STATE OF WISCONSIN
LABOR AND INDUSTRY REVIEW COMMISSION
P O BOX 8126, MADISON, WI 53708-8126 (608/266-9850)

LIFEPLANS INC, Employer

UNEMPLOYMENT INSURANCE CONTRIBUTION LIABILITY DECISION

Account No.
Hearing No. S0200012MD

SEE ENCLOSURE AS TO TIME LIMIT AND PROCEDURES ON FURTHER APPEAL

An administrative law judge (ALJ) for the Division of Unemployment Insurance of the Department of Workforce Development issued a decision in this matter. A timely petition for review was filed.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted to the ALJ. Based on its review, the commission agrees with the decision of the ALJ, and it adopts the findings and conclusion in that decision as its own, except that it makes the following modifications in order to more completely reflect the evidence of record, to correct certain errors, and to more accurately reflect the commission's decision rationale:

The FINDINGS OF FACT and CONCLUSIONS OF LAW section is deleted and the following substituted:

LifePlans, Inc. ("LifePlans"), the putative employer, provides risk assessment and claims management services for long-term care and life insurance companies.

LifePlans utilizes the services of individuals with training in the medical field to conduct evaluations of applicants for insurance as well as of those currently insured.

During the time period relevant here, LifePlans utilized the services of Geraldine Schrader ("Schrader"), a registered nurse, to conduct such evaluations. During this time period, Schrader was employed full time as a registered nurse by entities other than LifePlans.

Wisconsin Statutes §§ 108.02(12)(a) and (bm) state as follows, as relevant here:

> (a) "Employee" means any individual who is or has been performing services for an employing unit, in an employment, whether or not the

individual is paid directly by such employing unit; except as provided in par. (b), (bm), (c), or (d).

(bm) During the 4-year period beginning on January 1, 2000, with respect to contribution requirements, ...par. (a) does not apply to an individual performing services for an employing unit...if the employing unit satisfies the department that the individual meets 7 or more of the following conditions by contract and in fact:

1. The individual holds or has applied for an identification number with the federal internal revenue service.

2. The individual has filed business or self-employment income tax returns with the federal internal revenue service based on such services in the previous year or, in the case of a new business, in the year in which such services were first performed.

3. The individual maintains a separate business with his or her own office, equipment, materials and other facilities.

4. The individual operates under contracts to perform specific services for specific amounts of money and under which the individual controls the means and method of performing the services.

5. The individual incurs the main expenses related to the services that he or she performs under contract.

6. The individual is responsible for the satisfactory completion of the services that he or she contracts to perform and is liable for a failure to satisfactorily complete the services.

7. The individual receives compensation for services performed under a contract on a commission or per-job or competitive-bid basis and not on any other basis.

8. The individual may realize a profit or suffer a loss under contracts to perform services.

9. The individual has recurring business liabilities or obligations.

10. The success or failure of the individual's business depends on the relationship of business receipts to expenditures.

Wisconsin Statutes §108.02(12)(a) creates a presumption that a person who provides services for pay is an employee, and it requires the entity for which the person is performing those services to bear the burden of proving that they are not employees. *See, Dane County Hockey Officials,* UI Hearing No. S9800101MD (LIRC Feb. 22, 2000); *Quality Communications Specialists, Inc.,* UI Hearing Nos. S0000094MW, etc. (LIRC July 30, 2001).

Although the issue noticed for hearing states that the status of Schrader "and any other individuals performing similar services for LifePlans, Inc." is to be determined, there was no evidence adduced in regard to any other individuals, and no stipulation by the parties that evidence offered in regard to Schrader would be deemed evidence offered in regard to any other persons. As a result, the discussion and decision here will relate only to Schrader.

Commission review of a decision of an administrative law judge is not appellate in nature, but is instead a *de novo* decision-making process. Any petition for commission review from any party brings the entire case before the commission. *See, Dane County Hockey Officials, supra.* As a result, the commission has not limited its review of this case to those aspects of the administrative law judge's decision challenged by Lifeplans in its petition.

