

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 12, 2008

David R. Schanker
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. 2007AP2122

Cir. Ct. No. 2007CV69

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

TONY NIHLES D/B/A TONY NIHLES TREE SERVICE,

PLAINTIFF,

WISCONSIN WORKERS COMPENSATION UNINSURED EMPLOYERS FUND,

PLAINTIFF-APPELLANT,

v.

WILLIAM F. CULL AND LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Grant County:
ROBERT P. VANDEHEY, Judge. *Affirmed.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. The Wisconsin Worker’s Compensation Uninsured Employers Fund (the Fund) appeals an order affirming a jurisdictional coverage decision by the Labor and Industry Review Commission (LIRC). We affirm for the reasons discussed below.

¶2 It is undisputed that William Cull was injured on October 1, 2003, while performing work for Tony Nihles, who operated his own tree-trimming business. The parties also agree that the primary issue before LIRC was whether Nihles qualified as an “employer” subject to the Worker’s Compensation Act.

¶3 The statutes define an employer subject to the act to include a person who usually employs less than three people if the person paid wages of more than \$500 in a preceding calendar quarter. WIS. STAT. § 102.04(1)(b)2. (2005-06).¹ LIRC adopted an administrative law judge’s factual finding that in the quarter preceding Cull’s accident, Nihles had paid about \$725 to a logger named Robert Merkes. The Fund challenges that factual finding on appeal.

¶4 The Worker’s Compensation Act limits the scope of judicial review for factual findings. WISCONSIN STAT. § 102.23 provides in relevant part:

(1)(a) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive....

....

(6) If the commission’s order or award depends on any fact found by the commission, the court shall not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. The court may, however, set aside the commission’s order

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

or award and remand the case to the commission if the commission's order or award depends on any material and controverted finding of fact that is not supported by credible and substantial evidence.

The question before us on this appeal, then, is whether there was substantial and credible evidence to support LIRC's factual finding that Merkes earned about \$725 working for Nihles in the quarter preceding Cull's accident.

¶5 LIRC's finding was based on Merkes' testimony that he worked for Nihles during April, May and June of 2003. Merkes testified that he would stop by Nihles' home to see if Nihles had work for him. He testified that he worked for Nihles at several homes, including one a few blocks from Merkes' house, one at what he believed was called Evergreen Mobile Park in Platteville, and one in Belmont. He earned \$15 an hour and was paid in cash at the end of each day, which averaged \$100 to \$125 on a daily basis. He did not know exactly how many jobs he had performed for Nihles and did not have any documentation of the payments. However, he believed he had probably earned between \$500 to \$1,000 during the relevant three-month period, with his best estimate being about \$700 to \$750.

¶6 The Fund points out that: the Evergreen Mobile Park manager testified that Nihles had not performed tree work for him in 2003; Nihles himself flatly disputed that Merkes had worked multiple jobs for him in the spring of 2003; Nihles' wife recalled Merkes working for Nihles on only one roofing job; Merkes was a longtime friend of Cull and may have had a grudge against Nihles because he had accused him of stealing a chainsaw; Merkes had no documentation to show exactly when or how much Nihles had paid him; and Merkes also worked for Nihles' brother and did not distinguish between their companies. From this, the Fund argues that Merkes' testimony was "so completely discredited by other

evidence that it is incredible as a matter of law.” See *Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 52, 330 N.W.2d 169 (1983) (superseded by statute on other grounds).

¶7 Evidence is incredible when it is in conflict with the uniform course of nature or with fully established or conceded facts. *Simos v. State*, 53 Wis. 2d 493, 495, 192 N.W.2d 877 (Ct. App. 1972). For the purposes of administrative review, “[c]redible evidence is that evidence which excludes speculation or conjecture. Evidence is substantial if a reasonable person relying on the evidence might make the same decision.” *City of Oak Creek by its Water and Sewer Utility Comm’n v. PSC*, 292 Wis. 2d 119, 134, 716 N.W.2d 152 (Ct. App. 2006) (citing *Bumpas v. DILHR*, 95 Wis. 2d 334, 343, 290 N.W.2d 504 (1980) and *Bucyrus-Erie Co. v. DILHR*, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979)).

¶8 Merkes’ testimony that he performed several tree jobs for Nihles in the spring of 2003 and earned between \$500 and \$1,000 does not conflict with the uniform laws of nature. The testimony was not based on mere speculation or conjecture, but rather upon his recollection of having performed those jobs, and an estimate of how much he would likely have earned based upon his usual rate and method of payment. A reasonable person could rely on that testimony to decide that Merkes had earned about \$725 in the relevant quarter.

¶9 The Fund misunderstands the role which other evidence in the record plays in our review. As the court explained in *Princess House*, considering whether evidence is incredible as a matter of law “is clearly not the same as a reviewing court’s weighing conflicting credible evidence to determine what shall be believed.” *Princess House*, 111 Wis. 2d at 52. Here, the other evidence which the Fund claims completely discredits Merkes’ testimony is not documentary or

inherently incontrovertible in nature. Rather it is simply other testimony from other witnesses. Weighing the relative credibility of such testimony is LIRC's responsibility, and we are precluded from substituting our judgment for that of LIRC in the matter.

¶10 In sum, Merkes' testimony was not incredible as a matter of law, and it provided a credible and substantial evidentiary basis for LIRC's determination.

By the Court.—Order affirmed.

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

