

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 3, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-0697

Cir. Ct. No. 02CV000620

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**BURGER KING/AMERIKING AND ACE AMERICAN
INSURANCE COMPANY, C/O GALLAGHER BASSETT
SERVICES, INC.,**

PLAINTIFFS-APPELLANTS,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION AND GRACE
BUCHHOLZ,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. This appeal arises from a worker's compensation claim. Burger King/Ameriking and Ace American Insurance Company, c/o Gallagher Bassett Services, Inc. (Burger King), appeal a judgment affirming the

Labor and Industry Review Commission's disability benefits award to Burger King's former employee, Grace Buchholz, for a work-related back injury. Burger King argues that the commission erred as a matter of law by finding a work-related injury occurred on April 19, 2001, and erroneously awarded temporary disability benefits. Burger King further contends that the commission erroneously permitted Buchholz to maintain a claim for loss of earning capacity when she voluntarily chose not to return to work. In addition, Burger King claims that the commission erroneously found that Buchholz sustained a 4% permanent partial disability. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 The record discloses that Buchholz, born December 14, 1915, began working at Burger King when she was eighty years old. Her previous jobs included housekeeping for ranchers out west, farm work, factory work during World War II and food service at a university. Although she retired at age sixty-two, after her husband passed away in 1992 she "just didn't like sitting around because I had been busy all my life." In 1995, when she saw that Burger King needed help, she obtained a part-time position as a hostess. She testified they were happy to hire her, telling her that their experience was that older workers were more reliable than younger ones.

¶3 Initially, Buchholz's hostess duties included clearing tables and keeping the dining room clean. Before long, these duties expanded to "all kinds of work" including "bathrooms, garbage cans, sweeping and mopping the floors, cleaning furniture, cleaning walls in the bathroom," making coffee and maintaining supplies in the dining room. She occasionally shoveled snow away

from doorways, refilled containers and generally cleaned. Buchholz stated that she enjoyed her job very much and got along well with her co-workers.

¶4 In January 2001, after working at Burger King for over five years, Buchholz injured her back while emptying garbage. She stated that she was pulling a garbage bag that weighed approximately fifty pounds out of a can when she “got a sharp pain right down the middle lower middle part of my back it just cut like I broke a bone or something.” She immediately told her supervisor, who gave her \$10 to take a taxi to St. Michael’s Hospital. A diagnostic imaging report noted “marked degenerative changes” in the lumbar spine, but no fracture or other acute abnormality. Physical therapy for low back pain was prescribed.

¶5 Buchholz obtained treatment at the Ford Chiropractic Clinic, S.C. Her January 10, 2001, diagnosis was “severe lumbosacral sprain/strain injury; right sacroiliac joint subluxation; right L5 radiculopathy; myalgia and myositis.” Buchholz was off work and under doctor’s care for a number of months. On April 11, 2001, Ford noted that Buchholz continued to experience pain and spasm, but because she was showing some signs of improvement, “we may try to return the patient to work on 4/19/01.” Ford’s medical notes of April 13 and 18 stated that he wanted her to try to return to work and “see how the patient tolerates it and further decision to be made at that time.”

¶6 On April 19, 2001, Buchholz returned to work. She testified that when she was emptying trash bags from the bathroom, “I picked them up and was taking them out to the kitchen and I over lifted them and did the same thing all over again to my back, the lower part where it had been hurt before.” She stated that “It was the same thing. I had just reinjured what had been probably somewhat fixed before it was in the same place that it was injured before.”

¶7 Buchholz drove herself to St. Michael's Hospital where she was seen in the urgent care unit. Her X-rays again revealed degenerative changes and physical therapy was recommended. Buchholz returned to the Ford Chiropractic Clinic. Ford's April 20 medical note states: "Grace presents after an acute severe exacerbation that occurred yesterday after the patient returned back to work. ... Patient is acute, antalgic with spasms present, paravertebral, lumbar spinal musculature."

¶8 On April 26, 2001, Buchholz saw Phil Mahoney, a physician's assistant at the Rice Medical Center. Notes from that visit indicate that Buchholz's pain "is quite diffuse throughout the lumbosacral area." Mahoney indicated she was unable to return to work because of persistent severe pain and recommended she continue under the care of her chiropractor, concluding, "He can release her to work when she has shown adequate improvement." Because of Buchholz's continuing symptoms, Ford ultimately concluded she "is being put under permanent restrictions and will not return to work."

¶9 At Buchholz's worker's compensation hearing, the administrative law judge found that Buchholz had sustained a work-related injury on January 8, 2001, and again on April 19, 2001. Burger King appealed the commission's decision. After reviewing the entire record and conferring with the administrative law judge regarding credibility, the commission affirmed the administrative law judge's findings and decision. It further stated: "The commission credits Dr. Ford's assessment the applicant was unable to return to work following her work injuries, and suffered four-percent permanent partial disability." The commission reserved jurisdiction for adjudication of loss of earning capacity.

