

Department of Workforce Development
Unemployment Insurance Division
Bureau of Legal Affairs
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Scott Walker, Governor
Raymond Allen, Secretary

May 16, 2018

To: State Selected Health Care Corp.
C/O Aaron Holmes
142 S. Maple Ave
Hillside, IL 60162

Cherese Butcher
142 S. Maple Ave
Hillside, IL 60162

Labor and Industry Review Commission
3319 West Beltline Highway
Madison, WI 53713

Legislative Reference Bureau
One East Main Street, Suite 200
Madison, WI 53703

Re: In the matter of personal liability of Cherese Butcher for delinquent
unemployment insurance taxes, interest, penalties, or special assessments owed by State
Selected Health Care Corp.
UI Hearing No. S1600067EC

PLEASE TAKE NOTICE that the Wisconsin Department of Workforce
Development, under Wis. Stat. § 108.10(7)(b), does not acquiesce in the decision of the
Labor and Industry Review Commission dated May 2, 2018, identified above, Hearing
No. S1600067EC, a copy of which is attached to this notice, and requests that the
Legislative Reference Bureau obtain publication of this Notice in the Wisconsin
Administrative Register under Wis. Stat. § 108.10(7)(b). Although the decision is binding
on the parties to the case, the Commission's conclusions of law, the rationale and
construction of the statutes in the case are not binding on the Department in other cases.

A handwritten signature in black ink, appearing to read "Christine Galinat".

Christine Galinat
Attorney
Department of Workforce Development
P.O. Box 8942
Madison, WI 53708-8942

State of Wisconsin

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Labor and Industry Review Commission

State Selected Health Care Corp.
Employer

Cherese Butcher
Debtor/Appellant

Hearing No.S1600067EC PL

Unemployment Insurance
Contribution Liability
Decision¹

Dated and Mailed:


MAY 02 2018

The commission reverses the appeal tribunal decision. Accordingly, the appellant is not personally liable for the payment of delinquent unemployment insurance taxes, interest, penalties, or special assessments owed by State Selected Health Care Corp., as specified in the initial determination.

By the Commission:


Georgia E. Maxwell, Chairperson


Laurie R. McCallum, Commissioner


David B. Falstad, Commissioner

¹ **Appeal Rights:** See the blue enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you must name the following as defendants in the summons and the complaint: the Labor and Industry Review Commission, all other parties in the caption of this decision or order (the boxed section above), and the Department of Workforce Development.

Appeal rights and answers to frequently asked questions about appealing an unemployment insurance decision to circuit court are also available on the commission's website <http://lirc.wisconsin.gov>.

Procedural Posture

This case is before the commission to consider whether the appellant is personally liable for certain delinquent unemployment contributions (taxes) of the employer. An appeal tribunal of the Unemployment Insurance Division of the Department of Workforce Development held a hearing and issued a decision holding that the appellant was, and the appellant filed a petition for commission review.² The commission has considered the petition and the positions of the parties, and it has independently reviewed the evidence submitted at the hearing. Based on its review, the commission makes the following:

Findings of Fact and Conclusions of Law

1. State Selected Health Care Corporation provided assisted living services to the elderly. The corporation became subject to Wisconsin unemployment insurance law in 2006. Wisconsin Department of Financial Institution records reflect that the corporation was organized as a non-stock corporation.
2. When the corporation was organized in 2006, Aaron Holmes, Jr. (Holmes) was its initial registered agent, incorporator, owner, and Chief Executive Officer. Holmes died in December 2014. The appellant, who is Holmes' daughter, began working for the corporation in 2009.
3. In or around 2011, Ayton L. Taylor became involved with the business. He acted as the corporation's accountant and was on its Board of Directors, but it is unknown whether he also was an officer of the corporation. Taylor assisted with payroll and oversaw the disbursement of funds.
4. As of the beginning of the relevant time period, July 2012, the appellant acted as the corporation's administrative assistant; her duties included managing the corporation's workers and clients. For clients, she bought food and other supplies and ensured that they attended their doctor's appointments. If a bill needed to be paid, she submitted the bill to Taylor with a disbursement voucher. If Taylor approved the disbursement, the appellant wrote a check from one of the corporation's bank accounts with Associated Bank N.A. All checks the appellant wrote had to be co-signed, and all checks in the record were signed both by the appellant and by Holmes. Several of the checks were made out either to the appellant or to Holmes. Checks made out to the appellant were reimbursements for monies the appellant loaned the corporation for such matters as nursing and grocery expenses.
5. In August 2012, Taylor took over the writing of checks on behalf of the corporation and the appellant stopped writing them. Effective the end of September 2012, Taylor had closed the corporation's Associated Bank N.A.

