

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 28, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-2788

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**CARDINAL FG AND AMERICAN MOTORISTS INSURANCE
COMPANY,**

PLAINTIFFS-APPELLANTS,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION AND JUDY
MRDUTT,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dunn County:
C. A. RICHARDS, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Cardinal FG and its insurer appeal a judgment affirming a decision of the Labor and Industry Review Commission that Judy Mrdutt's shoulder and neck problems resulted from a work-place injury. They argue that the commission failed to take into account Mrdutt's prior medical

history and erred by adopting the opinions of Mrdutt's treating physicians because they were unaware of her medical history. We reject these arguments and affirm the judgment.

Mrdutt was injured when she was struck by a forklift. Without objection, she testified that people who witnessed the incident told her she flew or was dragged some distance before the forklift driver realized he had hit her. Mrdutt received medical attention including four stitches and then returned to work. The next day, when she bent over to put on her shoes, she passed out. She saw a chiropractor, Dr. Donald Arvold, who informed her that she had a lateral whiplash and should stop working. When she returned to work after two or three weeks, she was placed on light duty with restrictions on lifting, bending, twisting and stretching. Without referrals, she received treatment from several other doctors. For the year following the injury, she followed her doctors' instructions and gradually worked herself back up to twelve-hour shifts. She was again taken off work approximately one year after the initial injury when she experienced excruciating pain. Her employer asked her not to come back until she was able to perform full duty. She testified that the symptoms in her shoulder worsened with nonuse. She had been experiencing improvement in her neck and shoulder with physical therapy, but medical benefits were denied and the therapy was discontinued.

In support of her claim, Mrdutt submitted medical opinions from Dr. Arvold and Thomas Rieser, M.D. Cardinal argues that the commission should not have relied on their reports because Mrdutt failed to inform them of her prior medical history including some complaints of shoulder and neck pain.

The commission's findings of fact are conclusive in the absence of fraud. *See* § 102.23(1), STATS. Reviewing courts are not allowed to substitute their judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. *See* § 102.23(6), STATS. This court's mandate to search the record for substantial and credible evidence to support the commission's finding should not be construed to allow this court to overturn the commission's findings on credibility unless the evidence is incredible as a matter of law. *See Princess House, Inc. v. DILHR*, 111 Wis.2d 46, 54-55, 330 N.W.2d 169, 173 (1983). The opinions of Arvold and Rieser are not so completely discredited that this court could declare them incredible as a matter of law. Mrdutt testified that she informed Arvold of her prior chiropractic treatment. She sought chiropractic treatment for all sorts of conditions, including minor aches and pains, sore throats and ear infections. Although some of her complaints related to her neck and shoulders, she apparently believed the injuries caused by the industrial accident were different in kind or severity. Whether Mrdutt's previous complaints relate to the same type of pain in the same areas and whether her failure to disclose the previous treatments was significant go to the weight and credibility of her evidence and were matters for the commission to resolve.

The Commission specifically reviewed Cardinal's assertion that the administrative law judge failed to take into consideration Mrdutt's previous medical history. The commission found her to be a credible witness with a strong work ethic and determined that Arvold's opinions were based on sufficient knowledge of Mrdutt's prior medical condition as to render his opinion credible. Arvold's report includes the statement "particular attention was paid to prior injuries...." The commission had the right to believe Mrdutt's testimony that Arvold knew of her past chiropractic treatments. Any inconsistencies in her

testimony must be resolved by the commission, not this court. *See Universal Rundle Corp. v. Industrial Comm’n*, 271 Wis. 578, 580-81, 74 N.W.2d 193, 194 (1956). The commission had ample reason to conclude that Mrdutt had an innocuous past medical history bearing no substantial relationship to the injuries she sustained in the industrial accident.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