Pursuant to WIS. STAT. § 102.23,¹ Burger King appealed to the circuit court, which affirmed the commission's decision. This appeal follows.

DISCUSSION

I. Credible and substantial evidence supports the commission's finding of an April 19, 2001, work-related injury.

¶10 Burger King acknowledges that Buchholz suffered a work-related injury, a lumbar strain, on January 8, 2001. However, it disputes whether Buchholz subsequently injured herself while at work on April 19. It claims that no credible and substantial evidence supports the commission's determination. It asserts there is no medical evidence showing a new work-related injury rather than simply a flare-up of pre-existing chronic lower back pain, degenerative arthritis or degenerative disc disease. Burger King contends the April 20 medical records refer to spasms and fail to identify the cause of Buchholz's condition. Burger King asserts that the medical records permit only one conclusion, that "the April 19, 2001, event was a flare-up of Buchholz' long-standing chronic lower back pain condition."

¶11 Burger King refers to Dr. Nathaniel Jalil's and Dr. Michael Borkowski's notes to support its contention. Borkowski, an independent medical examiner who evaluated Buchholz at Burger King's request, stated that her January lumbar strain was resolved and no injury occurred on April 19. His opinion was that she experienced manifestations of her chronic low back disease. He stated that Buchholz was a selective historian and less than valid examinee.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶12 Burger King claims that the commission relied exclusively on Buchholz's testimony. Burger King concludes that the commission's determination conflicts with the credible evidence test articulated in *Valadzić v. Briggs & Stratton Corp.*, 92 Wis. 2d 583, 592, 286 N.W.2d 540 (1979). It claims the commission "acted in excess of its administrative powers when it found a work injury on April 19th that was not supported by credible and substantial evidence."

¶13 We disagree. The commission's findings of fact are conclusive if supported by credible and substantial evidence. *Princess House Inc. v. DILHR*, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983).

In applying the credible evidence test, this court does not weigh conflicting credible evidence to determine what evidence shall be believed. If there is credible evidence to sustain the finding, irrespective of whether there is evidence that might lead to an opposite conclusion, we must affirm. There must be, however, such credible evidence that the findings will rest on facts and not on conjecture or speculation.

Valadzić, 92 Wis. 2d at 592-93.

¶14 When reviewing the weight and credibility of testimony, the standard that applies has been described as follows: "In evaluating medical testimony, the Department is the sole judge of the weight and credibility of the witnesses. The commission's finding on disputed medical testimony is conclusive. Where there are inconsistencies or conflicts in medical testimony, the Department, not the court, reconciles the inconsistencies and conflicts." *Id.* at 598. Thus, we review the record to locate credible and substantial evidence that

supports the commission's determination, rather than to weigh evidence opposed to it. *Vande Zande v. DILHR*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).²

¶15 We conclude that the record discloses substantial and credible evidence supporting the commission's finding that Buchholz suffered a work-related injury on April 19, 2001. First, Buchholz testified that on April 19 she reinjured her back while emptying the garbage cans at work. The record states: "The commission consulted with the administrative law judge concerning his assessment of the applicant's demeanor and testimony of the nature and onset of her back problems on April 19, 2001 ... he found the applicant to be straightforward and credible" Also, medical notes from Dr. Ford and the Rice Medical Center corroborate her testimony. Ford's notes state that Buchholz experienced an acute, severe exacerbation with muscle spasms after she returned to work April 19. The physician's assistant at the Rice Medical Center stated that Buchholz's pain was "diffuse" throughout the lumbosacral area.

¶16 The commission could reasonably infer that although Buchholz's spine had degenerative changes and she suffered other ailments as well, they did not interfere with her duties because she apparently was able to perform her normal work at Burger King for more than five years, including shoveling snow, cleaning and maintaining the restaurant. There is no dispute she suffered a work-related back injury in January 2001. Following her return to work on April 19, Ford's notes indicate spasms and severe exacerbation of her January injury. The commission was entitled to conclude that Buchholz suffered a severe exacerbation and reinjury on April 19. See *Lewellyn v. DILHR*, 38 Wis. 2d 43, 59, 155 N.W.2d

² Because Burger King's arguments raise issues of fact, not law, we reject its proposed standard of review of due deference.

678 (1968) (“If the work activity precipitates, aggravates and accelerates beyond normal progression, a progressively deteriorating or degenerative condition, it is an accident causing injury.”).

¶17 In any event, the record also permits the finding that on April 19, Buchholz had not completely healed from the January work-related injury. On April 11, 2001, Ford noted that Buchholz continued to experience pain and spasm, but because she was showing some signs of improvement, “we may try to return the patient to work on 4/19/01.” The fact that Ford stated he would “see how the patient tolerates it and further decision to be made at that time” indicates that her January work-related injury had not completely healed. Thus, the commission could reasonably infer that despite improvement, Buchholz continued displaying symptoms of her January injury and, when she returned to work on a trial basis on April 19, she was therefore unable to perform her work.

