

May 16, 2018

To: Masonry Specialists II LLC  
4330 Conifer Ct  
Union Grove, WI 52182

Kathleen M. Froode  
5109 Briarwood Lane  
Racine, WI 534102

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

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

Re: In the matter of personal liability of Kathleen M. Froode for delinquent taxes, late fees,  
and interest of Masonry Specialists II, LLC  
UI Hearing No. S1500379MW

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 April 18, 2018, identified above, Hearing No. S1500379MW, 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.



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State of Wisconsin



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Labor and Industry Review Commission

Masonry Specialists II LLC  
Employer

Kathleen M. Froode  
Debtor/Appellant

Hearing No.S1500379MW

Unemployment Insurance  
Contribution Liability  
Decision<sup>1</sup>

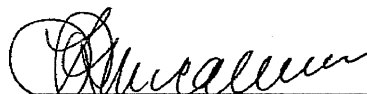
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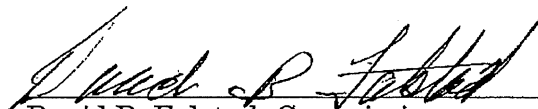
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The commission **modifies and affirms** the appeal tribunal decision. Accordingly, the appellant is not personally liable for the defaulted Chapter 11 restructured priority tax debt liability or for the delinquent taxes, late fees, and interest of Masonry Specialists II, LLC, accrued in the 4<sup>th</sup> calendar quarter of 2014 and the 1<sup>st</sup> calendar quarter of 2015, but she is personally liable, pursuant to Wis. Stat. § 108.22(9), for the delinquent taxes, late fees, and interest of Masonry Specialists II, LLC, accrued in the 4<sup>th</sup> calendar quarters of 2011 and 2013 and in the 2<sup>nd</sup> calendar quarter of 2014.

By the Commission:

  
Georgia E. Maxwell, Chairperson

  
Laurie R. McCallum, Commissioner

  
David B. Falstad, Commissioner

<sup>1</sup> **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 timely petition for commission review. 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

Subject to the modifications below, the commission makes the same findings of fact and conclusions of law as stated in the appeal tribunal decision and incorporates them herein by reference.

### Modifications

In paragraphs 32 and 34 of the appeal tribunal's Findings of Fact and Conclusions of Law, "2<sup>nd</sup> and 4<sup>th</sup> calendar quarters of 2014, and 1<sup>st</sup> calendar quarter of 2015" is deleted and "and 2<sup>nd</sup> calendar quarter of 2014" is substituted therefor.

### Memorandum Opinion

There are four criteria for the imposition of personal liability for a limited liability company's delinquent unemployment contributions: 1. the individual must hold at least 20 percent of the ownership interest of the company; 2. the individual must have control or supervision of or responsibility for filing required contribution reports or making contribution payments; 3. the individual must willfully fail to file the reports or make the payments (or ensure that the reports are filed or the payments made); and 4. the department must have engaged in proper proceedings against the company for the delinquent contributions.<sup>2</sup> Record evidence establishes, and the appellant does not contest, that she held 100 percent ownership interest in the company.

### Responsibility for Payments

Wisconsin law does not recognize the category of "figurehead" officer or director.<sup>3</sup> Every officer or director of a corporation occupies a fiduciary relation, demanding care, vigilance, and good faith.<sup>4</sup> Under Wisconsin law, this and the other principles governing the case apply with equal force to members of a limited liability company, the existence and operations of which are governed by Wis. Stat. ch. 183.

<sup>2</sup> Wis. Stat. § 108.22(9).

<sup>3</sup> See *Burroughs v. Fields*, 546 F.2d 215, 217 (7<sup>th</sup> Cir. 1976). Because there is no published 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).

<sup>4</sup> *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).

Management of a limited liability company is vested in its members, unless the company has vested management in one or more managers,<sup>5</sup> and no evidence in the record establishes any such vesting by the appellant, who is the sole member of the company.

The appellant also was the president of the company, and significant ownership interest and the holding of corporate office are indicia of responsibility for payment of contributions.<sup>6</sup> This is particularly the case with regard to the president of an entity. “[A]s president the appellant both was first in command of the organization and bore ultimate responsibility for oversight of its practices.”<sup>7</sup> The office of president itself gave the appellant the power and authority to see that the taxes in question were remitted, and that makes her a responsible person.<sup>8</sup>

The record also establishes that the appellant oversaw both the filing of the reports and the making of the payments. In fact, she filed quarterly reports and made payments herself, and communicated with both her staff and department personnel with regard to the proper allocation of the payments.

#### 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,<sup>9</sup> and in the present case this criterion is also met.

