COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1600

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

TERRANCE J. ROBRAN,

PLAINTIFF-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,
LIFETIME ASSOCIATES, INC. AND
AETNA CASUALTY & SURETY COMPANY,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Reversed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. The Labor and Industry Review Commission (LIRC), Lifetime Associates, Inc. (Lifetime) and Aetna Casualty and Surety

Company (Aetna),[1] collectively appeal from an order of the circuit court reversing an order issued by LIRC. After reviewing the record and conferring with the Administrative Law Judge (ALJ), LIRC concluded that Robran was not entitled to worker's compensation benefits because he qualified as an employer under § 102.04(1)(b), STATS. Robran appealed, and the circuit court reversed, concluding that LIRC's findings were not supported by credible evidence.

We reverse the circuit court and affirm the LIRC's order. First, we conclude that the circuit court improperly excluded Robran's tax return as hearsay. Robran's tax return is not hearsay; however, even if it was hearsay, the ALJ and LIRC are not necessarily bound by the rules of evidence and may consider hearsay evidence at their discretion. Second, the circuit court applied the wrong standard of review when it failed to give great weight deference to LIRC's conclusion that Robran was an employer. Finally, because we have reversed the circuit court's order, we do not reach the appellants' due process argument as that argument is now moot.

I. BACKGROUND.

Terrance J. Robran was installing garages for Lifetime Associates when he suffered a back injury. As a result of the injury, Robran underwent a "lumbar fusion" operation. Due to the injury and the resulting operation, Robran sought worker's compensation benefits from Lifetime. Lifetime refused to pay benefits to Robran claiming that Robran was not Lifetime's employee. Robran

[1] Aetna Casualty and Surety Company, now known as Travelers Property Casualty Corp., is listed as the Worker's Compensation Insurance Carrier on the application for hearing before LIRC. Both Aetna and Lifetime are represented by the same counsel in this matter, and both were made proper parties to the appeal before the circuit court.

filed for a hearing, but the parties reached a compromise agreement prior to the hearing date.[2]

After Robran sought additional medical treatment for his injuries, Lifetime again refused to provide benefits to Robran based on its original position that Robran was not a Lifetime employee. To resolve the issue of Robran's employment status, a hearing was held before the ALJ. At the hearing, two issues were presented: (1) was Robran a statutory employee under § 102.07(4), STATS., and, therefore, eligible for worker's compensation benefits from Lifetime?; or (2) was Robran either an independent contractor, pursuant to § 102.07(8)(b), STATS., or an employer, pursuant to § 102.04(1)(b), making him ineligible for worker's compensation benefits from Lifetime?[3] The ALJ concluded that Robran was an employee eligible for worker's compensation benefits after determining that Robran was not an independent contractor or an employer. Lifetime petitioned LIRC for a review of the ALJ's findings.

LIRC conducted a hearing and consulted with the ALJ regarding the credibility and demeanor of the witnesses, particularly Robran. After reviewing the record and consulting the ALJ, LIRC set aside the ALJ's findings of fact and substituted its own.

[2] The compromise agreement resolved temporary total disability benefits from the injury to the hearing date, permanent partial disability up to 15%, medical expenses, and penalties for delay and bad faith. All remaining issues were left open.

[3] An independent contractor is prohibited from being considered an employee if he meets the nine criteria listed under § 102.07(8)(b); an employer is prohibited from being considered an employee under § 102.07(8m).

Initially, LIRC concluded that Robran had presented sufficient evidence to establish that he was in the service of Lifetime when he was injured, and was, therefore, rebuttably presumed to be a Lifetime employee.

In Lifetime's successful attempt to rebut Robran's position that he was an employee, Lifetime relied almost exclusively on Robran's 1992 tax return. In Robran's 1992 tax return, he claimed several deductions, including a $6,000 deduction for "sub contract." Robran testified that he had no idea what the deduction was for, that he was completely unaware of how his tax return had been prepared, and that he had never hired any help. Faced with this conflicting evidence, LIRC concluded that Robran may not have known how his tax returns had been prepared, but it could not accept his testimony that he had never hired anyone to work for him. Consequently, LIRC concluded that Lifetime had presented sufficient evidence to successfully rebut the presumption that Robran was a Lifetime employee,[4] and found that Robran qualified as an employer under § 102.04(1)(b). As an employer, Robran is statutorily exempt from employee status under § 102.07(8m), and thus, he was not entitled to worker's compensation benefits from Lifetime.

