

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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JAMES A. ROGERS,  
*Petitioner/Employee,*

*v.*

THE INDUSTRIAL COMMISSION OF ARIZONA,  
*Respondent,*

BIZMART, INC.,  
*Respondent Employer,*

NEW HAMPSHIRE INSURANCE, CO.,  
*Respondent Carrier.*

No. 2 CA-IC 2019-0002  
Filed January 17, 2020

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

*See* Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);  
Ariz. R. P. Spec. Act. 10(k).

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Special Action – Industrial Commission  
ICA Claim No. 20172-780082  
Insurer No. 30178626217-0001  
Gary M. Israel, Administrative Law Judge

**AWARD AFFIRMED**

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COUNSEL

James A. Rogers  
*In Propria Persona*

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

Jardine Baker Hickman Houston, Phoenix  
By Steven M. Venezia  
*Counsel for Respondent Employer/Carrier*

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**MEMORANDUM DECISION**

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

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BREARCLIFFE, Judge:

¶1 In this statutory special action, petitioner James A. Rogers challenges the Industrial Commission's November 30, 2018 decision upon hearing denying his request for additional medical treatment, and the decision upon review affirming that decision. Rogers contends that the Administrative Law Judge (ALJ) erred in denying his request for additional medical treatment, including surgery, for an industrial injury that occurred in September 2017. His employer, Bizmart Inc., and its workers' compensation carrier, New Hampshire Insurance Company, contend the ALJ's decision was supported by the evidence and Rogers failed to meet his burden of proof. We affirm.

**Factual and Procedural Background**

¶2 We view the facts in the light most favorable to upholding the award. *Hackworth v. Indus. Comm'n*, 229 Ariz. 339, ¶ 2 (App. 2012). On September 17, 2017, Rogers sustained an industrial injury to his back while removing a boxed 140-pound desk from its storage location on a metal rack at shoulder height. Upon trying to lift the box, he immediately felt "excruciating pain" in his lower back, then in his buttocks, and down his left leg. The insurer accepted Rogers' claim for benefits. Rogers was first treated on September 18 and diagnosed with a sprain of the lumbar paraspinous muscles, and muscle spasm. He was given medications and referred to physical therapy, which he attended.

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¶3 Dr. Thomas Coury examined Rogers and recommended an MRI. Rogers had an MRI in November 2017 and Dr. Coury reviewed the MRI scans. Dr. Coury's treatment note stated that the MRI demonstrated "a large focal of disc extrusion at L4-L5 as well as a small disc extrusion at L3-L4." Dr. Coury recommended Rogers see a neurosurgeon, and Dr. Joseph Christiano, a board-certified neurosurgeon, subsequently evaluated Rogers.

¶4 Dr. Christiano examined Rogers and reviewed the MRI scans. Dr. Christiano's progress note stated that Rogers had a large disc herniation at L4-5, and recommended surgery, specifically a decompression discectomy and coflex procedure. Rogers was willing to have the surgery, and Dr. Christiano requested that the workers' compensation carrier approve the surgery.

¶5 Dr. Zoran Maric, board certified in orthopedic surgery and fellowship trained in spinal surgery, then conducted an independent medical examination (IME) of Rogers on March 8, 2018. At the time of the IME, Rogers reported some "numbness in his right anterolateral calf area" and recent intermittent low-back pain. Dr. Maric reviewed the MRI scans, noting they showed "a large disc herniation at L4-5."

¶6 In his report, Dr. Maric disagreed with Dr. Christiano's recommendation that Rogers is a good candidate for surgery, stating, "Mr. Rogers does not have a symptomatic disc herniation at L4-5. He has subjective lower back complaints, and has an MRI scan that shows a disc herniation. Again, he does not have specific radicular complaints that would indicate that the L4-5 disc herniation is actually symptomatic." And "surgery is not appropriate under the circumstances. If surgery is performed[,] . . . it has a very high likelihood of failure." Dr. Maric emphasized, "20% of the normal healthy adult population in [Rogers'] age group have disc herniations present." And "because disc herniations are so commonly seen, it is imperative that a physician correlates the patient's pain complaints with the MRI scan findings."

¶7 Dr. Maric also disagreed with Dr. Christiano's recommendation of using a coflex procedure, stating "[a] coflex procedure is designed for individuals who have age-related spinal stenosis," specifically "elderly individuals who have spinal stenosis on a degenerative basis." Rogers was thirty-five at the time of Dr. Maric's examination, and did not have this type of clinical condition. Additionally, Dr. Maric explained, "this type of procedure does not have long-term proven benefit in the medical literature. Even if Mr. Rogers had age-related spinal stenosis,

I would not recommend this type of surgical procedure.” Thus, “the recommended L4-5 decompression/discectomy and coflex procedures are not reasonable, necessary and related to the effects of the . . . industrial injury.” “Claimant has reached a permanent and stationary status for any injuries sustained under this claim.”

¶8 Dr. Christiano’s request for surgery was denied, and the claim was closed effective March 8, 2018, with a finding of no permanent injury. On May 1, 2018, Rogers requested a hearing. At the hearing, the ALJ heard testimony from Rogers, Dr. Christiano, and Dr. Maric.