For a finding of willfulness, finally, the corporation must have had monies to make the unemployment contributions and instead preferred other creditors, and that is the case here for the quarters in which the commission has found the appellant personally liable. At the time the contributions at issue were due, the corporation was an ongoing concern, and had sufficient funds to make payroll and to pay at least some of the corporation’s other creditors. The appellant herself received payment from the company in the form of wages in all relevant calendar quarters. These actions equal a preference of other creditors to the department, and that is sufficient to satisfy the willfulness standard.

The commission has concluded, however, that the appellant is not liable for delinquencies for the 4<sup>th</sup> quarter of 2014 and the 1<sup>st</sup> quarter of 2015. The willfulness determination is made at the time the contributions are due.<sup>10</sup> The 4<sup>th</sup>

<sup>5</sup> Wis. Stat. § 183.0401.

<sup>6</sup> See *Thibodeau v. United States*, 828 F.2d 1499, 1503 (11<sup>th</sup> Cir. 1987) (president of corporation responsible person for payment of federal employment taxes).

<sup>7</sup> *In re the Personal Liability of William Skemp (HGS Catering Inc.)*, UI Dec. Hearing No. S1300269EC (LIRC Dec. 4, 2013).

<sup>8</sup> See *Feist v. United States*, 607 F.2d 954, 960 (Ct. Cl. 1979) (any corporate officer or employee with the power and authority to avoid the default or direct the payment of taxes is a responsible person).

<sup>9</sup> *In re the Contribution Liability of Michael A. Pharo*, UI Dec. Hearing No. S9900158MD (LIRC Dec. 28, 2001).

<sup>10</sup> *In re the contribution liability of Herbert B. Zien*, UI Dec. Hearing No. S9100221MW (LIRC Apr. 29, 1992).

quarter 2014 contributions were due on January 31, 2015, and the 1<sup>st</sup> quarter 2015 contributions were due on April 30. All of the company's operating funds were in its business account, upon which the Internal Revenue Service placed a levy on January 15, 2015, and that event essentially ended the company's ability to meet its financial obligations. The result of this levy was that, as of January 31, 2015, the company's balance in its business account was negative \$4,499.99. The appellant therefore cannot be deemed to have willfully failed to meet the company's 4<sup>th</sup> quarter 2014 and 1<sup>st</sup> quarter 2015 contribution obligations to the department.

#### 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.<sup>11</sup> With respect to the delinquencies the commission has ultimately determined the appellant to be liable for, the department issued to the company initial determinations of tax deficiency, a Notice of Tax Warrant, a Notice Prior to Levy – Payment Demand letter, and a Tax Collection Statement. The department also issued a levy to the company's bank. This series of actions is sufficient to satisfy the "proper proceedings" criterion.

The appeal tribunal excluded from the appellant's personal liability the tax liability arising from the company's failure to meet its obligations under the confirmed plan that came out of the company's Chapter 11 bankruptcy petition, specifically the liabilities for quarters two and three of 2009 and one of 2010, and the commission must agree. The department argues in its response to the appellant's petition for review that the appeal tribunal was wrong to do so on the ground that the department has the right to seek those monies pursuant to traditional state law remedies, here Wis. Stat. § 108.22(9).<sup>12</sup> The appeal tribunal did apply Wis. Stat. § 108.22(9), however. The department did have the right to pursue the delinquencies in question but, as the appeal tribunal reasoned, one of the requirements for applicability of the statute is that the department have taken proper proceedings against the entity beforehand, and the record does not establish that the department took any timely action against the company for the delinquencies arising out of the confirmed bankruptcy plan.

The appellant asserts in the petition for review, and argued at hearing, that the delinquencies at issue have all been paid in full, particularly the delinquencies for the 4<sup>th</sup> quarter of 2011. Department records indicate, however, that as of June 22, 2016, delinquencies remained pending for that quarter and for the 4<sup>th</sup> quarter of 2013 as well. The record also indicates a potential source for any confusion regarding the delinquencies. The department's practice, upon receipt of a payment that does not match a pending liability at the time of receipt, is to apply the

<sup>11</sup> *In re the Personal Liability of Edward H. Trier III*, UI Dec. Hearing No. S1000331MW (LIRC Sept. 11, 2014).

<sup>12</sup> *See In re Jenkins*, 184 B.R. 488, 494 (Bankr. E.D. Va. 1995).

payment to the debtor's oldest liability, unless the debtor has instructed the department otherwise. Some of the company's payments initially were applied to liabilities not intended by the appellant, because of the appellant's failure to specify the liabilities to which the payments were intended to apply. This resulted in several payment application reversals and re-applications (to the liabilities intended by the appellant).

**cc:** Attorney Christine Galinat