Robran appealed LIRC's order dismissing his application, to the circuit court. The circuit court determined that the Commission erroneously relied on Robran's 1992 tax return which the court discounted as inadmissible hearsay.

[4] Under ***Revels v. Industrial Commission***, 36 Wis.2d 395, 402, 153 N.W.2d 637, 641 (1967), once Robran proved that he performed services for Lifetime the burden shifted to Lifetime to prove that he was not an employee. LIRC concluded that Lifetime had met that burden by demonstrating that Robran was an employer. Then the burden shifted back to Robran to rebut Lifetime's evidence, which Robran was unable to do. Consequently, LIRC concluded that Robran had not satisfied his burden of proof and that Lifetime had successfully rebutted the presumption that Robran was an employee by establishing that he was in fact an employer.

The court asserted that, "[w]ithout the tax return, the record does not contain credible evidence supporting the Commission's finding that [Robran's] testimony was incredible." Consequently, the circuit court reversed LIRC's order and upheld the findings of the ALJ. This appeal follows.

II. ANALYSIS.

For purposes of this appeal, we review LIRC's actions and not the circuit court's. *See* ***Stafford Trucking, Inc. v. DILHR***, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981) ("We do not deal with the question of whether the circuit court made the right decision. Our task is merely to determine whether the commission's decision was correct."). In addition, when reviewing LIRC's actions, we "owe no special deference to the circuit court"; rather, "[o]ur task is merely to determine whether the Commission's decision was correct." *See* ***id.*** First, we consider whether Robran's tax return was admissible as evidence in the hearing before LIRC. Second, we review LIRC's findings of fact, reasonable inferences, and legal conclusions.

A. Robran's tax return is not hearsay.

We determine that LIRC properly relied on Robran's tax return. The circuit court identified Robran's tax return as inadmissible hearsay, excluding it from evidence, and overturning LIRC's decision because the remaining facts did not support LIRC's order. The circuit court's conclusion fails for two reasons: (1) Robran's tax return is not hearsay; and (2) even if it is hearsay, it is admissible at the ALJ's and LIRC's discretion.

Section 908.01(4)(b), STATS., exempts an admission by a party opponent from the definition of hearsay. An admission by a party opponent is a

statement offered against the party that is either made by the party, or adopted by the party. *See* § 908.01(4)(b)1 & 2; ***State v. Rogers***, 196 Wis.2d 817, 830, 539 N.W.2d 897, 902 (Ct. App. 1995). Lifetime offered Robran's tax return as evidence against him, and, by his signature on the tax form, it is clear to us that Robran unequivocally adopted it.[5] Therefore, by definition his tax return is not hearsay.

Assuming arguendo that Robran's tax return was hearsay, it was still admissible in a worker's compensation case. WIS. ADMIN. CODE § DWD 80.12(1)(c) allows for the admission of hearsay testimony at the discretion of the examiners if the testimony has probative value. Therefore, even if the tax return was hearsay, it was admissible at the examiner's discretion, if it had probative value. Both the ALJ and LIRC found Robran's tax return to be probative and, exercising their discretion, admitted his return. Consequently, we conclude that the circuit court erred in excluding Robran's tax return as hearsay.

B. Standard of review.

At Robran's hearing, LIRC made several findings of fact, drew inferences from those facts, and then applied the facts and inferences to statutory

[5] We conclude that Robran's signature on his 1992 tax return is sufficient evidence to find that he intended to adopt his return because it supports the conclusion that he purposefully embraced its truth. *See* ***Rodgers***, 196 Wis.2d at 834, 539 N.W.2d at 904. We note that printed on the Wisconsin Income tax form immediately above Robran's signature is the language, "[u]nder penalty of law, I declare that this return and all attachments are true, correct, and complete to the best of my knowledge and belief." We are satisfied that Robran's signature coupled with this language immediately above his signature is more than sufficient evidence to manifest Robran's intent to adopt his tax return and purposefully embrace its truth. We are not willing to allow Robran to escape the legal effect carried by his signature affixed to such a document simply by pleading ignorance of the methods by which that document was prepared. Lending credence to such an argument would establish a dangerous precedent with consequences that would extend far beyond this case.

provisions to arrive at a conclusion. We must apply various standards of review to each step and, therefore, we shall review each step individually.