¶9 Dr. Maric testified that Rogers had “reached maximum medical improvement” and he “found no objective evidence for impairment.” And, because “[h]e’s not having symptoms consistent with an ongoing lumbar disc herniation, [Dr. Maric] would not recommend surgery under the circumstances.” Dr. Maric also explained that Rogers did not exhibit the symptoms of pain associated with a symptomatic disc herniation at L4-5. For instance, radicular pain consisting of “severe buttock pain and leg pain . . . seen down the back of the thigh, front of the lower leg, top of the foot into the big toe, . . . [and] numbness and tingling in that distribution” are symptoms of an L4-5 symptomatic disc herniation. However, Rogers never had any complaints of radicular pain, but only localized lower back complaints. Dr. Maric also testified as to the inappropriateness of the coflex procedure in this circumstance, and that he had, in fact, never seen it used for a disc herniation.

¶10 Dr. Christiano, to the contrary, testified that he does recommend the decompression discectomy and coflex stabilization procedure. And when asked why he recommends this procedure, rather than the lumbar laminectomy that Dr. Maric would recommend, had he thought surgery was necessary, Dr. Christiano responded, “I think Dr. Maric’s point is well taken.” But that “[a]t 35 years old, . . . there’s a significant downside to an instrumented lumbar fusion as the first surgery.” He further explained that a coflex procedure is sort of an intermediary between a lumbar fusion and a simple decompression that still offers a substantial amount of stabilization. Dr. Christiano testified that he does not believe Rogers’ L4-5 herniation is without symptoms, and that Rogers reported leg pain when Dr. Christiano did the leg raise test, at ten to fifteen degrees on the left and thirty degrees on the right.

¶11 However, Dr. Maric countered Dr. Christiano’s testimony and reports by stating that Dr. Christiano did not do the straight leg test properly, described what he claimed to be the proper way to do the test,

which focuses on distracting the patient and not making it clear what is being tested so the results are more objective. He explained that the ten to thirty degrees at which Rogers reported feeling pain was not sufficient to actually stretch the sciatic nerve to cause radicular pain down the leg.

¶12 On November 30, 2018, the ALJ issued a Decision Upon Hearings and Findings and Award for Temporary Disability Benefits finding “Dr. Maric’s dismissal of the coflex procedure in the applicant’s situation to be more persuasive.” And that Rogers’ “low back condition related to this accident was medically stationary as of March 8, 2018 with no permanent impairment.” The ALJ determined that Rogers was entitled to disability compensation and benefits from September 17, 2017 through March 8, 2018, but not entitled to supportive care or permanent compensation. Rogers filed a request for review of that decision. The ALJ affirmed the award on February 6, 2019. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2), 23-951(A), and Rule 10, Ariz. R. P. Spec. Act.

### Analysis

¶13 “We will not disturb an ALJ’s findings of fact [in a workers’ compensation proceeding] so long as it is substantiated by competent evidence.” *City of Tucson v. Indus. Comm’n*, 236 Ariz. 52, ¶ 6 (App. 2014). The ALJ, and not this court, is in the best position to resolve issues of credibility and consistency of evidence. *See S.L.C. Leasing v. Indus. Comm’n*, 25 Ariz. App. 366, n.\* (1975). “Claimants bear the burden of establishing all material elements of their claim, including causation and, in [workers’ compensation] cases, the necessary connection to a work-related injury.” *T.W.M. Custom Framing v. Indus. Comm’n*, 198 Ariz. 41, ¶ 12 (App. 2000).

¶14 Rogers essentially makes one argument on appeal, that the ALJ should have ignored Dr. Maric’s report and testimony. Rogers argues that there are a number of reasons for the ALJ to have discounted the report and testimony of Dr. Maric. For instance, Dr. Maric’s “egocentric report” contradicts the findings of other doctors that Rogers went to for treatment, Dr. Maric’s medical examination was only fifteen minutes and was “grossly incomplete” and “ludicrously insensitive to his well-being, [and was] nonsensical.” Additionally, during the IME, Rogers perceived “by way of Dr. Maric’s tone of voice, carriage, gestures, and zeal that Dr. Maric was not representing the interest of Mr. Rogers, but that of his hiring authority, Defendant Employer’s Carrier.” To the extent Rogers is asking us to reweigh the evidence, we will not. *See Simpson v. Indus. Comm’n*, 189 Ariz. 340, 342 (App. 1997).

¶15 The medical testimony pertaining to whether surgery was an appropriate procedure for Rogers' L4-5 disc herniation was in conflict, as well as whether Rogers' herniation was asymptomatic. "Where, as here, the ALJ is presented with a conflict in the medical testimony, we will not disturb the ALJ's resolution of such a conflict unless it is wholly unreasonable." *City of Tucson*, 236 Ariz. 52, ¶ 9. The ALJ found Dr. Maric to be more credible, stating that, "the conflict in the medical evidence of record is resolved by adopting the testimony, opinions, and report of Dr. Maric as being most probably correct and well-founded." He also explained that he finds "Dr. Maric's dismissal of the coflex procedure in the applicant's situation to be more persuasive and also finds more persuasive his explanation of the applicant's conditions relative to this complaint early on and at the IME."

¶16 Accordingly, the ALJ resolved the conflicting medical opinions with evidence in the record and made the type of credibility determination that it is in the best position to make, and the ALJ's findings of fact are substantiated by competent evidence in the record. *See Rosarita Mexican Foods v. Indus. Comm'n*, 199 Ariz. 532, ¶ 10 (App. 2001) (appellate court will not disturb ALJ's findings of fact unless unreasonable).

### **Disposition**

¶17 For the foregoing reasons, we affirm the ALJ's decision and award, as well as its decision after review affirming that award.