The record does not establish when Schrader first applied for a federal employer identification number (FEIN), but does establish that she obtained one in April of 2003. As a result, **condition 1.** was not satisfied until April of 2003.

The record establishes that, since 1999, Schrader has filed a business/self-employment tax return, and it appears to be undisputed, as a result, that **condition 2.** was satisfied at all times relevant to this matter.

The focus of **condition 3.** is upon determining whether a separate business, i.e., an enterprise created and existing separate and apart from the relationship with the putative employer, is being maintained with the individual's own resources. *See, Princess House, Inc., v. DILHR,* 111 Wis.2d 46, 330 N.W.2d 169 (1983); *Larson v. LIRC,* 184 Wis.2d 378, 516 N.W.2d 456 (Ct. App. 1994); *Lozon Remodeling,* UI Hearing No. S9000079HA (LIRC Sept. 24, 1999). Here, the only entity for which Schrader performed medical evaluations was LifePlans, even though the record establishes that LifePlans had competitors in Wisconsin. Schrader concedes that she never solicited business from such competitors and had not even researched whether she was permitted to do so under her agreements with LifePlans. Moreover, Schrader apparently did not have a business name, did not advertise her services, did not have a separate office other than an area in her home where she installed the FAX machine on which she received certain communications from LifePlans, and had a minimal investment in equipment. LifePlans argues that the element of economic dependence is not present here because Schrader was primarily dependent upon her other full-time employment for her livelihood. However, this factor would not be dispositive in regard to this condition because it is not uncommon for an individual to be an employee of two different entities, full-

time for one and part-time for the other. The commission concludes as a result that **condition 3.** was not satisfied. *See, Dane County Hockey Officials Association, Inc.,* UI Hearing No. S9800101MD (LIRC Feb. 22, 2000).

To satisfy **condition 4.**, it must be established that Schrader operated under contracts to perform specific services for specific amounts of money, and that, under these contracts, she controlled the means and method of performing the services. Schrader was an experienced nurse, and exercised enough independence and discretion in conducting the subject evaluations to satisfy the second part of the test. Without any supervision, she took blood pressure readings, observed and assessed physical and mental abilities, and exercised her professional judgment in seeking clarification or expanding the scope of inquiry beyond the questions stated on the interview/report form supplied by LifePlans. Unlike the form utilized by the putative employer in *Tri-State Home Improvement Co., Inc., v. LIRC,* 111 Wis.2d 103, 330 N.W.2d 186 (1983), the interview/report form under consideration here was not utilized by LifePlans to monitor the quality of Schrader's performance, e.g., the appropriateness of her interactions with those whom she was interviewing or the accuracy of her observations or assessments, but instead was intended as a detailing of the type of information required by its client insurance companies in order to carry out their underwriting functions.

Condition 4. also requires multiple contracts. These may take the form of multiple serial contracts with the putative employer if such contracts are shown to have been negotiated "at arm's length," with terms that will vary over time and will vary depending on the specific services covered by the contract. The existence of *bona fide* multiple contracts tends to show that the individual either has multiple customers, or that she has periodic opportunities for "arm's length" negotiation with the putative employer as to the conditions of their relationship. *See, T-N-T Express LLC,* UI Hearing Nos. S9700385, etc. (LIRC Feb. 22, 2000). Here, in regard to her performance of evaluations within her core geographic area, Schrader and LifePlans essentially entered into periodic serial contracts with terms, including those governing the per-evaluation fee, which varied little from period to period and which were not the product of arm's length negotiations. However, given that Schrader and LifePlans appeared to have entered into at least two different types of contracts based on the need for different screening mechanisms for different categories of insurance policies, it is not clear whether these periodic contracts would satisfy the multiple contracts requirements of condition 4. *See, Gronna v. The Floor Guys,* UI Hearing No. S9900063WU (LIRC Feb. 22, 2000); *Barnett v. Alternative Entertainment, Inc.,* UI Hearing No. 02003109WU (LIRC Oct. 29, 2002)(single contract that essentially renewed unchanged except for unnegotiated updated price structures does not satisfy condition 4.); *Dane County Hockey Officials Association, Inc., supra.* However, Schrader and LifePlans also negotiated numerous, apparently unwritten, contracts for her performance of evaluations outside her core geographic area. Schrader, based on considerations of travel time and expense, would determine the minimum fee she would accept for such an evaluation, and would decline the work if, after negotiating with LifePlans, she was not offered at least this minimum fee.

