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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
# ARIZONA COURT OF APPEALS
**DIVISION ONE**

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MARIA N. DRUMMOND, *Petitioner*,

*v.*

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

CHOICE HOTELS INTERNATIONAL, INC., *Respondent Employer*

TRUMBULL INSURANCE COMPANY, *Respondent Carrier.*

No. 1 CA-IC 18-0001
FILED 11-15-2018

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Special Action – Industrial Commission
ICA Claim No. 20170-460132
Carrier Claim No. Y67C41728

The Honorable Paula R. Eaton, Administrative Law Judge

**AFFIRMED**

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COUNSEL

Maria N. Drummond, Chandler
*Petitioner*

Industrial Commission of Arizona, Phoenix
By Gaetano Testini
*Counsel for Respondent ICA*

Lester Norton & Brozina PC, Phoenix
By Christopher S. Norton
*Counsel for Respondent Employer/Carrier*

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**MEMORANDUM DECISION**

Presiding Judge Jennifer M. Perkins delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Jon W. Thompson joined.

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**P E R K I N S**, Judge:

**¶1** Maria Drummond appeals the Decision Upon Review of the Industrial Commission of Arizona ("ICA") denying her claim for workers' compensation. For the following reasons, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

**¶2** Drummond began working for Choice Hotels as a training and communications manager in May 2016. She found the ergonomics of her work station "dysfunctional and funky" and reported her concerns to her boss, but nobody took further action. Within a few months, Drummond started feeling pain in both hands, more so in her right. In November 2016, Drummond first reported this pain to Dr. Eric Eifler, an orthopedic surgeon she was seeing for an unrelated issue. Eifler diagnosed Drummond with bilateral carpal tunnel syndrome. The two then discussed treatment options; Drummond preferred surgery.

**¶3** Drummond reported her alleged injury to her employer in January 2017, apparently on the advice of a coworker, and lost her job the next day. Drummond then filed a workers' compensation claim on February 7, 2017. Trumball Insurance Co. ("Trumball"), Choice Hotels' insurer, issued a Notice of Claim Status denying Drummond's claim on March 9, 2017.

**¶4** On March 16, 2017, Dr. Paul Guidera, a hand specialist, performed an independent medical examination ("IME") on Drummond. Like Eifler, Guidera diagnosed Drummond with bilateral carpal tunnel

syndrome. Guidera disagreed about the syndrome's cause, though. Relying on two epidemiological studies of carpal tunnel syndrome, Guidera stated "there is no objective medical evidence that a work-related injury has occurred in this case." Although Guidera did not positively identify a cause, he opined that Drummond had three underlying risk factors for carpal tunnel syndrome unrelated to her workplace activities.

**¶5** Drummond timely requested a hearing, which an administrative law judge ("ALJ") held between August and December 2017. The only disputed issue was whether Drummond's work activities caused her carpal tunnel syndrome. Guidera testified that he did not find a "causal relationship" between Drummond's work and her carpal tunnel syndrome. Guidera relied on his review of epidemiological studies for this conclusion, stating that "the evolving evidence suggests that computers may not be the cause of carpal tunnel syndrome in most people." Eifler disagreed with Guidera's assessment, stating that he relied on studies and standards from his medical governing body and that Guidera was likely using a different set of standards. Drummond also offered several exhibits that she argued undercut the validity of the studies upon which Guidera relied.

**¶6** The ALJ issued a Decision Upon Hearing the day after Eifler testified. In it, the ALJ found Guidera's opinion "more probably correct and well founded," and accordingly held that Drummond had failed to establish her work activities caused her carpal tunnel syndrome. Drummond timely requested review, arguing the ALJ failed to give adequate consideration to the evidence Drummond adduced. The ALJ summarily affirmed the Decision Upon Hearing and Drummond timely petitioned this Court for a writ of certiorari. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 23-943(H), -951(A) (2018); Ariz. R. P. for Spec. Actions 10; *Watts v. Indus. Comm'n*, 180 Ariz. 512, 513 (1994).

## DISCUSSION

**¶7** In reviewing an ICA award, we defer to the ALJ's factual findings but review questions of law *de novo*. *Patches v. Indus. Comm'n*, 220 Ariz. 179, 180, ¶ 2 (App. 2009). We view the evidence in the light most favorable to upholding the ALJ's award. *Aguayo v. Indus. Comm'n*, 235 Ariz. 413, 414, ¶ 2 (App. 2014). On appeal, the petitioner bears the burden of demonstrating error and we will affirm the ALJ's award if "any reasonable interpretation of the evidence" supports it. *Hartford v. Indus. Comm'n*, 178 Ariz. 106, 110 (App. 1994). Where an injury's cause is not clearly apparent to a layperson, causation "must be established by expert medical

testimony," and the ALJ "has the prerogative to resolve conflicting medical opinions." *Phelps v. Indus. Comm'n*, 155 Ariz. 501, 505 (1987).