¶18 While the record also contains evidence of degenerative changes, as well as other doctors’ opinions that fail to support Buchholz’s claim, the commission, not this court, reconciles conflicts in the testimony. “A determination of the department that the testimony of one qualified medical witness rather than the testimony of another is to be believed is conclusive.” *E.F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 637, 264 N.W.2d 222 (1978). Burger King’s arguments amount to an attack on the weight and credibility of Buchholz’s and Ford’s testimony. It challenges the commission’s decision to place little weight on the opinions offered by Drs. Borkowski and Jalil. We may not substitute our weight and credibility determinations for those of the commission. *Valadzic*, 92 Wis. 2d at 598. To do so would exceed the scope of our review. *See*

id. Therefore, we conclude that the commission acted within its powers when it determined that Buchholz suffered a work-related injury on April 19, 2001.

II. The commission did not err as a matter of law by awarding temporary disability benefits.

¶19 Next, Burger King argues that the commission erred when it awarded a fourteen-week healing period when none of the medical providers found a healing period in excess of ten weeks. It claims that both Ford's and Borkowski's notes fail to support a finding of a healing period beyond March 21, 2001. We disagree with Burger King's characterization of the record. On April 11, 2001, Ford noted that Buchholz continued to experience pain and spasm, but because she was showing some signs of improvement, "we may try to return the patient to work on 4/19/01." Also, Ford stated that he wanted her "to try to return" to work and see how she tolerates it, reserving further determination regarding her condition.

¶20 We conclude that the commission could reasonably conclude that Buchholz's healing period continued until she returned to work on April 19. Burger King cites evidence from which contrary inferences may be drawn. This argument neglects our standard of review, which is to locate credible and substantial evidence in the record that supports the commission's findings. *Vande Zande*, 70 Wis. 2d at 1097. We therefore reject it.

¶21 Burger King further argues that Buchholz refused "light/modified" employment without reasonable cause, thereby disqualifying her from temporary disability benefits. The commission was entitled to find to the contrary. Buchholz testified that she received a letter on May 3, 2001, advising that she report to work on May 7. When she reported as directed, the manager told her he had no

knowledge that she was to return to work, so she did not work. The commission specifically found this testimony credible.

¶22 Burger King also argues that Buchholz was offered light/moderate work immediately following her April 19, 2001, incident. However, the commission found that she was not released to work at that time. Ford's notes support the commission's finding.

III. The commission did not err when it found that Buchholz sustained a 4% permanent partial disability.

¶23 Finally, Burger King claims that the commission erroneously found that Buchholz sustained a 4% permanent partial disability. The record shows that the commission gave credit to Ford's assessment that Buchholz suffered a 4% permanent partial disability but reserved jurisdiction for adjudication of loss of earning capacity "given the deficiencies in the vocational expert's reports presented at the hearing." Burger King contrasts Ford's conclusory statement with Borkowski's detailed opinion based on medical records. Burger King argues that the commission's finding "is incredible as a matter of law as the assessment is based solely on the incredible opinion of Dr. Ford."

¶24 Burger King does not define "incredible as a matter of law." It has been held that incredible as a matter of law is to be inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. *In re Estate of Neumann*, 2001 WI App 61, ¶27, 242 Wis. 2d 205, 626 N.W.2d 821. Because the record fails to support this characterization, Burger King's argument fails.

¶25 Burger King further contends that the commission based its determination on “cultivated intuition,” contrary to *Leist v. LIRC*, 183 Wis. 2d 450, 457, 515 N.W.2d 268 (1994). With respect to “cultivated intuition,” *Leist* states:

It is LIRC's duty to deny benefits if it finds that a legitimate doubt exists regarding the facts necessary to establish a claim. [*Erickson v. ILHR Department*, 49 Wis. 2d 114, 118, 181 N.W.2d 495 (1970)]. If there is credible evidence to support LIRC's denial, we will not upset it on appeal. *Id.* We have cautioned, however, that: “This does not mean ... that any doubt is a legitimate doubt so long as the commission chooses to entertain it.... [T]he rule does not permit the commission to exercise its judgment arbitrarily and capriciously.... There must be in the testimony some inherent inconsistency before the commission is warranted in entertaining a legitimate doubt. *It cannot rely solely upon its cultivated intuition.*”

Id.

¶26 We conclude that the commission did not violate this standard. The record shows that Ford examined and treated Buchholz numerous times. His notes contain extensive findings with respect to his exams. The commission’s assessment of his credibility was not based solely on intuition.³ We reject Burger King’s argument.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

³ The commission argues that Burger King’s argument is premature and fails to show prejudice. Because we reject Burger King’s argument, we need not address the commission’s other reasons for rejecting it. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938).