The contracts between Schrader and LifePlans, considered as a whole, satisfy condition 4.

The commission concludes that the requirements of condition 4. were satisfied here.

Applying **condition 5.** requires a determination of what services are performed under the contract, what expenses are related to the performance of those services, which of those expenses are borne by the person whose status is at issue, and whether those expenses constitute the main expense. *See, Lozon Remodeling, supra.; Quality Communications Specialists, Inc., supra.* Here, related expenses include those for required equipment, e.g., blood pressure cuff, weight scale, tape measure, FAX machine, telephone; and for travel to the homes of those being evaluated. The record establishes that Schrader, not LifePlans, paid these expenses, and it appears to be undisputed, as a result, that condition 5. was satisfied.

In regard to **condition 6.**, it is not simply the obligation to do re-work without additional pay which is the determining factor, because this obligation is typical as well of piece-work employees. *See, T & D Coils*, UI Hearing No. S9800147MW (LIRC Dec. 15, 1999); *Quality Communications Specialist, Inc.,* UI Hearing Nos. S0000094MW, etc. (LIRC July 30, 2001); *Wisconsin Tennis Officials, Inc., supra.*. Evidence establishing, for example, not only an obligation to do such re-work but an expectation that it will be done, as well as a penalty for not doing so, would satisfy this condition. Here, the record establishes only that Schrader was not paid for those evaluations she conducted which were incomplete or otherwise did not meet LifePlan's quality standards. The record does not establish that Schrader was expected to remedy any deficiencies or that there would be a penalty for her failure to do so. As a result, condition 6. was not satisfied.

In regard to **condition 7.**, the evidence of record establishes that, until mid-2003, Schrader was paid on a per-job basis for certain evaluations and an hourly basis for others. Payment on an hourly basis does not satisfy the requirement of condition 7. that the individual not receive compensation on a basis other than commission, per-job, or competitive-bid. Even though payment on an hourly basis may have represented only a minor part of the work Schrader performed for LifePlans, the language of the statute is clear and does not make a distinction based on relative frequency. *See, Quale and Associates, Inc.,* UI Hearing No. S0200201MW (LIRC Nov. 19, 2004); *Care & Comfort Associates, Inc.,* UI Hearing No. S9700120MW (LIRC April 30, 1999); *Wisconsin Tennis Officials, Inc., supra.* As a result, the record supports a conclusion that condition 7. was not satisfied until the middle of 2003.

Condition 8. examines whether, under an individual contract for Schrader's services, there could be a profit (if the income received under that contract exceeds the expenses incurred in performing the contract), as well as whether there could be a loss under that contract (if the income received under that contract fails to

