 In support of this argument, Dustin first asserts the ALJ should not have accepted and relied on the medical reports and opinions rendered by three doctors, Neal L. Rockowitz, M.D., Paul M. Guidera, M.D., and Irwin Shapiro, M.D., who evaluated Dustin at the request of the Respondents, because their reports contained misleading and incorrect information and because she was not allowed to cross-examine them. As the Respondents point out, and the record reflects, even though the ALJ invited Dustin to file a statement identifying any perceived inaccuracies in their reports, the statement she filed failed to list any inaccuracies. Further, under the rules applicable to proceedings before the Industrial Commission, a party who wishes

to cross-examine the author of a medical report filed into evidence must request a subpoena, and if the party fails to timely request a subpoena, the "party waives the right to cross-examine the author" of the report and the ALJ "shall admit the medical" report in evidence. Ariz. Admin. Code R20-5-155(G). As the Respondents point out, and as the record also confirms, Dustin did not request the ALJ to subpoena the doctors for cross-examination.

¶3 Dustin next argues the ALJ should not have excluded the report issued by Kenneth D. Osorio, M.D., supporting her assertion that she had sustained a venous insufficiency causally related to the industrial injury. We disagree. As the record reflects, the ALJ granted Dustin an extension of time to January 5, 2012 to obtain and file a report from Dr. Osorio. Dustin, however, did not attempt to file a report from him until January 26, 2012. The ALJ properly excluded the report, explaining:

> As you know, medical reports are by rule to be filed no later than 25 days before the hearing. This is to provide both parties ample time to prepare to meet the evidence offered by the other side. In this case, I . . . extended the deadline for filing medical reports to January 5, 2012, or more than two weeks past the initial hearing. In other words, January 5th was the last date for accepting your medical reports in evidence.

> Unfortunately, you missed that deadline by three weeks. I cannot in good conscience permit this late filing.

¶4 Finally, Dustin argues the ALJ should have relied on and adopted the testimony offered by her treating physician, Charles Matthews, M.D. The ALJ rejected Dr. Matthews' testimony because he failed to express an opinion that it was medically probable that a causal relationship existed between Dustin's extensive spinal osteoarthritis and the industrial injury. *See Honeywell, Inc. v. Litchett*, 146 Ariz. 328, 331, 705 P.2d 1379, 1382 (App. 1985) (standard of sufficiency for medical evidence is reasonable medical probability) (citation omitted). Further, when an ALJ, charged with responsibility of resolving conflicts in medical testimony, adopts one expert's opinion over another, we will not disturb that resolution unless it is "wholly unreasonable." *Gamez v. Indus. Comm'n*, 213 Ariz. 314, 316, ¶ 15, 141 P.3d 794, 796 (App. 2006). When reviewing the appropriateness of an ALJ's ruling, we are not allowed to weigh the evidence; we are obligated to consider it in the light most favorable to sustaining the award. *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975). Pursuant to these authorities, the ALJ's adoption of the medical evidence presented by Respondents was not "wholly unreasonable," and we are not at liberty to reject her determinations.

CONCLUSION

¶5 For the foregoing reasons, we affirm the ALJ's award.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Judge

/s/
JON W. THOMPSON, Judge