

State of Wisconsin



Labor and Industry Review Commission

**Rice Mgmt., Inc. (Atrium)**<sup>1</sup>  
Employers

**Kevin P. Breslin**

Debtor

UI Hearing Nos. S1900089MW-  
S1900117MW (29 cases)

**Robert M. Parkins**

Debtor

UI Hearing Nos. S1900262MW –  
S1900290MW (29 cases)

**Mary Jo Parkins**

Debtor

UI Hearing Nos. S1900291MW –  
S1900319MW (29 cases)

**Gino S. Mignano**

Debtor

UI Hearing nos. S1900320MW-  
S1900348MW (29 cases)

**Anthony M. Carriero**

Debtor

UI Hearing Nos. S1900349MW-  
S1900377MW (29 cases)

**Unemployment Insurance  
Contribution Liability  
Decisions<sup>2</sup>**

**Dated and Mailed:**

December 30, 2020

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<sup>1</sup> See attached table showing the names of the 29 employers, unemployment insurance employer account numbers, quarters of unpaid taxes, amounts of unemployment insurance taxes due, and hearing numbers for each employer for each of the five putative debtors involved in these cases.

<sup>2</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>.

The commission **modifies and affirms** the decisions of the appeal tribunal in UI Hearing Nos. S1900089MW to S1900117MW. Accordingly, for the fourth quarter of 2016 through the third quarter of 2018, **Kevin P. Breslin is personally liable** for the payment of delinquent unemployment insurance taxes, interest, penalties, and special assessments owed by the above-named employers, in the amount of \$488,151.08.

The commission **modifies and affirms** the decisions of the appeal tribunal in UI Hearing Nos. S1900262MW to S1900290MW. Accordingly, **Robert M. Parkins is not personally liable** for any of the unpaid unemployment taxes, interest, penalties, and special assessments of the above-named employers from the fourth quarter of 2016 through the third quarter of 2018.

The commission **modifies and affirms** the decisions of the appeal tribunal in UI Hearing Nos. S1900291MW to S1900319MW. Accordingly, **Mary Jo Parkins is not personally liable** for any of the unpaid unemployment taxes, interest, penalties, and special assessments of the above-named employers from the fourth quarter of 2016 through the third quarter of 2018.

The commission **modifies and affirms** the decisions of the appeal tribunal in UI Hearing Nos. S1900320MW to S1900348MW. Accordingly, **Gino S. Mignano is not personally liable** for any of the unpaid unemployment taxes, interest, penalties, and special assessments of the above-named employers from the fourth quarter of 2016 through the third quarter of 2018.

The commission **modifies and affirms** the decisions of the appeal tribunal in UI Hearing Nos. S1900349MW to S1900377MW. Accordingly, **Anthony M. Carriero is not personally liable** for any of the unpaid unemployment taxes, interest, penalties, and special assessments of the above-named employers from the fourth quarter of 2016 through the third quarter of 2018.

By the Commission:

/s/

Michael H. Gillick, Chairperson

David B. Falstad, Commissioner

/s/

Georgia E. Maxwell, Commissioner

## PROCEDURAL POSTURE

The Department of Workforce Development's Unemployment Insurance Division (department) issued initial determinations to the 29 employers named in these cases, finding that the employers were liable for unpaid unemployment insurance taxes and notifying them of tax deficiencies, interest, and penalties. After unsuccessfully attempting to collect the tax deficiencies from the employers, the department issued several initial determinations assessing personal liability against the individuals named in these cases.

On April 11, 2019, the department issued 29 separate determinations finding that Kevin P. Breslin (UI Hearing Nos. S1900089MW to S1900117MW) was personally liable for the unpaid unemployment insurance taxes, interest, penalties, and special assessments of the employers named in the determinations, for eight consecutive quarters, beginning the fourth quarter of 2016 and ending with the third quarter of 2018. On April 12, 2019, the department issued 29 separate determinations finding that William G. Burris was personally liable for the unpaid unemployment insurance taxes, interest, penalties, and special assessments of the employers named in the determinations, for eight consecutive quarters, beginning the fourth quarter of 2016 and ending with the third quarter of 2018.<sup>3</sup>

On September 11, 2019, the department issued 28 separate determinations and on September 12, 2019, the department issued one determination for Gino S. Mignano (UI Hearing Nos. S1900320MW to SW1900348MW) finding that he was personally liable for the unpaid unemployment insurance taxes, interest, penalties, and special assessments of the employers named in the determinations, for eight consecutive quarters, beginning the fourth quarter of 2016 and ending with the third quarter of 2018.

On September 11, 2019, the department issued 29 separate determinations for Anthony M. Carriero (UI Hearing Nos. S1900349MW to S1900329MW), finding that he was personally liable for the unpaid unemployment insurance taxes, interest, penalties, and special assessments of the employers named in the determinations, for eight consecutive quarters, beginning the fourth quarter of 2016 and ending with the third quarter of 2018.

On September 12, 2019, the department issued 29 separate determinations for each Robert M. Parkins (UI Hearing Nos. S1900262MW to S1900290MW) and Mary Jo Parkins (UI Hearing Nos. S1900291MW to S1900319MW), finding that they were each personally liable for the unpaid unemployment insurance taxes, interest, penalties, and special assessments of the employers named in the determinations, for eight consecutive quarters, beginning the fourth quarter of 2016 and ending with the third quarter of 2018.

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<sup>3</sup> William G. Burris withdrew his hearing request before the hearings in these matters, and the initial determinations remain in effect as against Mr. Burris. Transcript of Proceedings dated January 27, 2020 (Tr. 1), pp. 12, 27-28. These were for hearing numbers S1900118MW to S1900146MW.

The putative debtors appealed the determinations, and, on January 27, 28, and 29, 2020, a department appeal tribunal held combined hearings in the matters. On April 13, 2020, the appeal tribunal issued 29 decisions affirming the department's determinations against Kevin P. Breslin and finding him personally liable for the payment of the delinquent unemployment insurance taxes, interest, penalties, and special assessments of the employers named in the determinations, for eight consecutive quarters, beginning the fourth quarter of 2016 and ending with the third quarter of 2018. The appeal tribunal reversed the department's other 116 determinations in decisions finding that Robert M. Parkins, Mary Jo Parkins, Gino S. Mignano, and Anthony M. Carriero were not personally liable for the unemployment insurance taxes, interest, penalties, and special assessments of the employers named in the determinations.

Kevin P. Breslin timely appealed the appeal tribunal decisions that held him personally liable. The department timely appealed the appeal tribunal decisions that found that Robert M. Parkins, Mary Jo Parkins, Gino S. Mignano, and Anthony M. Carriero were not personally liable. All of the parties have briefed the matters before the commission.

The commission has considered the petitions and the positions of the parties, and it has independently reviewed the evidence submitted at the hearings. Based on its review, the commission modifies and affirms the decisions of the appeal tribunal and makes the following:

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Rice Management, Inc. (Rice), owned and operated several health and senior living facilities in Wisconsin for many years. Rice was one of several business entities owned by the Rice family under a group called Rice Group, LLC; other entities included elevator companies, distribution centers, fitness centers, manufacturing companies, and healthcare groups.<sup>4</sup>
2. KBWB Operations, LLC, is a New Jersey limited liability company (LLC) that adopted an Amended and Restated Operating Agreement on March 4, 2015.<sup>5</sup> Members of the LLC at the time included Kevin P. Breslin (20%), William G. Burris, Jr. (15%), William G. Burris, III (5%), Vincent Tufariello (20%), Mary Theresa Khawly (20%), and Elia Zois (20%). The Operating Agreement designated Kevin P. Breslin as the sole "Manager" and "Tax Matters Member." The Operating Agreement vested the management, operation, and business of the company in the Manager, who was authorized and empowered to carry out any and all of the company's powers, objectives, and purposes; this included the authority to employ people and to enter into agreements in the name of the company. The Manager had authority to appoint officers to be responsible for the day-to-day administration of the company, subject to the direction and control of the Manager.

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<sup>4</sup> Transcript of Proceedings dated January 28, 2020 (Tr. 2), p. 164.

<sup>5</sup> Exhibit (Ex.) 39.

