

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

June 28, 2018

To: Corley Trucking Inc.
c/o Kelly Corley
13712 South Prairie
Gratiot, WI 53541

James A. Corley
PO Box 26
Darlington, WI 53530

Atty. William Haus
Haus, Roman and Banks, LLP
148 E Wilson St
Madison, WI 53703

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 James Corley for the payment of any unemployment insurance taxes, interest, penalties, or special assessments alleged to be owed by Corley Trucking, Inc.
UI Hearing No. S1600241MD

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 31, 2018, identified above, Hearing No. S1600241MD, 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 "Andrew Rubsam".

Andrew Rubsam
Attorney
Department of Workforce Development
P.O. Box 8942
Madison, WI 53708-8942

State of Wisconsin



Labor and Industry Review Commission

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DEPARTMENT OF
LEGAL SERVICES

Corley Trucking, Inc.
Employer

James A. Corley
Debtor/Appellant

Hearing No.S1600241MD

Unemployment Insurance
Contribution Liability
Decision¹

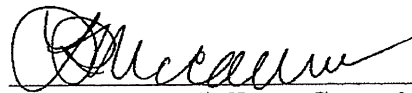
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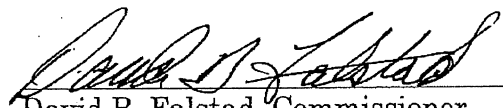
MAY 31 2018

The commission **modifies and affirms** the appeal tribunal decision. Accordingly, the appellant is not personally liable for the payment of any unemployment insurance taxes, interest, penalties, or special assessments alleged to be owed by Corley Trucking, Inc.

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 allegedly 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 not liable therefor, and the department 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 upon its review, the commission makes the following:

Findings of Fact and Conclusions of Law

1. Prior to September 24, 1996, the appellant operated Corley Trucking as a sole proprietorship. Effective September 24, 1996, there was a mandatory unemployment compensation account transfer, pursuant to Wis. Stat. § 108.16(8)(e), from Corley Trucking to the employer, Corley Trucking, Inc. This was a total transfer from the transferor to the employer (transferee). Subsequent to the transfer, one of the appellant's sons owned 100 percent of the stock of the corporation.
2. The appellant was the employer's registered agent with the Wisconsin Department of Financial Institutions. The appellant wrote checks on behalf of the employer, including payroll checks and checks to the department for due or past due unemployment contributions. The appellant was the primary contact person for department matters, including negotiations with regard to various matters, including past due contributions. The appellant also hired drivers on the employer's behalf and appeared on its behalf at unemployment benefit hearings involving the employer's employees or former employees.
3. The appellant had responsibility for making required contribution payments to the department.
4. The appellant knew of the requirement that unemployment contributions be paid to the department and, as found above, made some of them himself. The employer, throughout the time period at issue, paid the bills necessary for it to remain in operation.
5. The record contains no competent evidence of the amounts of any allegedly delinquent contributions of the employer.
6. The record also contains no competent evidence of proceedings by the department against the employer with regard to the alleged delinquent contributions.
7. The employer ceased operations at an unspecified point in the third calendar quarter of 2012. That quarter therefore is the last calendar quarter at issue.

8. No personal liability, pursuant to Wis. Stat. § 108.22(9), attaches to the appellant for any alleged delinquent contributions of the employer.

Memorandum Opinion

There are four criteria for the imposition of personal liability for a corporation's delinquent unemployment contributions: 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 have willfully 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 contributions.²

This analysis, as noted, applies to an entity's delinquent unemployment contributions. The alleged delinquencies, like anything else, must be proved with competent evidence. Where, as here, there is no competent evidence regarding the existence of the alleged delinquencies, there is no basis upon which to assess personal liability to an individual who otherwise might meet the criteria for that liability.

The only liability determination in the record is the personal one to the appellant. While it lists the amounts allegedly due for the multiple calendar quarters at issue, the personal liability determination itself is not competent evidence either of the issuance of the underlying initial determinations to the employer or of the amounts for which those determinations were issued. The only other determination in the record is an April 28, 2015, Audit Initial Determination which removes previously-asserted liabilities for the second and third calendar quarters of 2012. Because the record does not establish with competent evidence the existence of the amounts of any delinquent contributions of the employer, as a matter of law there cannot be personal liability for the alleged delinquencies.

There must also be competent evidence in the record of the proceedings the department engaged in against the entity, and such evidence also is lacking in this case. The record evidence of the department's proceedings is a list of collection actions by the department, including initial determinations to the employer; notices prior to levy and levies against the employer, payment agreements, and warrants. This list is hearsay evidence, however. The record contains no actual relevant determinations, or payment agreements, notices prior to levy, or levies. There thus also is no evidentiary basis in the record upon which to conclude that the department engaged in the proceedings against the employer required by statute.

² Wis. Stat. § 108.22(9) (2011-12). Effective with personal liability determinations issued on or after April 1, 2018, there is no longer a requirement that one have an ownership interest in an entity in order to be personally liable for that entity's delinquent contributions. See 2017 Wis. Act 157, §§ 64, 72(5), and 73.

But for these evidentiary failures, liability would have been established.

Ownership Interest

The appellant's son owned 100 percent of the corporation's stock during the time periods at issue. For purposes of personal liability for delinquent contributions, however, ownership interest in a corporation 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.³

By statute, therefore, the son's ownership interest in the employer is attributable to the appellant.

Responsibility for Payments

The record does not establish that the appellant held corporate office with the employer. However, the appellant exercised responsibility in fact with regard to the employer's responsibilities to the department. When issues with the department came up, he dealt with them, and did so almost exclusively on the employer's behalf. He had the authority to write checks on behalf of the employer, and wrote both payroll checks and checks to the department for unemployment contributions. These factors are sufficient to establish that the appellant in fact was responsible for making required contribution payments to the department.

Willfulness

In the context of the remittance of taxes, a responsible person has willfully breached his or her duty if the responsible person voluntarily, consciously, and intentionally fails to pay over the taxes due.⁴ Willfulness is shown if the responsible person knows or is aware that the money owing to the government for unpaid withholding taxes is used for other corporate purposes.⁵ That is, knowledge of the liability, coupled with failure to have paid it when the means were available to do so, satisfies this criterion.⁶ If the entity had monies to make the unemployment contributions and instead preferred other creditors, the responsible person or persons willfully failed to make the unemployment contributions.

The appellant was the employer's primary contact with the department with regard to the employer's tax matters, including negotiations regarding the employer's delinquencies. The appellant also conceded that he discussed with both of his sons the employer's tax obligations to the state. The appellant therefore had full knowledge of those obligations. The appellant also conceded that the employer remained in business, paying the bills necessary for it to do so, throughout the time

³ *Id.*

⁴ *Hornsby v. Internal Revenue Service*, 588 F.2d 952, 953 (5th Cir. 1979).

⁵ *Id.*

⁶ *In re Michael A. Pharo*, UI Dec. Hearing No. S9900158MD (LIRC Dec. 28, 2001).

period at issue. These factors, though, are sufficient to establish the willfulness criterion.

Department Collection Proceedings

The fourth personal liability criterion is that the department have previously 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.⁷ A series of actions that includes initial determinations to an employer, notices prior to levy and levies against it, payment agreements, and warrants without question meets the proper proceedings requirement of the statute. Again, however, there must be competent evidence in the record of such actions by the department.

cc: Attorney William Haus
Attorney Andrew J. Rubsam

⁷ *In re Edward H. Trier III*, UI Dec. Hearing No. S1000331MW (LIRC Sept. 11, 2014).