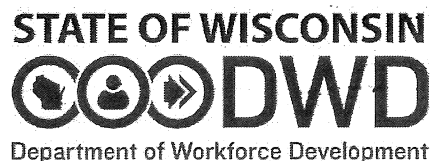


Department of Workforce Development  
Unemployment Insurance Division  
Bureau of Legal Affairs  
201 E. Washington Ave., Rm. E300  
Madison, WI 53703  
Telephone: (608) 266-0399  
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Scott Walker, Governor  
Raymond Allen, Secretary

December 20, 2018

To: Your Family Dentist LLC  
1700 Coral Dr., Ste A  
Waukesha, WI 53186


Proven Dental  
1700 Coral Dr.  
Waukesha, WI 53186

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 Your Family Dentist LLC and Proven Dental LLC  
UI Hearing No. S1700099MW

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 November 29, 2018, identified above, Hearing No. S1700099MW, a copy of which is attached to this notice, and requests that the Legislative Reference Bureau obtains 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.

  
Andrew Rubsam, Esq. (SBN 1079600)  
Department of Workforce Development  
P.O. Box 8942  
Madison, WI 53708-8942  
608-261-9440





Labor and Industry Review Commission

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BUREAU OF LEGAL AFFAIRS

Your Family Dentist, LLC,  
Employer/Transferor

Proven Dental, LLC  
Employer/Transferee

Hearing No. S1700099MW

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

Dated and Mailed:

NOV 29 2018

The commission **affirms** the appeal tribunal decision. Accordingly, as of September 4, 2014, there was a partial transfer of business from Your Family Dentist, LLC (transferor) to Proven Dental, LLC (transferee), and Proven Dental, LLC is the mandatory successor to 91 percent of the unemployment insurance account of Your Family Dentist, LLC.

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 what percentage of Your Family Dentist, LLC (YFD) transferred to Proven Dental, LLC (PD). An appeal tribunal of the Unemployment Insurance Division of the Department of Workforce Development held a hearing and issued a decision holding that the transfer percentage was 91 percent, 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 on its review, the commission makes the following:

### Findings of Fact and Conclusions of Law

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.

### Memorandum Opinion

Under certain conditions following a business transfer, an entity which "succeeds" either some or all of another entity must also take on some or all of the other entity's unemployment "experience," that is, its tax rate and its tax liabilities, if any, to the department. A business transfer occurs when "any asset or any activity of an employer . . . is transferred in whole or in part by any means, other than in the ordinary course of business".<sup>2</sup> Assets include real estate, machinery and equipment, contracts, licenses, goodwill, and accounts receivable,<sup>3</sup> and a transfer of assets occurs if ownership, possession, or use changes from the transferor to the transferee.<sup>4</sup> Business activity includes the product or the service provided by a business,<sup>5</sup> and a transfer of business activity occurs when the business activity after the transfer is similar to the business activity before the transfer.<sup>6</sup> Methods of transferring assets or business activities include gift, sale, lease, inheritance, foreclosure, termination or cancellation of lease, bankruptcy sale, reorganization, merger or consolidation, and receivership.<sup>7</sup>

There is no dispute as to a mandatory transfer having occurred between YFD and PD; the only dispute is as to the percentage of YFD's business that transferred to PD. The position of the owner of PD is that the transfer was total; the department's position is that the transfer percentage was 50 percent. The appeal tribunal held that the transfer percentage was 91 percent and, for the following reasons, the commission agrees.

A successor takes over and continues the transferor's account, including its positive or negative balance and all other aspects of its unemployment experience, in proportion to the payroll assignable to the transferred business.<sup>8</sup> The successor

<sup>2</sup> Wis. Stat. § 108.16(8)(a) (2015-16).

<sup>3</sup> Wis. Admin. Code § DWD 100.02(4).

<sup>4</sup> Wis. Admin. Code § DWD 115.01(4).

<sup>5</sup> Wis. Admin. Code § DWD 100.02(7).

<sup>6</sup> Wis. Admin. Code § DWD 115.01(5).

<sup>7</sup> Wis. Admin. Code § DWD 115.01(2).

<sup>8</sup> Wis. Stat. § 108.16(8)(f).

entity acquires that part of the transferor's unemployment reserve account as that account bears to the percentage of the business (of the transferor) acquired (by the successor), and this calculation is based upon the transferor's payroll.<sup>9</sup> In other words, the percentage of the transferor's overall payroll that goes to the successor is the percentage of the transferor's experience that goes to the successor. The transfer percentage is computed by dividing the payroll in the transferred portion of the transferor's business prior to the transfer date by the transferor's total payroll.<sup>10</sup> The transfer percentage is not based on the number of employees taken over by the transferee, but rather on the payroll incurred in the transferred portion prior to the transfer date. *Id.*

Drs. Murphy and Salm were members and equal owners of YFD at the time of its dissolution. Of the nine employees who worked for YFD in the 3<sup>rd</sup> quarter of 2014, the seven who worked full time went to work for PD, Murphy's subsequent business, and the two who worked part time went to work for Smiles for Miles Family Dentistry (SfM), Salm's subsequent business. The seven individuals who went to PD accounted for just over 91 percent of YFD's 3<sup>rd</sup> quarter 2014 payroll. The appeal tribunal, in finding the transfer percentage to be 91 percent, applied the formula called for by the administrative code.

The department argues that the appeal tribunal did not take into account that the employees in question performed services for both Murphy and Salm. There is no precise quantitative evidence as to that breakdown of services, however.

Few of YFD's patients accompanied Salm to SfM, and Salm's inability to retain patients led in part to his having to file for bankruptcy, in which proceeding he asserted that his portion of YFD had no value.

Salm gave the required one-year notice, on September 4, 2013, of his intention to dissolve the company effective September 4, 2014. Salm effectively had "thrown in the towel" as of April or May 2014 and, as of September 2014, had "walked out the door," indicating that the company had no value. The company needed infusions of funds to pay employees, cover taxes, and fund other liabilities, and those were provided by Murphy, not by Salm. Finally, two of YFD's three hygienists went to YFD, one to SfM.

A high transfer percentage for PD is also consistent with the terms Murphy and Salm ultimately agreed upon regarding the dissolution of YFD. Net proceeds of its liquidation were to go to Murphy, as well as all tangible assets. In addition, Salm acquired the entirety of a different entity, including inventories, contracts, equipment, furniture, good will, customer lists, and all franchise licenses.

<sup>9</sup> *Karbalis-Nelson Enter. v. LIRC*, 150 Wis. 2d 921, 924, 927, 442 N.W.2d 548 (Ct. App. 1989).

<sup>10</sup> Wis. Admin. Code § DWD 115.09(1).

S1700099MW

The more reasonable inference from these facts in their entirety is that PD took over the bulk of YFD's work. The commission therefore cannot conclude, as the department asks it to, that only 50 percent of YFD transferred to PD.

**cc:** Attorney Christine Galinat