3. KBWB Operations, LLC, purchased the 29 Rice facilities that are the employers in these cases on December 31, 2014, and took over operations on January 1, 2015. In February of 2015, Rice adopted the tradename, Atrium Health and Senior Living (Atrium).<sup>6</sup> Atrium purchased additional facilities in Wisconsin in 2016.
4. From October 2016 to September of 2018, Atrium received \$47,320,731.73 in Medicaid fee-for-service revenue from the Department of Health Services.<sup>7</sup>
5. Atrium deposited revenues into an account at Valley National Bank and the funds were wired overnight to another financial institution, MidCap Financial. The funds were used to pay down lines of credit at MidCap Financial, which were used to pay the company's bills. The collateral for the financing was the accounts receivable of the borrowers. MidCap Financial had a lending capacity limit on a daily basis that it would transfer to Atrium's operating accounts based on a mathematical formula; however, it was possible that the calculation for the borrowing base certificate could result in no funds being transferred.<sup>8</sup> The MidCap line of credit allowed Mr. Breslin access to several million dollars at any point in time, and Mr. Breslin used the MidCap line of credit to keep the business afloat.
6. Atrium made weekly distributions of payments to the owners of KBWB Operations, LLC, which amounted to at least \$218,250.00, of which \$43,650.00 was paid to Kevin Breslin. An additional guaranteed payment of \$183,333.32 was also transferred monthly to Kevin Breslin (\$83,000.00), William Burris, Jr. (\$83,000.00), and William Burris III (\$16,000.00). The 2016 Form 1065 for the partnership tax return of KBWB Operations, LLC, reflects that the partnership distributed cash and marketable securities in the amount of \$14,553,732.00.<sup>9</sup>
7. In September of 2018, Atrium went into receivership and Health Dimensions Group took over operations for the Wisconsin facilities.<sup>10</sup>
8. Kevin Breslin was the sole Manager and Tax Matters Member of KBWB Operations, LLC. He did not appear personally at the hearings in this matter. In various organizational charts, Kevin Breslin was listed at the top of the charts as the Manager, Co-Chairman, and Co-Chief Executive Officer.<sup>11</sup> Kevin Breslin held himself out as being responsible for the financial operations of the business. He finalized any budget. Mr. Breslin also could authorize spending,

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<sup>6</sup> Ex. 15.

<sup>7</sup> Ex. 11. These revenues did not include managed care payments for residents on publicly-funded long-term care programs. Tr. 2, p. 18.

<sup>8</sup> Tr. 2, pp. 51-52, 98-99.

<sup>9</sup> Exs. 1, 18; Tr. 1, pp. 58, 62, 99.

<sup>10</sup> Tr. 1, p. 246.

<sup>11</sup> Ex. 26. The other Co-Chairman and Co-Executive Officer was William Burris. Tr. 2, p. 147.

and get refinancing or recapitalization of loans for the company. Kevin Breslin approved the wage scales for employees at the various entities, and he had to approve a wage if someone was to be hired outside the wage scale by even 10 cents.<sup>12</sup> Ray Thivierge, the Chief Operating Officer in 2018, and not a party to these cases, credibly confirmed that Kevin Breslin controlled all of the financial decisions of the company and no other employee had discretion over the distribution of funds.<sup>13</sup>

9. Kevin Breslin was a “very direct person” who could be intimidating, a “very big persona” with an ego, and someone for whom it was hard to accept no for an answer. He was a “micromanager” and “the ultimate decider.” He was also considered “intimidating” and “difficult to work with at times.” Meetings with Kevin Breslin were not a collaborative process. The staff provided data and Mr. Breslin said yes, no, or maybe as to what to pay, whom to pay, and when to pay, based on the information provided. If funds were available, Mr. Breslin made the decision how to spend the funds.<sup>14</sup>
10. Brian Kirkpatrick, the Chief Financial Officer for the Atrium organization from June of 2015 to July of 2016, was directly responsible for overall accounts payable and treasury management during his employment.<sup>15</sup>
11. Robert Parkins is a certified public accountant who began working for Rice in 2006 as its Controller, and was based in Appleton, Wisconsin. When Atrium purchased Rice on December 31, 2014, Mr. Parkins continued his position as Controller. From January of 2015 until approximately July of 2016, Robert Parkins’ title was Executive Vice President and Chief Financial Officer Atrium Midwest. An internal telephone list from March of 2016 identified him as the “Exec VP, CFO.” After Brian Kirkpatrick left the company in July of 2016, Mr. Parkins’ title was Executive Vice President and Treasurer. He was not the CFO for all of Atrium. From December 31, 2014, to June of 2015, Mr. Parkins reported directly to Kevin Breslin; from June of 2015 to June or July of 2016, he reported to Brian Kirkpatrick, after which he again reported directly to Kevin Breslin. Robert Parkins was an employee of Rice and then Atrium. He was not an owner or member of KBWB Operations, LLC, or Atrium.<sup>16</sup>
12. Mr. Parkins’ job duties included producing financial statements, handling accounts payable and receivable, and payroll, as well as handling some interactions with the organization’s lender, MidCap Financial. After Mr. Kirkpatrick was hired, Mr. Parkins’ duties were more directly related to preparing data related to the operations of the Midwest businesses; after

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<sup>12</sup> Tr. 2, pp. 70, 171-173, 224, 267. Mr. Carrierio confirmed that this would be the type of decision Mr. Breslin would need to approve. Transcript of Proceedings dated January 29, 2020 (Tr. 3), p. 134.

<sup>13</sup> Tr. 3, pp. 285-286.

<sup>14</sup> Tr. 2, pp. 52, 111-112, 119, 139, 292; Tr. 3, p. 171.

<sup>15</sup> Tr. 2, pp. 31-32.

<sup>16</sup> Tr. 2, pp. 29-31, 48, 57, 61, 127-128, 149; Ex. 17.

Mr. Kirkpatrick left, Mr. Parkins took on a role of treasury management for the entire organization. His duties in treasury management included moving funds within the organization to pay bills, including taxes. Treasury management included distributing payments to the company's owners; regarding the amount of the payments to the owners and if they were too high, Robert Parkins considered that issue "above his pay grade" and not for him to decide. If it had been his business, he would not have done it that way, but he considered himself more fiscally conservative than the owners of Atrium.<sup>17</sup>

13. After Brian Kirkpatrick left the company in July of 2016, Mr. Parkins attended meetings at least weekly with Kevin Breslin and Anthony Carriero to discuss estimates of payroll and related liabilities, estimates of distributions to be made to the owners, vendors that needed to be paid for a specific week, and priorities. Robert Parkins provided forecasted cash flow data to Mr. Breslin by email on a daily basis that Mr. Breslin used for decision making. Kevin Breslin made all of the decisions as to the disbursement of cash and gave directions to Mr. Parkins and Mr. Carriero whom to pay and how much. If Mr. Breslin told Mr. Parkins what to do as far as paying someone, Mr. Parkins was expected to do it.<sup>18</sup>
14. Mr. Parkins had signature authority on the Valley National Bank account that represented the majority of the business operating accounts. He did not have authority to direct payments from the Valley National Bank account without Mr. Breslin's approval. He also had signature authority on two patient needs resident trust fund accounts that could not be used to pay operating expenses. Robert Parkins had no independent authority to direct payment from the bank accounts. He did not have authority to obtain refinancing or loans on his own.<sup>19</sup> At various times in 2014, 2015 and 2016, Robert Parkins was listed as a registered agent with the Wisconsin Department of Financial Institutions for some Atrium entities.<sup>20</sup>
15. During 2016 when the organization was expanding, Mr. Parkins was aware that there were delays in making payments on unemployment taxes while they were trying to get the electronic login rights for the newly acquired businesses. Those payments were made and brought current by Mr. Parkins. Mr. Parkins did not have the codes to access the department's online website to file unemployment reports.<sup>21</sup>
16. Robert Parkins' duties related to the payroll function were transferred to Tanya Quade in New Jersey in January of 2017. Mr. Parkins was not a party to developing the finance team in New Jersey. On January 31, 2017,

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<sup>17</sup> Tr. 2, pp. 32-33, 63-65, 67

<sup>18</sup> Tr. 2, pp. 43-44, 112, 125.

<sup>19</sup> Tr. 2, pp. 45, 47, 50, 136, 150, 345.

<sup>20</sup> Ex. 15.

<sup>21</sup> Tr. 2, pp. 35, 40.