² The appellant's petition for review was late because she did not receive the appeal tribunal decision mailed to her by the department on November 16, 2017, and that is a reason beyond control for a late petition for review.

accounts and transferred the corporation's monies to out-of-state financial institutions. Thereafter, the appellant neither had check-signing authority nor in fact signed any checks on behalf of the corporation.

6. Through early 2013, the corporation did not always make payroll. However, during the relevant time period it did regularly meet certain other obligations, in particular its utilities bills.
7. The appellant was unaware that the corporation was not making its required contributions to the department; she expected Taylor to pay such bills. The appellant did not handle incoming mail or review "paper" bills. Electronic payment of bills was done by Taylor. It was also Taylor, and not the appellant, who filed required contribution, tax, and wage reports with the department.
8. Taylor discharged the appellant in January 2013. At an unspecified time thereafter, the corporation went out of business.
9. Between August 2012 and May 2013, the department issued various determinations to the corporation for past due taxes, interest, special assessments for interest, and penalties for the second through fourth quarters of 2012 and the first quarter of 2013. The department also issued tax collection statements to and filed various warrants and levies against the corporation.³
10. In August 2015, the department issued the present Personal Liability Assessment Determination to the appellant, for payment of the delinquencies in question.
11. The appellant is not personally liable, within the meaning of Wis. Stat. § 108.22(9), for the corporation's delinquent taxes, interest, special assessments for interest, or penalties for the second through fourth quarters of 2012 and first quarter of 2013.

Memorandum Opinion

At the time of the department's Personal Liability Assessment Determination against the appellant, the criteria for the imposition of personal liability for a corporation's delinquent unemployment contributions were: 1. the individual must have held at least 20 percent of the ownership interest of the corporation; 2. the individual must have had control or supervision of or responsibility for filing required contribution reports or making contribution payments; 3. the individual must willfully have failed to file the reports or make the payments (or ensure that the reports were filed or the payments made); and 4. the department must have engaged in proper proceedings against the corporation for the delinquent

³ In 2013, the department issued a Personal Liability Assessment Determination against Holmes for the same delinquencies now at issue, which Holmes did not appeal. The department has not issued a personal liability determination against Taylor.

contributions.⁴ Record evidence does not establish, however, that the appellant meets the first and second criteria.

To be personally liable under the statute, the individual must hold at least 20 percent of the ownership interest of the entity in question. What constitutes ownership interest is the following:

Ownership interest of a corporation or limited liability company includes ownership or control, directly or indirectly, by legally enforceable means or otherwise, by the individual, by the individual's spouse or child, by the individual's parent if the individual is under age 18, or by a combination of 2 or more of them.⁵

At hearing, the department argued that the statute allows the department to combine the ownership interests of the appellant and her father in order to reach the 20 percent ownership interest threshold. As the appeal tribunal reasoned, however, this is only the case where the individual is under the age of 18 and, given the duties the appellant performed on behalf of the corporation, the only reasonable inference is that the appellant is not under that age.

The commission cannot agree with the appeal tribunal, however, that the appellant exercised control of the ownership interests of the corporation. No evidence establishes, or even suggests, that the appellant directly possessed or controlled the requisite ownership interest in the corporation, which leaves indirect ownership and control.

The leading unemployment insurance case on the issue of indirect ownership interest and control is *Linse v. LIRC*, 135 Wis. 2d 399, 400 N.W.2d 481 (Ct. App. 1986). The statute at issue there was Wis. Stat. § 108.04(1)(g)3., which limits the base period wages of an individual who owns or controls, directly or indirectly, one-fourth or more of the ownership interest of a corporation or limited liability company. The plaintiff and his brother each owned 50 percent of the corporation's stock. The brother conveyed his stock to the Plaintiff, without consideration. The Plaintiff then conveyed all of the corporation's stock to a friend, again for no consideration, a conveyance the friend never reported to any government body.

The brothers continued to operate the business. They controlled all assets and aspects of the business, and the friend never exercised any control over the business's operations. It thus is clear that the stock conveyance was a sham.

The court of appeals reasoned that, because the statute used "own" and "control" in the disjunctive, it would be possible for a person to control a corporation but not own it, or vice versa. Also, including both indirect and direct ownership and control

⁴ Wis. Stat. § 108.22(9) (2015-16). Effective with personal liability determinations issued on or after April 1, 2018, 2017 Wis. Act 157 amended § 108.22(9) in certain respects, including the deletion of the ownership provision discussed below. 2017 Wis. Act 157, §§ 64, 72(5), and 73.