cover the expenses incurred in performing the contract). Even assuming, as the commission did in *Quality Communications Specialists, Inc., supra.*, that it is at least arguable that the receipt by Schrader of more in pay for her services under the subject contracts than she was required to spend on the various expenses she incurred in performing such services would constitute "realiz[ing] a profit...under contracts to perform services," the record does not support a conclusion that she could suffer a loss within the meaning of condition 8. There is no business risk to Schrader under the subject contracts, i.e., no realistic possibility that, in performing evaluations under the subject contracts, she would earn less than she expended. *See, also, Lozon, supra.* The possibility of non-payment does not establish the existence of a cognizable business risk, since employees as well as independent contractors share the risk of not being paid for services they have rendered. It is argued here that, if the cost of gas exceeded the fee she was paid for traveling outside her core territory, Schrader could sustain a loss. However, Schrader only consented to do such remote evaluations if she was satisfied that the amount she would be paid over and above the per-evaluation fee would cover her reasonable travel expenses. Moreover, even if the evaluation did not proceed after she traveled to its location, Schrader was paid a cancellation fee. Consequently, there was no realistic possibility that she would sustain a loss under those circumstances. *See, Wisconsin Tennis Officials, Inc., supra.; Dane County Hockey Officials Association, Inc., supra.* (no realistic possibility of realizing a loss since, when the officials accept an assignment, the income they will receive is already determined, the fact that they will receive it if they go to the match is determined, and the expenses they will incur are determined). Condition 8. was not satisfied.

Condition 9. requires proof of a cost of doing business which Schrader would incur even during a period of time she was not performing work through LifePlans. The record establishes that Schrader maintained her own liability insurance, which is not a cost associated with a particular evaluation, but an expense she would incur even during periods of time when she was receiving few if any assignments from LifePlans. As a result, condition 9. was satisfied here. *See, Barnett, supra.; Quale & Associates, Inc., supra..*

The commission has interpreted **condition 10.** as intending to examine the overall course of a person's business. *See, Quality Communications Specialists, Inc., supra.* Here, Schrader had only a small investment in equipment, and her recurring expenditures could be readily discontinued if the flow of work she was given by LifePlans ceased, so that she faced no realistic prospect of any significant period of time in which she would have to make expenditures without any receipts coming in. *See, Thomas Gronna, supra.*; *Harlan Mrochinski,* UI Hearing No. S0100001WR (LIRC July 15, 2004)(condition 10. requires that a significant investment is put at risk and there is the potential for real success through the growth in the value of the investment and for real failure in the sense of actual loss of the investment); *Barnett, supra; Dane County Hockey Officials, Inc., supra..* LifePlans failed to prove that condition 10. was satisfied.

Finally, LifePlans argues here, citing *Grutzner S.C., Byron, Holland & Vollmer v. LIRC*, 154 Wis.2d 648, 453 N.W.2d 920 (Ct. App. 1990), that classifying Schrader as an employee of LifePlans is inconsistent with the public policy underpinnings of the unemployment compensation program because she was not economically dependent upon LifePlans but instead upon another entity by which she was employed full time. It should first be noted that, in *Grutzner,* the court was interpreting statutory language no longer in force. Moreover, the court was considering a very narrow question, i.e., whether a business endeavor in which an individual engages less than full time because they are otherwise gainfully employed could be considered an "independently established business." In resolving this question in the affirmative, although the court held that there would be no need to classify a person's part-time endeavor as an employment relationship when the person is eligible for benefits based upon other full-time employment, the court did not hold, either expressly or by implication, that, if the part-time relationship met the required conditions, it would be inappropriate to do so. As discussed above, a person can simultaneously be considered an employee of two or more different entities.

To summarize, until sometime in 2003, only conditions 2., 4., 5., and 9 were satisfied. Beginning in 2003 and thereafter, conditions 1. and 7. were satisfied. At no time, therefore, were more than six conditions satisfied. LifePlans, as a result, failed to rebut, by establishing that at least seven conditions were satisfied, the presumption that Schrader performed services as an employee during the relevant time period.

DECISION

The decision of the administrative law judge, as modified, is affirmed. Accordingly, based on its employment of Geraldine Schrader, the employer is liable, effective January 1, 2000, for contributions to the Unemployment Reserve Fund.

Dated and mailed

APR - 7 2005

lifepla.smd:115:4

/s/

James T. Flynn, Chairman

/s/

David B. Falstad, Commissioner

/s/

Robert Glaser, Commissioner

cc: Mintz Levin Cohn Ferris Glovsky Popeo PC
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