Mr. Parkins tendered his resignation because the organization was centralizing its finance functions and personnel in New Jersey. When he tendered his resignation, the payroll function had already been transferred to Tanya Quade in New Jersey and he was not aware of any unpaid unemployment taxes. The vast majority of the financial infrastructure had been transferred to New Jersey except for some processing personnel.<sup>22</sup>

17. Mr. Parkins was aware of the notices from the department regarding the tax liabilities for the newly activated business units for prior to the fourth quarter of 2016, but he did not become aware of any other unpaid unemployment taxes until September of 2019 when he received the determinations of personal liability from the department. Mr. Parkins did not see the tax delinquency notices sent by the department on February 13, 2017, for the fourth quarter of 2016, which were addressed to human resources. Mr. Parkins' last day of work was February 24, 2017. Prior to leaving, he did not become aware of unpaid unemployment taxes. Michael Braun, Brad Everts, and Connie Ihde did not say anything to Robert Parkins about unemployment insurance taxes for the fourth quarter of 2016.<sup>23</sup>

18. Mary Jo Parkins began working for Rice in 2013 as an IT manager. She is Robert Parkins' spouse.<sup>24</sup> She has a degree in accounting and management information systems. She was an employee, and not an owner or stockholder of the business as Rice or Atrium. About two weeks after Atrium purchased the healthcare businesses of Rice, Kevin Breslin asked her if she would run the operations for the Midwest, at which time he gave her the title of Executive Vice President and Chief Operations Officer for the Midwest. She reported directly to Kevin Breslin. In the beginning of 2018, her title changed to Senior Vice President of Financial Operations, handling accounts receivable for the Midwest and East Regions, and she then reported to Ray Thivierge.<sup>25</sup>

19. Mary Jo Parkins' job duties were to make sure the organization was caring for the residents, meeting regulatory requirements, and ensuring they had policies and procedures in place. She would review monthly budget-to-actual and per patient day financial reports. For about three or four months in 2017, she did not receive any financial reports. Her financial responsibilities involved accounts receivable, not accounts payable. She also worked with marketing to get new residents. The only human resources responsibilities she had were to make sure the centers had a human resources director and if there was a problem with an employee; she did not get mail addressed to human resources. She did not supervise Terri Rowe or the human resources directors. Mary Jo

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<sup>22</sup> Tr. 2, pp. 34, 36, 72-73, 109-110, 130.

<sup>23</sup> Tr. 2, pp. 37-41, 54, 93-94; Ex. 13.

<sup>24</sup> Tr. 2, p. 28.

<sup>25</sup> Tr. 2, pp. 163-164, 166, 169-170, 178-179, 208-209, 211; Tr. 3, p. 272.



Parkins eventually had some authority over the receivables collection billing process, but not banking activities or payroll.<sup>26</sup>

20. In 2018, Mary Jo Parkins was responsible for making sure that all of the billings went out to the various Medicare, Medicaid, and managed care for collections for the Midwest and East Regions; the East Region accounts receivables were very high and she was asked to help them get under the same policies and procedures as the Midwest Region, which had a very good cash collection rate. Her supervisor, Mr. Thivierge, described Ms. Parkins as "over delivering" to the company, keeping long hours, trying to help cover for operations, and digging into a significant amount of old accounts receivables to try to fix funding problems.<sup>27</sup>
21. Mary Jo Parkins did not have signature authority on bank accounts for operational expenses, she had nothing to do with processing payroll, she did not have access to the department's online portal for filing unemployment reports or paying unemployment taxes, she did not have approval authority over invoices to be paid, she did not have access to bank statements, and she did not prepare any financial reports or make cash flow analyses or decisions. She did have signature authority for back-up purposes on resident trust accounts and an employee health savings clearing account, which accounts were not company monies. Ms. Parkins did not have any responsibility for or knowledge of unemployment payments; she did not generate reports for unemployment payments; and she did not file anything with the state having to do with unemployment payments.<sup>28</sup> At various times in 2017 and 2018, Mary Jo Parkins was listed as a registered agent with the Wisconsin Department of Financial Institutions for some Atrium entities.<sup>29</sup>
22. Ms. Parkins attended leadership team meetings approximately monthly to discuss various issues, but these did not include tax liabilities or unemployment payments. She described Kevin Breslin as "intimidating" and "difficult to work with at times" and indicated that he had made her cry. She did not attend the weekly meetings that Robert Parkins had with Kevin Breslin to discuss accounts payable. Ms. Parkins knew the owners of KBWB Operations, LLC, received distributions, but she did not know the amounts or from which accounts they were paid.<sup>30</sup>
23. Mary Jo Parkins worked for Atrium until September of 2018. The first time Ms. Parkins got notice that Atrium was behind on unemployment taxes was in

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<sup>26</sup> Tr. 2, pp. 55, 107, 170, 174-177, 198-199, 243, 248, 254; Ex. 26.

<sup>27</sup> Tr. 2, pp. 179-180; Tr. 3, pp. 274-275, 288.

<sup>28</sup> Tr. 2, pp. 184-186, 202-208, 229, 303; Exs. 24, 25, 31.

<sup>29</sup> Ex. 15.

<sup>30</sup> Tr. 2, pp. 107, 124-126, 252-253, 292, 304.

September of 2019 when she received a determination of personal liability from the department.<sup>31</sup>

24. Gino Mignano began working for Atrium in February of 2017 as the Treasurer. He is not a member or owner of Atrium. The payroll department would let him know the amount of unemployment taxes that needed to be paid and he would get approval from Kevin Breslin to make those payments. He did not have any authority to make the payments without Kevin Breslin's approval. Mr. Mignano did not have any discretionary authority over the Atrium finances. He did not have authority to hire or fire employees. Mr. Mignano had check-writing authority on the Valley National Bank account.<sup>32</sup>
25. Every time a payment was made, Mr. Mignano had to ask Kevin Breslin for approval. On about a weekly basis, Mr. Mignano would receive an email with lump sums of all of the payments that needed to be made and then he would discuss them with Kevin Breslin, who would tell him what to pay; then Mr. Mignano would email back to let others know what payments could be made.<sup>33</sup> Mr. Mignano indicated that Kevin Breslin "basically, gave the commands, and – and that's what we did" and "he was the one that was directing everything on what we were doing on a daily basis."<sup>34</sup>
26. Mr. Mignano did not recall ever reversing any unemployment payments made by Terri Rowe.<sup>35</sup> Correspondence from the department was addressed to Gino Mignano, including initial determinations of tax delinquencies, tax warrant notices, notices prior to levies, levy notices, and notices of intent to intercept federal tax refunds for the employers for the quarters when payments were delinquent.<sup>36</sup> In August of 2017, Mr. Mignano forwarded to Kevin Breslin information and a phone number for Jessica at the department regarding outstanding unemployment taxes; Mr. Breslin indicated that he would reach out to her.<sup>37</sup>
27. Anthony Carriero worked as an Assistant Controller for Atrium in Little Falls, New Jersey, from March of 2016 to March of 2019. For about six months, he reported to Kevin Breslin, then he reported to Robert Parkins; when Robert Parkins left in February of 2017, he reported to Carol Cavanaugh, the Controller. He was not a member or owner of Atrium. He did have check-writing authority and wrote expense checks to the construction group run by William Burris. Mr. Carriero never signed a check without Kevin Breslin's approval. He did not pay or approve payment for Wisconsin unemployment

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<sup>31</sup> Tr. 2, pp. 187-189, 192; Ex. 27.

<sup>32</sup> Tr. 3, pp. 225-228, 231-232, 244.

<sup>33</sup> Tr. 3, pp. 262-264.

<sup>34</sup> Tr. 3, p. 228.

<sup>35</sup> Tr. 3, pp. 240, 243.

<sup>36</sup> Exs. 20-22, 43-68.

<sup>37</sup> Ex. 38.

taxes and he did not write checks for Wisconsin unemployment taxes. Mr. Carriero did not have authority to hire or fire anyone, and he did not sign any financial statements or tax forms. Mr. Carriero did not have control over how funds were allocated to creditors and he did not have any vote in corporate government. Mr. Carriero did have access to the SAGE system; he did not see the 360 reports.<sup>38</sup> During his employment, Mr. Carriero missed work due to medical treatment for a brain tumor.

