

Department of Workforce Development
Unemployment Insurance Division
Bureau of Legal Affairs
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Insert Date Here



Tony Evers, Governor
Caleb Frostman, Secretary

January 18, 2019

To: JoAnn Drake



Thomas R. Drake



5-R Processors, Ltd.



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

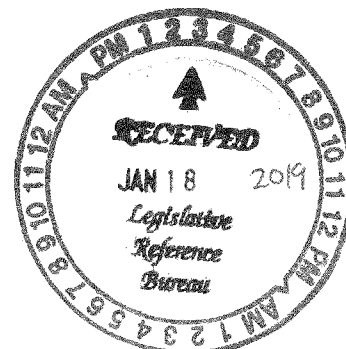
Legislative Reference Bureau
One East Main Street, Suite 200
Madison, WI 53703

Re: In the matter of Personal Liability for Unemployment Taxes of 5-R Processors, Ltd.
Debtors: JoAnn Drake and Thomas R. Drake
UI Hearing Nos. S1500396EC, S1500400EC

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 December 21, 2018, identified above, Hearing Nos. S1500396EC and S1500400EC, 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.

A handwritten signature in black ink, appearing to read "Brett A. Balinsky".

Brett A. Balinsky (State Bar No. 1025215)
Department of Workforce Development
P.O. Box 8942
Madison, WI 53708-8942
608-266-8313



State of Wisconsin



Labor and Industry Review Commission

5-R Processors, Ltd.
Employer

Thomas R. and Jo Ann Drake
Debtors

Hearing Nos. S1500396EC (PL)
S1500400EC (PL)

Unemployment Insurance
Contribution Liability
Decision¹

Dated and Mailed:

DEC 21 2018

The commission **modifies and affirms** the appeal tribunal decision. Accordingly, the debtors are not personally liable, pursuant to Wis. Stat. § 108.22(9), for the delinquent unemployment insurance taxes, interest, penalties, or special assessments owed by 5-R Processors, Ltd.

By the Commission:


Georgia E. Maxwell, Chairperson


David B. Falstad, Commissioner

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LABOR AND INDUSTRY REVIEW COMMISSION
DEC 26 AM 8:58

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 debtors are personally liable for certain delinquent unemployment taxes, interest, and penalties 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 they are not, 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 hearings. 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

Paragraph eight of the appeal tribunal's Findings of Fact and Conclusions of Law is deleted.

The eighth sentence in paragraph 14 of the appeal tribunal's Findings of Fact and Conclusions of Law is deleted.

The penultimate and last sentences in paragraph 14 of the appeal tribunal's Findings of Fact and Conclusions of Law are deleted, and the following is substituted therefor:

Consequently, Thomas Drake and Jo Ann Drake each held at least 20 percent ownership interest in the company for the second quarter of 2014 through the the second quarter of 2015. The first element of the statute therefore was met for those quarters.

Memorandum Opinion

At the time of the department's Personal Liability Assessment Determinations against the Drakes, 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 contributions.² No one disputes that the department satisfied the fourth criterion.³

² Wis. Stat. § 108.22(9) (2015-16). The legislature recently amended § 108.22(9) in certain respects, including the deletion of the ownership provision discussed herein, effective with personal liability determinations issued on or after April 1, 2018. See 2017 Wis. Act 157, §§ 64, 72(5), and 73.

³ The department's efforts included multiple initial determinations, tax collection statements, levies, and warrants.

The ownership criterion is in dispute, the Drakes arguing that for part of the time period at issue neither held the required 20 percent ownership interest in the corporation. The best record evidence on the issue, however, which includes the March 1, 2013, Binding Letter of Intent between the Drakes and Kevin Shibilski, another owner of the corporation, and the minutes of the corporation's February 6, 2014, board meeting, establishes that each of the Drakes held the requisite ownership interest at all material times.

The second criterion is control of, supervision of, or responsibility for the payments at issue. Wisconsin law does not recognize the category of "figurehead" officer or director.⁴ Every officer or director of a corporation occupies a fiduciary relation, demanding care, vigilance, and good faith,⁵ and significant ownership interest and the holding of corporate office are indicia of responsibility for payment of contributions.⁶ While Mr. Drake was the non-executive Chairman of the corporation's Board of Directors, the chairmanship of an entity's board of directors typically is not an operational position. Ultimate responsibility generally rests, and did so here, with the corporation's Chief Executive Officer. Mrs. Drake also did not have sufficient corporate office or general responsibility to satisfy this criterion.

In a civil proceeding such as the present one, willfulness, the third criterion, requires a conscious, voluntary decision on the actor's part; knowledge of the liability, coupled with failure to have paid it when the means were available to do so, satisfies this criterion.⁷ The record does not establish, however, that the Drakes' failures to make the payments were voluntary decisions on their part.

During the early years of the corporation's existence, when the Drakes were in charge of it, the corporation met its tax obligations to the department. After Shibilski took over the running of the corporation, it ceased doing so, and the persuasive record evidence establishes that this cessation was not due to willful failure on the Drakes' part.

Mr. Drake, who is severely diabetic, underwent surgeries in late 2012 and early 2013. There were sufficient complications with these surgeries that he was significantly physically incapacitated for more than two years thereafter. Mr. Drake's

⁴ See *Burroughs v. Fields*, 546 F.2d 215, 217 (7th Cir. 1976). Because there are no published Wisconsin court decisions 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).

⁵ *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).

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

⁷ *In re the Contribution Liability of Michael A. Pharo*, UI Dec. Hearing No. S9900158MD (LIRC Dec. 28, 2001).

condition ultimately did not resolve until late in 2017, after three additional surgeries in the last half of 2017 alone.

The Drakes' ability to participate in the affairs of the corporation was also marginalized by Shibilski, who was the Chief Executive Officer of the corporation and by Stephen Willett, who purported to be acting as the corporation's attorney. Shibilski instructed James Moss, the corporation's president, not to speak directly with the Drakes, but rather to do so only through Shibilski or Willett. Shibilski and Willett, in turn, ignored the Drakes' attempts to responsibly manage the corporation. On one occasion, the Drakes directed Shibilski and Willett to return a check Shibilski had had issued by the corporation for an improper purpose, using funds that had been earmarked for certain tax obligations. Both Shibilski and Willett intentionally misled the Drakes with regard to the matter, resulting in the issuance of the check notwithstanding significant efforts by the Drakes to stop it. Willett also regularly told the Drakes that Shibilski was in charge of the business and could do anything he wanted with it. For their part, the Drakes had significant difficulty obtaining their own counsel, because of multiple area counsels' conflicts of interest.

Other actions by Shibilski included selling off property of the corporation to other entities owned by him, at significant loss to the corporation, and moving the corporation's employees to another entity. These factors, taken cumulatively, are more than sufficient to establish that the Drakes did not willfully fail to make the contributions at issue.

Note: The commission considers that all the testimonial evidence from the first of the two hearings overall is properly part of the hearing record. The appeal tribunal excluded Mr. Drake's testimony due to the passage of time between the hearings. At the end of the first hearing, however, the appeal tribunal indicated only that the hearing would be continued. In addition, although it was just over a year between the two hearings, that by itself is not a sufficient basis for disregarding evidence adduced at the first hearing.

cc: Mr. James Moss
Attorney Brett Balinsky
Attorney Sarah E. Fortune
Attorney James R. Phelan