1. *Findings of fact.*

"LIRC's findings of fact are conclusive on appeal so long as they are supported by credible and substantial evidence." ***Applied Plastics, Inc. v. LIRC***, 121 Wis.2d 271, 276, 359 N.W.2d 168, 171 (Ct. App. 1984) (citing ***Nottelson v. DILHR***, 94 Wis.2d 106, 114, 287 N.W.2d 763, 767 (1980) ("It is axiomatic that the Commission's findings of fact are conclusive on appeal so long as they are 'supported by credible and substantial evidence ….'"); § 102.23(6), STATS. We will not substitute our judgment for LIRC's in considering the weight or credibility of the evidence on any finding of fact. *See* § 102.23(6); ***id.*** After reviewing the record, we are satisfied that LIRC's findings of fact are supported by credible and substantial evidence.

2. *Reasonable inferences.*

Drawing reasonable inferences from the facts also constitutes fact finding, and, therefore, reasonable inferences are conclusive on appeal if supported by credible and substantial evidence. *See* ***Applied Plastics***, 121 Wis.2d at 276, 359 N.W.2d at 171. Lifetime introduced Robran's 1992 tax returns which listed a $6,000 deduction for "sub contract." LIRC asserted, "[i]f applicant's sole proprietorship files a tax return claiming a deduction, it is not unreasonable to hold him to the most reasonable inference that may be drawn from the deduction, absent a more convincing explanation …." From the deduction listed in his tax return, LIRC inferred that Robran hired subcontractors to perform services in the course of his work. Because the drawing of reasonable inferences from undisputed facts constitutes fact finding, we must once again apply the credible

evidence test, under which LIRC's inferences are also conclusive on appeal if supported by credible and substantial evidence. *See* ***Applied Plastics***, 121 Wis.2d at 276, 359 N.W.2d at 171. We conclude that LIRC's inference—that Robran hired at least one subcontractor—is both reasonable and supported by credible and substantial evidence. Consequently, we conclude that LIRC's inference is conclusive on appeal.

3. *Legal conclusions.*

From its own findings of fact and reasonable inferences drawn from those facts, LIRC arrived at the legal conclusion that Robran was a statutory employer. Legal conclusions drawn by LIRC from its findings of fact present this court with questions of law that are subject to independent judicial review. *See* ***Nottelson v. DILHR***, 94 Wis.2d 106, 114-15, 287 N.W.2d 763, 767-68 (1980). "However, the application of a statutory concept to a set of facts frequently also calls for a value judgment; and when the administrative agency's expertise is significant to the value judgment, the agency's decision is accorded some weight." ***Applied Plastics***, 121 Wis.2d at 276-77, 359 N.W.2d at 171. The instant action required LIRC to apply the facts of the case to the statutory definition of "employer," contained in § 102.04(1)(b), STATS., to determine whether Robran was an employer. If such a decision also involves value judgments and policy determinations that require LIRC's expertise, then under ***Applied Plastics***, LIRC's decision must be afforded some weight.

LIRC argues that we must give great weight deference to its decision that Robran was a statutory employer because such a question involves LIRC's particular expertise. We agree. "When [an] agency uses its expertise to interpret a statute, we accord the agency one of two levels of deference, namely, 'due

weight,' or 'great weight.'" ***CBS, Inc. v. LIRC***, 219 Wis.2d 564, 572, 579 N.W.2d 668, 672 (1998). We must apply four factors to determine whether great weight deference is appropriate. *See* ***id.*** We will give LIRC's decision great weight deference if:

> (1) [LIRC] is charged by the legislature with administering the statute; (2) [LIRC's interpretation] is one of long standing; (3) [LIRC] employed its expertise or specialized knowledge in forming the interpretation; and (4) [LIRC's] interpretation will provide uniformity in the application of the statute.