28. Kevin Breslin told Mr. Carriero what bills he could and could not pay, and Mr. Carriero did not have authority to override Mr. Breslin's decisions; if he did, it would likely have resulted in his termination. Kevin Breslin had final say as to bill payments for debts, and Mr. Carriero was not aware of anyone who could override his decisions. Mr. Carriero credibly confirmed that Gino Mignano also could not make decisions regarding the corporate use of funds because Kevin Breslin made all of the decisions. When Atrium entered into a payment plan with the department, Kevin Breslin exercised approval authority over the payment plan to pay the unemployment taxes. Mr. Carriero indicated that "What he says goes," and "you knew who was in charge." Mr. Carriero did not have authority to decide where payments would be made or to whom; he did not control how any funds were allocated to creditors without approval. Mr. Carriero never discussed unemployment taxes with Robert Parkins.<sup>39</sup>

29. Brad Everts worked at Atrium from July of 2015 to January or February of 2017 as the Director of Financial Reporting, where his supervisor was mostly Robert Parkins and later Kevin Breslin. In his monthly consolidated financial reports for the various Atrium companies in Wisconsin, he included payroll tax liabilities that would have shown a growing debt. The unemployment tax liability would have been lumped together with other tax liabilities as a lump sum, and it would not have been possible to know from the statements what the unemployment tax liability was; the growing debt would have been for all tax liabilities. Kevin Breslin, Robert Parkins, and Mary Jo Parkins would have had access to these reports. After Robert Parkins met with others from the Midwest and East Regions, Robert Parkins would tell Mr. Everts whether or not to pay the unemployment tax. Mr. Everts understood that the ultimate authority over financial decision making came from the meetings between the Midwest and East Regions, which included at least Kevin Breslin, Robert Parkins, and Anthony Carriero. He did not think that Anthony Carriero had the authority to make the unemployment tax payments, but that it would have come from someone above him.<sup>40</sup>

30. Brad Everts did discuss unemployment taxes with Kevin Breslin. On some occasions, Terri Rowe would ask Mr. Everts about whether she could pay the

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<sup>38</sup> Tr. 3, pp. 127-129, 132-134, 137, 145-146, 151.

<sup>39</sup> Tr. 2, pp. 133-134; Tr. 3, pp. 130-136, 169, 172-173.

<sup>40</sup> Tr. 1, pp. 271-272, 274, 276, 280, 282-283, 288, 290, 297, 299, 308, 310, 322, 327.

unemployment taxes, and Mr. Everts would have to ask Robert Parkins. At some point, Mr. Parkins told Mr. Everts to hold off paying unemployment taxes, but that would have come from the weekly meetings. At some point before he ended his employment, Mr. Everts indicated that Atrium received letters from the department, which he gave to Robert Parkins; Robert Parkins told him to keep them together and they would deal with them at some point. Initially, Mr. Everts thought that these were for the unemployment taxes for the fourth quarter of 2016, however, on cross-examination, he admitted that they could have been for prior quarters for accounts that had been acquired and were in the process of having unemployment accounts opened for them. Brad Everts had brought to Robert Parkins' attention the fact that some unemployment taxes were not paid in 2016. Mr. Everts thought that the Midwest Region would have had sufficient funds to pay the unemployment taxes owed. Mr. Everts did not deal with Mary Jo Parkins on payroll liability issues, and he did not bring the letters from the department to her attention.<sup>41</sup>

31. Todd Myzeka was the Director of Cash Management Accounts Payable Payroll and Benefits for Atrium from the beginning of December 2015 to the end of June of 2016 (prior to the quarters at issue in these cases). He supervised nine payroll and cash management people, including Terri Rowe, who were responsible for paying the unemployment taxes; and his direct supervisor was Robert Parkins. He indicated that other creditors or bills were paid and prioritized over unemployment tax payments when he worked for Atrium, however, he could not recall being behind on unemployment payments while he was working for the employer. During weekly calls with the cash management group, he recalled that Robert Parkins would bring up an item that needed to be paid and wait for Brian Kirkpatrick or Anthony Carriero to tell him if it could be paid or needed to be put off. The cash management group meetings included Mike Braun or Ellen Dickinson, Robert Parkins, Dan Meltz from the Midwest Region, and Brian Kirkpatrick, Anthony Carriero, and occasionally Kevin Breslin. He did not believe that Robert Parkins had the ability to stop the distributions to the owners. For a period of two or three weeks, Mary Jo Parkins had directed him to make payments on lower-level accounts payable to keep the facilities operating. Mr. Myzeka thought that the person making the final decisions as to what could or could not be paid was Kevin Breslin, but he would receive word back from Brian Kirkpatrick or Anthony Carriero.<sup>42</sup>

32. George Monroe worked as a staff accountant for Atrium from May of 2015 until June of 2017. After January of 2017, his supervisor was Anthony Carriero. Part of Mr. Monroe's job responsibility was to generate financial reports through a system called SAGE; the liability for unemployment taxes would have been contained in the payroll records in the SAGE program. Mr. Monroe did not know who had access to the SAGE system. In his reports, the balance sheet

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<sup>41</sup> Tr. 1, pp. 282-284, 296, 301-302, 305-306, 310, 330-331; Tr. 2, p. 96.

<sup>42</sup> Tr. 3, pp. 76, 80, 94, 101, 103, 107-109, 111.

would not reflect the unemployment tax liabilities; however, if someone had access to the SAGE program, they could see the details of that. After a month end, he would usually complete his consolidated financial reports within the first two weeks of the following month. He indicated that Mary Jo Parkins was managing the administration of each of the facilities. He did not recall any discussion with Robert Parkins or Mary Jo Parkins or anyone else about unemployment tax payments. The only report Mr. Monroe delivered to others was the 360 report which showed the performance of the facilities by profit and loss; it did not have tax liability information on it. He distributed the 360 report to Mary Jo Parkins.<sup>43</sup>

33. Michael J. Braun began working for Atrium in June of 2015 to do cash management and backup payroll for the New Jersey location. His position was located in Appleton, Wisconsin.<sup>44</sup> He worked for the company for about 10 months. Mr. Braun's employment and experience with the cash management responsibilities of the employer ended in the second quarter of 2016 and preceded the time period of the quarters at issue in these matters by over a year.

34. Mr. Braun's job dealt with 60 checking accounts in 12 locations, and he transferred money in the accounts to avoid negative balances. He reported to Heather Amsler and later Todd Myzeka, people he understood reported to Robert Parkins.<sup>45</sup> He set up the Wisconsin unemployment insurance employer accounts on the department's online website for 27 or 28 Wisconsin locations and scheduled payments for them. He transferred to benefits in December of 2015 and worked for Atrium until April 29, 2016. Prior to leaving his employment, he trained Terri Rowe to take over the unemployment insurance tax filings. As far as he was aware, Robert Parkins was ultimately responsible for making sure that the unemployment taxes were paid. This was based on his understanding from coworkers; he did not actually know if Mr. Parkins needed approval from anyone else to authorize payments. Michael Braun was not aware of any delinquent unemployment taxes. He recalled that on one occasion, possibly in January 2016, he had filed the taxes and then a week or so later when he double-checked, the dates had been deleted, so he reentered the dates. He thought that Brad Everts and Robert Parkins had access to the online system; Brad told him he knew nothing about it and Robert Parkins told him he must have done something wrong.<sup>46</sup>

35. In his cash management work, Mr. Braun answered to Brian Kirkpatrick, who told him which bills to pay and which money to move in the East Region. If there was not enough money to cover for the East Region, then Mr. Kirkpatrick would have him contact Robert Parkins to get approval to move money from

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<sup>43</sup> Tr. 3, pp. 32-35, 42, 51, 55-58, 69, 72-73.

<sup>44</sup> Tr. 1, p. 135.

<sup>45</sup> Heather Amsler left Atrium in September of 2015 and Todd Myzeka replaced her. Tr. 1, p. 94.