⁵ *Id.*

exhibits an intention by the legislature to include persons who may control a corporation but not own stock in it. The court held that, in each case, the commission must determine whether ownership or control, *in reality*, exists, and it affirmed the commission's conclusion that, in *Linse*, such control did exist.

The commission followed the reasoning in *Linse* in *Zitzner v. LIRC (and Accurate Construction, Inc.)*, No. 91 CV 4968 (Wis. Cir. Ct. Dane Cnty. Nov. 13, 1992). There, although the plaintiff's mother owned the corporation, the plaintiff and his brother were responsible for its management, in particular directing all construction activities. The plaintiff also was a corporate director and its vice-president. These factors were sufficient to support the commission's conclusion that the plaintiff had indirect control of a fourth or more of the corporation's ownership interest, within the meaning of Wis. Stat. § 108.04(1)(g).

The commission found a debtor personally liable for delinquent contributions, and was affirmed by the Dane County Circuit Court, in *Pharo v. LIRC*, No. 02 CV 272 (Wis. Cir. Ct. Dane Cnty. Mar. 19, 2003). In that case, Pharo assumed the positions of acting president and Chief Executive Officer. He was the sole manager and had exclusive authority over and responsibility for the corporation's bank accounts, payroll, and bill payments. He represented himself as the owner of the corporation and managed its day-to-day affairs.

In affirming the commission's conclusion that Pharo was personally liable for his corporation's delinquent contributions, the circuit court reasoned that Pharo controlled the corporation's stock because it had been transferred to the corporation, Pharo was its only corporate officer, and he had total control of the corporation's checkbook.

Relying on the circuit court's reasoning in *Pharo*, the commission held a debtor not liable for his corporation's delinquent contributions, in *In re Edward H. Trier III*, UI Dec. Hearing No. S1000331MW (LIRC Sept. 11, 2014). There, the plaintiff was the corporation's Chief Financial Officer at all times material, but the corporation's president, who also held a controlling interest in the corporation, had specifically instructed the plaintiff that the plaintiff did not have independent authority to remit past-due tax obligations to the department.

The commission distinguished the responsibility for making contributions from the holding or controlling of ownership interest in an entity. The commission also reasoned, relying on *Pharo*, that the indirect control provision goes to control of the stock of the corporation, something the debtor did not have, and the department acquiesced in this holding.⁶

⁶ In tax cases, the department is deemed to acquiesce in the construction the commission has placed upon a statute, unless it does one of two things, neither of which it did with respect to *Trier*. First, it may seek review of the commission decision construing the statute. Wis. Stat. § 108.10(7). Second, if it does not seek review the department may still non-acquiesce in the decision, if it: sends notice of non-acquiescence to the commission, to the legislative reference bureau for publication in the Wisconsin administrative register, and to the employer, before the expiration of the appeal period for

In each of these cases, the individuals who were found to have exercised the requisite control under the statute in question controlled most or all of the assets and aspects of the entity in question. In addition, in most cases the individuals also held directorships and high corporate offices.

In the present case, by contrast, the appellant had nothing like the control the plaintiffs had in *Linse*, *Zitzner*, or *Pharo*. She was not able to single-handedly write checks on behalf of the corporation, because two signatures were required for the issuance of any check on the corporation's behalf. In addition, during all relevant time periods the issuance of checks required the approval of Taylor, who was on the corporation's Board of Directors and who acted as the corporation's accountant. While the record does not contain documentary evidence establishing that the procedure requiring Taylor's approval was always followed, the record also contains no evidence suggesting that the co-signing requirement ever was not followed. In addition, the appellant was only an administrative assistant for the corporation; she held no directorship or corporate office. For these reasons, the commission has concluded that the appellant does not meet the ownership or control criterion. The record also does not establish that the appellant bore responsibility for making the payments at issue.

Responsibility for Payments

Wisconsin law does not recognize the category of "figurehead" officer or director.⁷ Every officer or director of a corporation occupies a fiduciary relation, demanding care, vigilance, and good faith.⁸ The appellant was not an officer of the corporation, however, so there are no duties of office that would as a matter of law render the appellant responsible for making the contribution payments at issue.