Id.

Following our supreme court's analysis in ***CBS, Inc.***, we conclude that LIRC's decision—that Robran qualified as an employer—must be afforded great weight deference. The first factor is met because the legislature, through § 102.14(1), STATS., has charged LIRC (together with the Department of Workforce Development) with administering the Worker's Compensation Act. *See* ***id.*** at 573, 579 N.W.2d at 672. In addition to this legislative mandate, courts have instructed LIRC to interpret the statute and make factual findings. *See* ***id.*** LIRC meets the second and third factors because, as it asserts in its brief, it has been resolving questions concerning the existence of employer-employee relationships, the very foundation of the compensation act, since 1911 when the Worker's Compensation Act was passed. Because of this wealth of experience, we are satisfied that LIRC has gained a great deal of technical competence and specialized knowledge in ascertaining the existence of an employer-employee relationship. Finally, drawing upon the reasoning in ***CBS, Inc.***, we note that LIRC's interpretations and decisions in this area will "provide uniformity in the application of the statute, as its judgment, rather than the judgments of various

courts, will be uniformly applied" when ascertaining the existence of an employer-employee relationship. ***Id.*** Therefore, because LIRC's decision satisfies all four criteria, we conclude that LIRC's decision is entitled to "great weight" deference.

Because we give great weight deference to LIRC's conclusion that Robran was an employer, we must affirm the conclusion if it is reasonable, even if another conclusion would be equally reasonable. *See* ***id.*** at 573, 579 N.W.2d at 672. Section 102.04(1)(b)2, STATS., defines an employer as "[e]very person who usually employs less than 3 employes, provided the person has paid wages of $500 or more in any calendar quarter for services performed in this state." Based upon the record, primarily Robran's 1992 tax return, LIRC concluded that Robran was an employer as defined in § 102.04(1)(b).

In drawing the legal conclusion that Robran was an employer from conclusive findings of fact and corresponding inferences, LIRC asserted that "resolution of this case depends largely on the credibility of the applicant's testimony that he was unaware of what the basis of the $6,000 'sub contract' deduction was, and that he never hired anyone to perform services for him." A witness's credibility or the persuasiveness of the testimony is exclusively within the province of LIRC. *See* ***L&H Wrecking Co.***, 114 Wis.2d at 509, 339 N.W.2d at 347 (citing § 102.23(6), STATS.). LIRC concluded that while it was plausible that Robran did not know how his taxes were prepared, it could not accept his testimony that he had never hired anyone to work for him. LIRC was not swayed by Robran's protestation of ignorance, nor his claims that he was not aware of the financial aspects of his business, all of which were contradicted by the tax return. Therefore, despite Robran's testimony, LIRC concluded that Lifetime had offered sufficient evidence to demonstrate that Robran was an employer. We are satisfied

that LIRC's conclusions were reasonable, and we affirm LIRC's conclusion that Robran was an employer.

Because Robran is an employer under § 102.04(1)(b), he cannot also be an employee. Section 102.07(8m), STATS., provides that "[a]n employer who is subject to this chapter is not an employe of another employer for whom the first employer performs work or service in the course of the other employer's trade, business, profession or occupation." Therefore, because we agree with LIRC that Robran is a statutory employer, § 102.07(8m) prohibits him from also being Lifetime's employee. Because he is not an employee, he is not afforded protection under the Worker's Compensation Act, and Lifetime is not obligated to pay benefits to him.

For all of the above reasons, we reverse the order of the circuit court and affirm LIRC's order finding that Terrance J. Robran was an employer under § 102.04(1)(b) and, therefore, under § 102.07(8m), could not be a Lifetime employee, thus prohibiting him from collecting worker's compensation benefits from Lifetime. Lifetime argues that the ALJ's denial of a continued hearing violates due process. Because we affirm LIRC's findings and order, and reverse the circuit court's order, we do not reach the appellants' due process argument as that argument is now moot. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (holding that if a decision on one point disposes of an appeal, the appellate court need not decide the other issues raised).

By the Court.—Order reversed.

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