<sup>46</sup> Tr. 1, pp. 47-49, 98, 101-103.

the Midwest Region. He recalled having given a report to both Brian Kirkpatrick and Robert Parkins that \$6.4 million had been transferred from the Midwest Region to the East Region.<sup>47</sup> Mr. Braun also set up the weekly automatic payments to the owners or members of KBWB Operations, LLC.<sup>48</sup> In October of 2015, Mr. Braun sent an email to Brian Kirkpatrick expressing some concerns over the drain on the Midwest Region funds and suggesting that it was maybe time to approach Kevin Breslin about the payments; however, Mr. Braun was told that that was not appropriate.<sup>49</sup>

36. On September 7, 2015, Mr. Braun emailed Kevin Breslin expressing his concern over a bank refusing to cash employee checks due to the account being overdrawn and the fact that he had no funds he could wire to cover it. He noted, for instance, that the company had had \$22,680.00 in insufficient check charges that put the company on pace for over \$270,000.00 per year. He also expressed concerns about personal use of credit cards and his concern about the reputation of the company. Mr. Braun had contacted Kevin Breslin directly because Mr. Braun thought that Kevin Breslin had the final say in all of the financial decisions.<sup>50</sup> Kevin Breslin responded the same day and asked if he had brought his concerns up with Heather, Robert Parkins, or “ultimately Brian” Kirkpatrick. Mr. Braun responded that he had provided that information to them.<sup>51</sup>

37. Mr. Braun sent an email to Brian Kirkpatrick and Robert Parkins on October 27, 2015, specifically expressing his concerns that the company was spending far more than it was bringing in and needed to slow spending. Brian Kirkpatrick responded that Mr. Braun’s logic was flawed on the transfers and intercompanies, that the system needs were fully understood but his amounts were overstated, and that this work was not necessary but his cash forecast was. Mr. Braun responded that they were living on the “float” with their checks, and the East Region owed the Midwest Region a significant amount; he acknowledged that cash flow analysis was not part of his job and he was not an accountant, but he was expressing what he saw. Mr. Braun sent several emails in the fall of 2015 to Brian Kirkpatrick about the shortage of funds to pay expenses. Mr. Braun also filed an ethics complaint against Brian Kirkpatrick, alleging that he was fraudulently issuing checks on past due bills to take them out of accounts payable but not paying them; he noted in the complaint that he thought Robert Parkins was an ethical man. He also contacted one of the organization’s bank, Midcap Financial, about the distributions and late accounts payable to see if the company may be violating

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<sup>47</sup> Tr. 1, pp. 50-51.

<sup>48</sup> Tr. 1, pp. 56-58; Ex. 1. *See also* Ex. 19 regarding the owners.

<sup>49</sup> Tr. 1, p. 58; Exs. 2 and 3.

<sup>50</sup> Tr. 1, p. 70.

<sup>51</sup> Ex. 2.

its covenant with the bank which provided that all payable had to be paid within 90 days.<sup>52</sup>

38. Accounts payable was not within Mr. Braun's scope of responsibilities. He did not bring any concerns about unemployment taxes to Mary Jo Parkins. From Mr. Braun's perspective, Robert Parkins was ultimately responsible for the daily cash and payment decisions in the Midwest Region, and he had the ultimate responsibility to write checks and order staff to write checks and pay bills. Mr. Braun indicated that everything in the East Region flowed through Brian Kirkpatrick, and he had to clear things with Kevin Breslin. On several occasions Mr. Kirkpatrick told Mr. Braun that he had to clear something through Kevin Breslin.<sup>53</sup>
39. Mariam Mian worked as a Human Resources Assistant and Human Resources Generalist/Recruiting Specialist for Atrium from August 2014 to December of 2019. She did not file unemployment reports and did not handle employment taxes. She reported to the Human Resources Director, who reported to Mary Jo Parkins. She spoke occasionally to Robert Parkins about unpaid bills and she got the same answer as everyone else, i.e., that everything had to be approved by Kevin Breslin and that Mr. Parkins was doing everything he could; and she was aware that Mr. Parkins had to go to Mr. Breslin to get decisions and approval to make payments.<sup>54</sup>
40. Ms. Mian spoke with Mary Jo Parkins on some issues related to wages and recruiting tools. Ms. Mian thought that Mary Jo Perkins may have had "some sort of bucket she could pull from" for the wage issues, but for anything else, she had to go through Kevin Breslin for approval. In her opinion, all roads financial led to Kevin Breslin. Ms. Mian confirmed that Mary Jo Parkins' job duties were to make sure the facilities were operational and to make sure the Midwest Region facilities were running, that the health regulations were followed, that the residents were cared for, and for collecting accounts receivable. Near the time that Atrium went into receivership, Ms. Mian spoke with Ms. Parkins about vendors not getting paid.<sup>55</sup>
41. Connie Ihde worked for Atrium from 2001 until November 2019 as a Payroll Specialist. Her job duties included onboarding new employees, processing payroll, sending files to the bank for payroll, and preparing reports. As far as she knew, Robert Parkins was the point person for financial operations of Atrium's Appleton office. She would provide Mr. Parkins with the payroll totals and he would tell her when it was ok to send the file to the bank; she did not know what Mr. Parkins' process for getting approval was. She understood that Robert Parkins was responsible for approving payroll, and when he left, Gino

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<sup>52</sup> Tr. 1, pp. 60, 96; Exs. 2, 3, and 4.

<sup>53</sup> Tr. 1, pp. 83, 115-116, 125; Tr. 2, pp. 53-54.

<sup>54</sup> Tr. 1, pp. 209-210, 223, 227-228.

<sup>55</sup> Tr. 1, pp. 213, 229-236.

Mignano was responsible for approving payroll. In March or April of 2017, the company changed from paying employees by direct deposit to paying with paper checks signed by Kevin Breslin. There were at least two times when the employee payroll checks bounced for some people, and Ms. Ihde had to reissue the checks. The company also took money from employee checks for 401k contributions but did not put it into the 401k accounts. Ms. Ihde never discussed unemployment tax payments with Robert or Mary Jo Parkins.<sup>56</sup>

42. Terri Rowe, a Payroll Specialist for Atrium from January 2, 2016, to December 27, 2017, primarily processed, prepared, and distributed biweekly payroll checks to approximately 1,700 employees through 33 different facilities. She initially reported to Todd Myzeka, then Brad Everts and Robert Parkins, and finally to Gino Mignano. Ms. Rowe also handled payment of unemployment insurance taxes for the facilities after Michael Braun's employment ended. She had access to the department's online website to report wages and pay unemployment taxes. From her perspective, the responsibility to verify that the unemployment taxes had been paid fell to Brad Evert or Robert Parkins, and when they left, to Gino Mignano. Her understanding was that if you did not pay the unemployment taxes when due and an extension was not granted, then it would be delinquent by the end of the following quarter.<sup>57</sup>

43. Ms. Rowe noted that on one occasion someone had reversed an unemployment payment she had made and she believed this was Gino Mignano. She talked with her supervisor, Tanya Quade, about this and she also talked to Gino Mignano about it; she was bluntly informed that this was outside the scope of her duties. Also, Gino Mignano had told her not to make an unemployment tax payment. When she received letters from the department regarding unpaid tax liability, she sent them to Brad Evert, Robert Parkins, or Gino Mignano.<sup>58</sup>

44. Ms. Rowe did not have any communication with Anthony Carriero about unemployment taxes. If Gino Mignano was out of the office and she needed approval for a disbursement for child support garnishments or to pay payroll taxes, she would take those to Mr. Carriero for approval. To her knowledge, Mr. Carriero did not have responsibility for filing unemployment reports or seeing that unemployment taxes were paid. She first became aware of unpaid unemployment taxes in the second quarter of 2017, after Robert Parkins left the employer. According to Ms. Rowe, Robert Parkins had to get approval from someone else to make payments.<sup>59</sup> Initially, she indicated that it was her impression that Kevin Breslin controlled all of the spending decisions, but then she thought that because Gino Mignano was sure of himself, he made

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<sup>56</sup> Tr. 1, pp. 250-258, 261-263. The company went back to direct deposit after the receivership began. Tr. 1, p. 266.

<sup>57</sup> Tr. 1, pp. 150-151, 153, 194.

<sup>58</sup> Tr. 1, pp. 154-157.

<sup>59</sup> Tr. 1, pp. 157, 162, 167-168, 192.



decisions; later, she admitted that she did not know definitively who had ultimate authority to decide whether to pay the unemployment taxes.<sup>60</sup> Finally, she indicated that Kevin Breslin controlled all financial decisions, but Gino Mignano had independent authority "To some degree."<sup>61</sup> She thought that Gino Mignano had more authority than Robert Parkins because Mr. Mignano was in New Jersey; but she acknowledged that she had "no idea what went on in New Jersey."<sup>62</sup>

45. In May or June of 2017, Ms. Rowe noted that payments to the State of Wisconsin Department of Revenue and to the federal Internal Revenue Service (IRS) were being reversed or bounced, and she would get notices from them that the payments were reversed or bounced. She left her employment in December of 2017 because she did not want to work for a company where she was concerned that payroll checks would not clear.<sup>63</sup>

46. Atrium failed to pay its unemployment taxes for the fourth quarter of 2016 for some of its facilities by the deadline of January 31, 2017.

47. Jessica Durso, an Unemployment Insurance Collections Specialist Advanced for the department, first started to attempt to contact the employer for a delinquent amount of unemployment taxes due for the account of Hamilton Care Center on March 21, 2017. She first tried calling the employer's contact in April of 2017. Ms. Durso contacted Terri Rowe on May 4, 2017, who directed her to Tanya Quade; Ms. Durso attempted to reach Ms. Quade by email and telephone into August of 2017 but never reached her. Eventually, she was referred to Gino Mignano, but she could not always get through to him.<sup>64</sup> Ms. Durso found the contact information for Luke Breslin<sup>65</sup> on the internet and sent him an email to which Kevin Breslin finally responded and they spoke on September 8, 2017.<sup>66</sup> Kevin Breslin asked Ms. Durso to send him the information regarding the delinquent unemployment taxes, which she did on September 8<sup>th</sup>.<sup>67</sup> Later that day, at Kevin Breslin's direction, Mr. Carriero emailed Jessica Durso at the department to try to facilitate a conversation to get the unemployment taxes paid.<sup>68</sup> They spoke on September 13, 2017, regarding the accounts. From September to October 2017, Ms. Durso corresponded with Mr. Carriero and Mr. Mignano regarding the accounts and setting up a payment plan, and payments were initially made pursuant to the payment plan.

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<sup>60</sup> Tr. 1, pp. 174, 176-177, 180-181.

<sup>61</sup> Tr. 1, p. 199.

<sup>62</sup> Tr. 1, pp. 199-200.

<sup>63</sup> Tr. 1, pp. 163, 197-198.

<sup>64</sup> Tr. 1, p. 156; Ex. 7; Tr. 3, pp. 300, 333-335.

<sup>65</sup> Luke Breslin was listed as an attorney for various Atrium entities. Ex. 15.

<sup>66</sup> Tr. 3, p. 336.

<sup>67</sup> Tr. 3, p. 363; Ex. 7, p. 31.

<sup>68</sup> Ex. 7; Tr. 3, p. 155.

48. On December 6, 2017, Gino Mignano requested a final payout amount for the unpaid unemployment taxes to pay everything that week.<sup>69</sup> The balance at the time was over \$300,000, but Atrium did not make the payment. In January 2018, when no payment was made, Jessica Durso again contacted Mr. Mignano and Mr. Carriero about paying pursuant to the agreement. Payments were made for a short period of time, but were not made for the fourth quarter of 2017. Ms. Durso reached a second payment agreement plan with Gino Mignano in March of 2018. The first quarter of 2018 contributions were returned for insufficient funds and Mr. Mignano was notified that the agreement was at risk for being cancelled. Ms. Durso sent another email to Mr. Mignano in July of 2018, which she copied to Mr. Carriero, regarding the unpaid taxes; Mr. Carriero responded that Mr. Mignano was out and would get back to her. Mr. Mignano did not respond until July 25, 2018, when he notified her that a payment would bounce.

49. Mr. Mignano discussed payment of unemployment taxes with Jessica Durso at the department; before he did so, he spoke with Kevin Breslin about what Mr. Breslin would be willing to do, and then Mr. Mignano reported back after the call before executing any kind of payment plan. Kevin Breslin authorized Mr. Mignano to enter into a payment plan with the department to pay the unemployment taxes; Atrium paid for a period of time but then fell behind in 2018. Everything regarding the payment plan came at the direction of Kevin Breslin. At one point, Mr. Mignano contacted the department, at the direction of Kevin Breslin, to get the payoff amounts for the unemployment taxes because Mr. Breslin was trying to do the refinancing. Ultimately, Kevin Breslin gave the instruction after the payment plan started to get in arrears to stop the payments.<sup>70</sup>

50. The installment agreement was cancelled on August 16, 2018.<sup>71</sup> On August 17, 2018, Ms. Durso emailed Mr. Mignano, Mr. Carriero, and Mr. Breslin that the payment plan was cancelled and that she would issue levies on all of the accounts.<sup>72</sup>

51. When Atrium failed to pay its unemployment taxes pursuant to the payment plan, the department sent initial determinations to the employers for the delinquent taxes. The department then proceeded with collection efforts on each of the 29 employer accounts, including monthly tax collection statements, sending correspondence, issuing warrants, sending notices of levies, intervening in the receivership proceeding in circuit court, sending notices of intent to intercept federal tax refunds, and issuing between one and four levies on each employer account.<sup>73</sup>

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<sup>69</sup> Ex. 7.

<sup>70</sup> Tr. 3, pp. 229-230, 237-238.

<sup>71</sup> Tr. 3, p. 341; Exs. 20-22, 43-68.

<sup>72</sup> Ex. 7.

<sup>73</sup> Tr. 3, pp. 300, 313, 337, 342-343, 346; Exs. 6, 7, 20-22, 43-69.

52. Kevin Breslin, Mary Jo Parkins, and Anthony Carriero all were either an officer, employee, member, manager, partner, or other responsible person of the employer from the fourth quarter of 2016 through the third quarter of 2018. Robert Parkins was an officer and employee for only the fourth quarter of 2016 and part of the first quarter of 2017. Gino Mignano was an officer and employee from the first quarter of 2017 through the third quarter of 2018.
53. Kevin Breslin was a responsible person who had exclusive control or supervision of or responsibility for filing contribution reports and paying unemployment insurance taxes to the department from the fourth quarter of 2016 through the third quarter of 2018. Robert Parkins, Mary Jo Parkins, Gino Mignano, and Anthony Carriero were not responsible persons with significant control or supervision of or responsibility for filing contribution reports and paying unemployment insurance taxes to the department from the fourth quarter of 2016 through the third quarter of 2018.
54. Kevin Breslin willfully failed to pay the unemployment taxes owed by Atrium to the department. He was aware of the unpaid unemployment insurance taxes, yet he directed payments be made to the owners of KBWB Operations, LLC, and other creditors prior to paying the unemployment insurance taxes. Mr. Breslin refused to permit his subordinates to pay the unpaid Wisconsin unemployment insurance taxes, directing them instead to pay other bills, including significant payments to himself. Even if they could be considered responsible persons, Robert Parkins, Mary Jo Parkins, Gino Mignano, and Anthony Carriero were powerless to pay the unemployment insurance taxes without direction from Kevin Breslin and they did not willfully fail to pay the unemployment taxes owed by Atrium to the department.
55. The department made extensive proper collection efforts against the employers prior to seeking to hold Kevin Breslin, Robert Parkins, Mary Jo Parkins, Gino Mignano, and Anthony Carriero personally liable for the unpaid unemployment taxes.
56. All four statutorily required conditions for personal liability to attach are met only for Kevin Breslin. Therefore, only Kevin Breslin is personally liable for the payment of delinquent unemployment insurance taxes, interest, penalties, and special assessments owed by the Atrium employers. Robert Parkins, Mary Jo Parkins, Gino Mignano, and Anthony Carriero are not personally liable for the unpaid unemployment taxes from the fourth quarter of 2016 through the third quarter of 2018.

## MEMORANDUM

The department seeks to have the individual putative debtors found personally liable for the payment of unpaid unemployment insurance taxes, interest, penalties, and special assessments of the employers named in the determinations, for eight consecutive quarters, beginning with the fourth quarter of 2016 and ending with the third quarter of 2018. The issue is whether the department has shown by clear and convincing evidence that any of the individuals meets the four statutory conditions to be held personally liable. The appeal tribunal combined the hearings in these matters, and the relevant facts regarding the business operations are relevant to all of the parties. Therefore, the commission has combined its decisions in these cases.

### ANALYSIS

The legislature has provided that individuals may be found personally liable for unpaid unemployment insurance taxes if certain conditions are met. Wisconsin Stat. § 108.22 (9) provides:

Any person who is an officer, employee, member, manager, partner, or other responsible person of an employer, and who has control or supervision of or responsibility for filing any required contribution reports or making payment of amounts due under this chapter, and who willfully fails to file such reports or to make such payments to the department, or to ensure that such reports are filed or that such payments are made, may be found personally liable for those amounts in the event that after proper proceedings for the collection of those amounts, as provided in this chapter, the employer is unable to pay those amounts to the department. Personal liability as provided in this subsection survives dissolution, reorganization, bankruptcy, receivership, assignment for the benefit of creditors, judicially confirmed extension or composition, or any analogous situation of the employer and shall be set forth in a determination or decision issued under s. 108.10. An appeal or review of a determination under this subsection shall not include an appeal or review of determinations of amounts owed by the employer.

Thus, in order for personal liability to attach to an individual, the statute essentially provides that four conditions must be met:

- (1) The person must be or must have been either an officer, employee, member, manager, partner, or other responsible person of the employer;
- (2) The person must have had control or supervision of or responsibility for filing reports or making payments to the department;
- (3) The person must willfully have failed to file reports or willfully failed to pay the amounts due; and
- (4) The department first must have engaged in proper collection efforts against the employer to collect the delinquent contributions.

Since this provision is similar in many ways to the federal law which imposes personal liability on responsible persons for the willful failure to pay employees' withheld taxes,<sup>74</sup> the commission has looked to federal precedent to interpret the law to determine whether personal liability should attach under the Wisconsin law. Applying the law to the facts in a case is then a fact-intensive inquiry into the evidence and credibility of the witnesses.

*Applying the law to the facts in this case*

1. *The person must be or must have been an officer, employee, member, manager, partner, or other responsible person of the employer.*

This part of the statute has undergone some changes in recent years. Prior to 2015, the statute provided that before a person could be found personally liable, the individual had to be “an officer, employee, member or manager holding at least 20% of the ownership interest of a corporation or of a limited liability company” subject to Chapter 108.<sup>75</sup> In 2015, the legislature changed this so that the individual could be “an officer, employee, member, manager, partner, *or other responsible person* holding at least 20 percent of the ownership interest of a corporation, limited liability company, *or other business association*” subject to Chapter 108.<sup>76</sup> It appears that the impetus to broaden the statute in 2015 was to include managing partners of limited liability partnerships as persons who could be found personally liable for the contributions owed by an LLP, and to ensure that those people could be found responsible even if they chose another business entity.<sup>77</sup> However, if the person did not own 20% of the business, the condition still was not met. In 2018, the statute was changed again, and it now provides that before a person can be found personally liable for an organization’s unpaid unemployment insurance taxes, the first condition that must be met is that the person must be or must have been “an officer, employee, member, manager, partner, or other responsible person of an employer...”<sup>78</sup>

As the appeal tribunal noted, there is little case law on the first condition with the new statutory language. Previously, the analysis for this condition was focused on whether the individual owned 20% of the business and the nature of the business.<sup>79</sup> With the recent law changes, the legislature has expanded who can be found personally liable to persons beyond the listed titles and without regard to ownership, and it has expanded the application of the law to any employer rather than just to corporations, limited liability companies, or other business associations.

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<sup>74</sup> See 26 U.S.C. § 6672. Under the federal law, the penalty is assessed against “any officer or employee of a corporation who: (1) is under a duty to ‘collect, truthfully account for, and pay over any tax imposed by this title’—i.e., a ‘responsible person’; and (2) ‘willfully fails’ to do so.” *Smith v. U.S.*, 555 F.3d 1158, 1163 (10<sup>th</sup> Cir. 2009), *citing Taylor v. I.R.S.*, 69 F.3d 411, 413 (10<sup>th</sup> Cir. 1995).

<sup>75</sup> Wis. Stat. § 108.22(9) (2013-2014).

<sup>76</sup> See 2015 Wis. Act 334; Wis. Stat. § 108.22(9) (2015-2016); emphasis added.

<sup>77</sup> See “Analysis of Proposed UI Law Change D15-05” attached to Carriero Brief.

<sup>78</sup> The law was most recently amended in 2017 Wis. Act 157 and first applied to determinations of personal liability issued on April 1, 2018.

<sup>79</sup> See, e.g., *SBR, Inc.*, UI Dec. Hearing No. S9900041MD (LIRC Nov. 24, 1999); *HGS Catering, Inc. (Skemp)*, UI Dec. Hearing No. S1300269EC (LIRC Dec. 4, 2013); and *Cory Wilson*, UI Dec. Hearing No. S0600098MW (LIRC Mar. 13, 2008).

The appeal tribunal paraphrased this condition as requiring that the individual “has a special relationship with the company.” Under this interpretation, in addition to determining whether the individual was an officer or employee, etc., the appeal tribunal questioned whether the individual was *also* a “responsible person” of the employer and analyzed whether the individual’s particular duties made that owner, officer, or employee a “responsible person” of the employer. In this reading of the statute, the word “other” in the statute was read to imply that any officer or employee, etc., must also be a “responsible person” as well, and, therefore, the decision maker must decide whether the person is a “responsible person” under this first condition in addition to determining whether the person was an officer or employee, etc. In the Carriero decision, for instance, the appeal tribunal found that the words “or other responsible person of the employer” now acted to modify the word “employee” to differentiate employees who have greater responsibilities from those who do not.

While it is true that an individual may not be found personally liable unless the individual was responsible to pay the unemployment insurance taxes, the commission concludes that this analysis is generally more appropriately addressed under the second condition, where the commission has historically examined whether an individual is a “responsible person” for purposes of personal liability. This is consistent with the federal case law, which looks at who has a duty to collect and pay over the tax as a “responsible person.” It is thus not necessary to duplicate the analysis for both the first and second conditions, as the appeal tribunal did here. With this reading of the statute, the first condition is fairly simple. If the individual is an officer, employee, member, manager, or partner of the employer, the condition is met with no ownership requirement. The appeal tribunal essentially acknowledged this in one set of decisions by noting, e.g., “Mr. Parkins had no stake in the LLC, but he was indeed an officer, so he therefore satisfies this element.” It is also possible that someone who does *not* have the status of an officer, employee, member, manager, or partner of the employer could be found personally liable if that person had other authority or was otherwise responsible for the business of the employer, such as a financial agent or a family member.<sup>80</sup> Only if a person is not an officer, employee, member, manager, or partner of the employer, is it necessary, for purposes of this condition, to determine whether the person is an otherwise responsible person of the employer. This clarifies the first condition and also avoids unnecessary duplication of the analysis of whether a person is also a “responsible person” for the payment of unemployment insurance contributions under the second condition.<sup>81</sup>

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<sup>80</sup> The Seventh Circuit specifically rejected the notion that employment or formal corporate office is a prerequisite to liability. *Adams v. U.S.*, 504 F.2d 73, 75-76 (7<sup>th</sup> Cir. 1974). The Tax Appeals Commission has found, for instance, that a restaurant owner’s father was a “responsible person” where the father was never an officer or employee, but was a self-titled consultant who got involved in his son’s business when the business started to fail. See *Sandberg v. Wis. Dep’t of Revenue*, No. 08-W-143 (P-II) (WTAC Nov. 18, 2011), citing *Green v. Wis. Dep’t of Revenue*, Wis. Tax. Rptr. (CCH) ¶ 400-378 (WTAC 1998).

<sup>81</sup> In the rare case where a putative debtor is not an officer or employee, etc., but is alleged to be an otherwise responsible person, the analyses for the first and second conditions would indeed overlap. Under the prior law, even a “responsible person” had to have a 20% ownership interest, so the analyses under the two conditions were distinct, but that is no longer the case. Since the second condition has historically been interpreted to impose the “responsible person” qualification as interpreted under

The commission finds that the first condition is easily met in this case. Kevin Breslin was a member, officer, and manager of KBWB Operations, LLC, doing business as Atrium, and he had a 20% ownership interest. Robert Parkins was an employee, Controller and then Chief Operating Officer, and manager of Atrium Midwest, who left his employment in the first quarter of 2017. Mary Jo Parkins was an employee and Senior Vice President and Chief Operating Officer of the Midwest Operations, and managed the facilities in Wisconsin. Gino Mignano was an employee and the Atrium Treasurer beginning in the first quarter of 2017; and Anthony Carriero was an employee and Assistant Controller for Atrium. Accordingly, each of the putative debtors was at least an officer, employee, member, manager, or partner of the employer. **Therefore, the first condition is met for Kevin Breslin, Mary Jo Parkins, and Anthony Carriero for the fourth quarter of 2016 through the third quarter of 2018; the condition is met for Robert Parkins for only the fourth quarter of 2016 and part of the first quarter of 2017; and it is met for Gino Mignano for the first quarter of 2017 through the third quarter of 2018.**

2. *The person must have had control or supervision of or responsibility for filing reports or making payments to the department.*