The statute also includes employees who have responsibility for making contribution payments, but the record does not establish that the appellant had that responsibility. The appellant testified without contradiction that she had no responsibility for filing wage reports with, or making payments to, the department, that she never did either; and that both tasks were Taylor's responsibility. It does not follow, because the appellant had the authority to make expenditures for such things as nursing and grocery expenses, that she also was responsible for making contributions to the department, which is a discrete category of expenditure.

the commission decision in question. Wis. Stat. § 108.10(7)(b). Where the department takes neither step, it is deemed to have acquiesced in the commission's construction and "[t]he construction so acquiesced in shall thereafter be followed by the department." Wis. Stat. § 108.10(7)(a).

⁷ See *Burroughs v. Fields*, 546 F.2d 215, 217 (7th Cir. 1976). Because there is no published Wisconsin case law interpreting the concept of "responsible person" under Wis. Stat. § 108.22(9), it is proper for the commission to consult decisions concerning the personal liability of corporate officers under analogous state and federal statutes. See *Warner v. LIRC*, slip op. at 9, No. 93 CV 3157 (Wis. Cir. Ct. Dane Cnty. May 18, 1994).

⁸ *Boyd v. Mutual Fire Ass'n of Eau Claire*, 116 Wis. 155, 181, 94 N.W. 171 (1903), *overruled on other grounds by Harrigan v. Gilchrist*, 121 Wis. 127, 99 N.W. 909 (1904) (creditors of an insolvent corporation do have a cause of action against a receiver trustee for wrongful appropriation of funds).

For these reasons, the commission has concluded that the appellant also does not meet the responsibility criterion. The third criterion is met, but only with respect to the second quarter of 2012.

Willfulness

In a civil proceeding such as the present one, willfulness requires only a conscious, voluntary decision on the actor's part. That is, knowledge of the liability, coupled with failure to have paid it when the means were available to do so, satisfies this criterion.⁹

The calendar quarters at issue are the second through fourth of 2012 and the first of 2013. The respective due dates for the reports and contributions for these quarters were July 31, 2012, October 31, 2012, January 31, 2013, and April 30, 2013. There is no question, however, that as of October 31, 2012, the appellant had no access to the corporation's bank accounts, which at some point in September came under the exclusive control of Taylor. In addition, the appellant in fact was discharged before the fourth quarter 2012 and first quarter 2013 payments were due. Thus, even had the appellant had the requisite ownership interest and responsibility for the payments, the only delinquencies the appellant would be liable for are those related to the second quarter of 2012. The appellant would be liable for those delinquencies, because the record establishes that, during the relevant time period, the appellant expended monies on behalf of the corporation for items other than the unemployment taxes, such as nursing expenses and groceries for clients. The appellant also conceded at hearing that the bills were paid during that time period.

Department's Collection Proceedings

The fourth personal liability criterion is that the department previously have undertaken "proper proceedings" against the entity itself for the collection of the contributions in question. The requirement of proper proceedings is not a requirement that the department have exhausted, or engaged in, all possible proceedings.¹⁰ The only delinquencies the appellant could have been liable for were those related to the second quarter of 2012. The record establishes that the department issued an initial determination to the corporation for those delinquencies once they became past due. The department also issued a Notice of Warrant for the delinquencies on September 6, 2012, and then a Notice Prior to Levy – Payment Demand on September 25, 2012. The department sent the corporation notice on January 9, 2013, of a Levy Issued by the Division of Unemployment Insurance to the Associated Bank N. A., the corporation's financial institution during the time period at issue. The department also issued multiple warrants regarding the corporation's delinquencies, and this series of actions without question is sufficient to satisfy the "proper proceedings" criterion.

⁹ *In re Michael A. Pharo*, UI Dec. Hearing No. S9900158MD (LIRC Dec. 28, 2001).

¹⁰ *In re Edward H. Trier III*, UI Dec. Hearing No. S1000331MW (LIRC Sept. 11, 2014).

NOTE: The commission did not confer with the administrative law judge before determining to reverse the appeal tribunal decision. Such conferral is required where there is conflicting testimony and the administrative law judge made findings based upon the witnesses' credibilities.¹¹ In the present case, however, the commission's reversal is not based upon a differing credibility assessment from that made by the administrative law judge. Rather, the commission has concluded, as a matter of law, that the appellant did not meet the first and second criteria for the imposition of personal liability for an entity's delinquent contributions.

cc: Attorney Christine Galinat

¹¹ *Braun v. Indus. Comm'n*, 36 Wis. 2d 48, 57, 153 N.W.2d 81 (1967) (where there is conflicting testimony and the administrative law judge made findings based upon the credibility of witnesses, the commission must have the benefit of the administrative law judge's personal impressions of the material witnesses before the commission may make contrary findings).