

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2413

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**WISCONSIN WORKER'S COMPENSATION UNINSURED
EMPLOYEES FUND,**

PLAINTIFF-RESPONDENT,

V.

URBAN ARTIFACTS, INC.,

DEFENDANT-APPELLANT,

**LABOR AND INDUSTRY REVIEW COMMISSION AND
ROBERT WILSON,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie
County: JAMES T. BAYORGEON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Urban Artifacts, Inc., appeals a judgment affirming a decision of the Labor and Industry Review Commission (LIRC) that Urban Artifacts was an “employer” under WIS. STAT. § 102.04(1)(b), because it paid at least \$500 in wages to any employee or employees in a calendar quarter preceding Robert Wilson’s injury. Urban Artifacts argues that LIRC exceeded its powers by making a finding of fact based only on speculation and conjecture and that it impermissibly switched or lessened Wilson’s burden of proving that Urban Artifacts was an employer. We reject these arguments and affirm the judgment.

¶2 Three witnesses testified before the administrative law judge (ALJ) regarding Urban Artifacts’ status as an employer. Wilson, the injured applicant, testified that he started working for Urban Artifacts approximately two weeks before his injury. His testimony provided no information regarding wages Urban Artifacts paid in the preceding quarter. Jeff Janson, the sole proprietor of Urban Artifacts, expressed confusion and difficulty distinguishing payments for materials from payments for services. He did not recall whether he paid at least \$500 in wages to any employee in any given calendar quarter before Wilson’s injury. The ALJ noted that Janson was sophisticated with respect to the significance of the \$500 figure and gave detailed testimony on other matters. The ALJ concluded that Janson’s testimony would have been more certain if he had not paid that amount. Keith Hacek testified that he had worked for Urban Artifacts in the first calendar year of 1997 and had been paid “a couple thousand [or] a thousand” dollars. He was unsure of the exact figure, the exact dates, and the portion that was paid for materials he provided.

¶3 The ALJ found that Urban Artifacts had paid more than \$500 in wages in the first calendar quarter of 1997 and therefore met the definition of an “employer” under WIS. STAT. § 102.04(1)(b)2 on the date of Wilson’s injury.

LIRC affirmed the decision, conceding that Hacek's testimony was not entirely consistent, but finding that "the most reasonable conclusion from his testimony is that Mr. Hacek was paid at least \$500 in the first quarter of 1997." It noted that Janson also acknowledged paying another individual \$300 for services in the form of reimbursement for rent, that he did not recall whether he paid \$500 in a quarter for services, and it "decline[d] to apply the burden of proof to shield [Urban Artifacts] from its liability for benefits by failing to bring records to the hearing which would settle the issue at best or rebut the applicant's evidence on the issue at least."

¶4 The evidence as a whole is sufficient to support LIRC's finding that Urban Artifacts was an employer under the Worker's Compensation Act. Hacek's testimony, while somewhat inconsistent, was not so speculative that LIRC could not rely on it. The weight and credibility of testimony are to be decided by LIRC. See *E.F. Brewer Co. v. DILHR*, 82 Wis. 2d 634, 637, 264 N.W.2d 222 (1978). It is LIRC's function to reconcile inconsistencies. See *Carr v. Industrial Comm'n*, 25 Wis. 2d 536, 539, 131 N.W.2d 328 (1964). By taking selected portions of Hacek's testimony, minimizing the total amount he was paid and maximizing the amount that may have compensated him for goods, Urban Artifacts calculates that it only paid \$400 to Hacek for services performed during the quarter. LIRC was not required to accept those figures among the numerous other figures Hacek provided. Urban Artifacts also fails to consider Janson's admission that he paid another person \$300 for services rendered in the form of reimbursement for rent. Taken as a whole, the record supports the finding that Urban Artifacts and Janson paid more than \$500 for services rendered in the first quarter of 1997.

¶5 LIRC's statement that it would not "apply the burden of proof" to shield Urban Artifacts from its liability by failing to bring records to the hearing

does not constitute a shift in the burden of proof or a reduction in Wilson's burden of establishing his claim. Urban Artifacts simply failed to produce any evidence to rebut Wilson's evidence. LIRC's decision merely utilizes the principle that a trier of fact may draw an adverse inference when a party in possession of evidence fails to produce the evidence and fails to offer an explanation for failing to produce it. *See* 2 WIGMORE, EVIDENCE § 285, at 162 (3d ed. 1940). LIRC specifically noted that it was "satisfied the applicant ha[d] met his burden of proving that Urban Artifacts is a subject employer." We construe the language regarding the burden of proof as merely a refusal to expand the burden of proof to a level where an alleged employer can fail to rebut the applicant's evidence and fault the applicant for failing to produce better evidence that is in the employer's possession and control.

By the Court.—Judgment affirmed.

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