In order for an officer, employee, member, manager, partner, or other responsible person of an employer to be found personally liable for an employer's unpaid unemployment insurance taxes, the individual must have or have had control or supervision of or responsibility for filing the required contribution reports or making payments of the amounts due. As noted, the commission has looked to federal precedent to interpret whether an individual is a "responsible person" under this condition. As the commission summarized in *Henry A. Warner*<sup>82</sup>:

First, courts have generally given a broad interpretation to the term "responsible person." *Denbo v. U.S.*, 988 F.2d 1029 (10<sup>th</sup> Cir. 1993). Thus, the United States Court of Claims has held that any corporate officer with the power and authority to avoid default is a responsible party, within the meaning of section 6672. *Feist v. U.S.*, 607 F.2d 954 (Ct. Cl. 1979). Included are persons having power to control the decision-making process by which the corporation allocates funds to other creditors, and persons with ultimate authority over the corporation's expenditure of funds. *Godfrey v. U.S.*, 748 F.2d 1568, 1575 (Fed. Cir. 1984). This responsibility is a matter of status, duty, and authority, indicia of which include the holding of corporate office, control over financial affairs, authority to disperse corporate funds, stock ownership, and the ability to retain and discharge employees. *Thibodeau v. U.S.*, 828 F.2d 1499, 1503 (11<sup>th</sup> Cir. 1987). "Responsible person" status generally attaches to "high corporate officials charged with general

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federal law, the practical effect of the recent statutory changes is that any person who has control or supervision of or responsibility for filing the contribution reports or paying the taxes and willfully fails to do so may be found personally liable for the unpaid unemployment taxes.

<sup>82</sup> *Henry A. Warner*, UI Dec. Hearing No. S9100679 (LIRC July 16, 1993), *aff'd sub nom.*, *Henry A. Warner v. LIRC*, No. 93-CV-3157 (Wis. Cir. Ct. Dane Cnty. May 18, 1994).

control over corporate business affairs who participate in discussion concerning payment of creditors and disbursement of funds.” *Monday v. U.S.*, 421 F.2d 1210, 1214-15 (9<sup>th</sup> Cir. 1970). Although corporate office does not *per se* impose a duty to collect, account for, and pay over withheld taxes, liability does attach “to those with power and responsibility within the corporate structure for seeing that the taxes withheld from sources are remitted to the Government.” *Monday*, 421 F.2d at 1214.

Presumptions in this area are allowable. The court of claims has enunciated the rebuttable presumption that a corporate founder, chief stockholder, president, and member of the corporation’s board of directors is a responsible person under section 6672. *Feist*, 607 F.2d at 960. The same court has noted that, since a corporation acts through its officers, absent evidence to the contrary a person who occupies the offices of vice president, secretary, and treasurer, and who has the authority to make corporate disbursements, also has the duty to carry out what the law requires of the corporation, here the payment of withholding taxes. *Bolding v. U.S.*, 565 F.2d 663, 670 (Ct. Cl. 1977). This responsibility should generally be consonant with the duties of the person’s position within the corporation, though. For example, one’s status as the chairman of the board, alone, is insufficient to make one responsible pursuant to section 6672, since the duties of a chairman of the board do not in themselves give rise to the (federal) duty to collect, account for, and pay over taxes. *Godfrey*, 748 F.2d at 1575-76.

An otherwise-responsible person likewise may not avoid liability simply by delegating the responsibility away from him or herself. Responsible persons have a fiduciary duty to properly account for proper management of funds; such a fiduciary cannot [absolve] him or herself from liability by disregarding that duty and leaving it to someone else to perform. *Hornsby v. I.R.S.*, 588 F.2d 952, 953 (5<sup>th</sup> Cir. 1979). Even the claim that a corporate officer or director is “merely a figurehead” is without legal significance and does not relieve the individual of the responsibilities of his or her corporate offices. *Burroughs v. Fields*, 546 F.2d 215, 217 (7<sup>th</sup> Cir. 1976).

Just because an individual has a title in a business, that fact alone does not mean the person is responsible for filing reports or making payments.<sup>83</sup> The key to liability is control of the finances of the employer, and the power to control the decision-making process by which the employer allocates funds to the other creditors.<sup>84</sup> The Fourth Circuit has developed a non-exhaustive list of factors to consider in determining whether someone is a “responsible person,” which include: serving as an officer or director of the company; controlling the company’s payroll; determining which creditors to pay and when to pay them; participating in the business’s day-to-day

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<sup>83</sup> See, e.g., *O’Connor v. U.S.*, 956 F.2d 48 (4<sup>th</sup> Cir. 1992).

<sup>84</sup> *Haffa v. U.S.*, 516 F.2d 931 (7<sup>th</sup> Cir. 1975).



management; having the ability to hire and fire employees; and possessing the power to write checks.<sup>85</sup> No one factor is determinative and the court assesses the totality of the circumstances. The question is a matter of substance, not form;<sup>86</sup> and the substance of the circumstances must be such that the person uses his or her authority over financial affairs or general management, or is under a duty to do so, before the person will be found to be a “responsible person.”<sup>87</sup> It is a pragmatic inquiry, and the “crucial inquiry is whether the person had the ‘effective power’ to pay the taxes – that is, whether he had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed.”<sup>88</sup>

The issue, then, is not whether the individual *could* make the tax payment by virtue of his or her position, but whether the individual had “control” to make them. Courts have held that the person who has “control” is “that individual who has the final word as to what bills should or should not be paid and when.”<sup>89</sup> The “final word” means significant rather than exclusive control over the corporation’s financial affairs and disbursement of funds.<sup>90</sup> The fact that someone exercises a mechanical duty of signing a check or preparing tax returns is not determinative of liability; the duty to make payments must be viewed in light of the individual’s power to compel or prohibit the allocation of the corporate funds.<sup>91</sup>

When determining who is a responsible person, the Wisconsin Tax Appeals Commission has noted that courts are reluctant to find responsible a person who does not have significant control because the person is dominated by another person in the company. It summarized the relevant cases:

There is a line of federal cases that has absolved individuals from liability where, apart from any instructions, they were in no real position to ensure that funds would actually pass from the business to the IRS. These cases stress that while an individual’s title or authority to sign checks may suggest a theoretical authority to effectuate such a payment, those features are not controlling if, based on the record as a whole, it preponderates that a given individual actually lacked the effective ability to pay the taxes over to the IRS. *See, e.g., Barrett v. U.S.*, 580 F.2d 449, 453 (1978) (despite having authority to sign checks, corporate director not “responsible officer” where corporate president controlled which creditors would be paid, including the IRS); *Bauer v. U.S.*, 543 F.2d 142, 149 (1976) (“Mere office holding of and by itself does not render one responsible for the collection and paying over of employee withholding taxes.”); *De Alto v. U.S.*, 40 Fed. Cl. 868, 878 (1998) (“While the existence of another responsible person would not excuse plaintiff,

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<sup>85</sup> *Erwin v. U.S.*, 591 F.3d 313, 320 (4<sup>th</sup> Cir. 2010).

<sup>86</sup> *Godfrey v. U.S.*, 748 F.2d 1568, 1576 (Fed. Cir. 1984).

<sup>87</sup> *O’Connor v. U.S.*, 956 F.2d at 51.

<sup>88</sup> *Plett v. U.S.*, 185 F.3d 216, 219 (4<sup>th</sup> Cir. 1999).

<sup>89</sup> *Adams v. U.S.*, *supra*.

<sup>90</sup> *Purcell v. U.S.*, 1 F.3d 932, 937 (9<sup>th</sup> Cir. 1993), and *Caterino v. U.S.*, 794 F.2d 1, 11 (1<sup>st</sup> Cir. 1986).

<sup>91</sup> *Godfrey v. U.S.*, *supra*.

[plaintiff's superior] retained such exclusive authority that plaintiff effectively had none when dealing with creditors"); *Heimark v. U.S.*, 18 Cl. Ct. 15, 21-23 (1989)(treasurer not responsible person where responsibilities were ministerial and president of company was "autocratic" in the control of funds); *U.S. v. Rem*, 38 F.3d 634, 637 (2<sup>nd</sup> Cir. 1994)(the power to sign checks and the holding of corporate office "can exist in circumstances where the individual in reality does not possess significant control over corporate finances"); *Williams v. U.S.*, 25 Cl. Ct. 682, 684 (1992)(officer that had written checks to creditors other than the IRS held not responsible where "though plaintiff had check writing authority and seemingly important titles, he lacked any independent authority within the [company]."); *U.S. v. