

October 1, 2018

To Esperanza Unida, Inc
c/o Manuel Perez

Manuel A. Perez


Atty. Piermario Bertolotto
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Labor and Industry Review Commission
P. O. Box 8126
3319 West Beltline Highway
Madison WI 53708-8126

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

Re: In the matter of personal liability of Manuel A. Perez for the payment of any unemployment insurance taxes, interest, penalties, or special assessments alleged to be owed by Esperanza Unida, Inc.
UI Hearing No. S1600149MW

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 August 30, 2018, identified above, Hearing No. S1600149MW, 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

Esperanza Unida, Inc.
Employer

Manuel A. Perez
Debtor/Appellant

Hearing No.S1600149MW (PL)

Unemployment Insurance
Contribution Liability
Decision¹

Dated and Mailed:

AUG 30 2018

The commission **modifies and affirms** the appeal tribunal decision. Accordingly, the appellant is not personally liable, pursuant to Wis. Stat. § 108.22(9), for the delinquent unemployment insurance taxes, interest, penalties, or special assessments owed by Esperanza Unida, 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 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, 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

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

The fifth, sixth, and seventh sentences of paragraph nine of the appeal tribunal's Findings of Fact and Conclusions of Law are deleted, and the following is substituted therefor:

This criterion goes to control of the assets and other aspects of the entity. A corporation's stock typically is one such asset. Esperanza Unida, Inc. is a non-stock entity, however, without shares, membership interests, or owners. For purposes of this provision, other assets would be an entity's property, plant, and equipment, for example. The record does not establish, however, that the appellant controlled those kinds of assets, such that he may be considered to have controlled the ownership interests of the corporation.

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 contributions.² Record evidence does not establish, however, that the appellant meets the first criterion.

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.

To be personally liable under the statute, the individual must have held 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, limited liability company, or other business association 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

There is no issue as to whether the appellant holds any kind of direct ownership interest in the employer. The employer is a non-stock entity and the employee owns none of its assets, which leaves only 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 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).

³ *Id.*

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 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.⁴

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 did not have the control the plaintiffs had in *Linse*, *Zitzner*, or *Pharo*. While the appellant was the employer's Executive Director, no evidence establishes that he ever made himself out to be its owner, as did Pharo, or exercise the required control over the employer's property. He reported to the employer's Board of Directors, which was the final decision-maker

⁴ 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 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).

with regard to matters affecting the employer, both in fact and by operation of the employer's bylaws. The appellant testified, finally, that he handled day-to-day operations and the board handled strategic ones, and this is a fair characterization of the distinction between the control one exercises over the making of tax payments to the department and the control one exercises over an entity's ownership interests. For these reasons, the commission has concluded that the appellant does not meet the 20 percent ownership or control criterion and, given this conclusion, the remaining criteria need not be addressed.

cc: Attorney Piermario Bertolotto
Attorney Christine Galinat