**¶8** Drummond first argues that the ALJ abused her discretion in finding Guidera's testimony "more probably correct and well-founded" because Guidera made factual mistakes regarding a particular epidemiological study upon which he "largely based" his opinion. Drummond further argues that, "[a]t a minimum," the ALJ should have ordered a further evidentiary hearing.

**¶9** A reasonable interpretation of the evidence supports the ALJ's conclusion. *Hartford*, 178 Ariz. at 109–10. In his testimony, Guidera admitted that each epidemiological study does not "in and of [itself] stand as firm, conclusive evidence," but that he based his opinion on "the cumulative studies that have been done." Indeed, Guidera conceded he based his opinion on "where the evidence leads us right now" and that the evidence "may change in five years but that's where the evidence takes us." Reasonable evidence supports a finding that Guidera's opinion, based on a corpus of epidemiological studies about carpal tunnel syndrome, was more probably correct than Eifler's. We will not disturb that finding on appeal. *Kaibab Indus. v. Indus. Comm'n*, 196 Ariz. 601, 609, ¶ 25 (App. 2000). Nor was the ALJ required to order another evidentiary hearing *sua sponte*. First, the ALJ heard from Drummond's expert after hearing from the independent medical examiner. Drummond thus had ample opportunity to challenge the validity of Guidera's opinions with her own expert. Second, Drummond did not request a continuance or an additional hearing at either the conclusion of the hearing or in her request for review. *See* Ariz. Admin. Code ("A.A.C.") R20-5-156(A).

**¶10** Drummond argues that no reasonable evidence supports the ALJ's conclusions because Guidera failed to offer a positive account of what caused Drummond's carpal tunnel condition and merely denied that Drummond's work activities were the cause. The burden of proof, however, was on Drummond to show that her work activities caused her carpal tunnel, not on Trumball or Guidera to offer or prove alternative causation. *See Aguayo*, 235 Ariz. at 415–16, ¶ 10 (App. 2014); *see also* A.R.S. § 23-901.01(A).

**¶11** Drummond next asserts that Trumball denied her claim "without any reasonable basis on March 9, 2018," because it denied her claim before Guidera performed the IME. Trumball contends it issued the Notice of Claim Status to forestall its liability under A.R.S. § 23-1061(M). In relevant part, § 23-1061(M) states that if the insurer "does not issue a notice

of claim status denying the claim within twenty-one days from the date the carrier is notified by the commission of a claim . . . the carrier shall pay immediately compensation as if the claim were accepted." Drummond submitted her claim to the commission on February 7, 2017, more than 21 days before the March 9 Notice of Claim Status. Trumball has identified a reasonable basis why it chose to issue a Notice of Claim Status denying Drummond's claim before Guidera performed the IME.

**¶12** Finally, Drummond contends the ALJ, opposing counsel, and Guidera all engaged in unprofessional or unethical conduct. As to the ALJ, Drummond did not attempt to change ALJs, either for cause or of right. *See* A.R.S. § 23-941(I), (J). She has thus waived this claim. *Pavlik v. Chinle Unified School Dist. No. 24*, 195 Ariz. 148, 151, ¶ 8 (App. 1999) ("Generally, a failure to raise an issue before an administrative tribunal precludes judicial review of that issue unless it is jurisdictional.").

**¶13** As to the others, the claims are not properly before us. An employee must bring a bad faith or unfair processing claim via complaint before the ICA or the superior court, but Drummond has done neither here. *See* A.R.S. § 23-930(A) ("The commission has exclusive jurisdiction . . . over complaints involving alleged unfair claim processing practices or bad faith."); *see also* A.A.C. R20-5-163(C) ("A person alleging bad faith or unfair claim processing practices . . . shall file a written complaint with the claims manager of the Commission."); *but see Hayes v. Continental Ins. Co.*, 178 Ariz. 264 (1994) (despite vesting "exclusive jurisdiction" in the ICA, "A.R.S. § 23-930 does not divest Arizona's courts of jurisdiction over workers' compensation bad faith actions but instead establishes an administrative remedy complementing the common-law action afforded by our courts"). Because of this, we lack jurisdiction over those claims. *See* A.R.S. § 12-120.21(A)(1)–(2).

## CONCLUSION

**¶14** For the forgoing reasons, we affirm the ALJ's decision upon review.

AMY M. WOOD • Clerk of the Court
FILED: AA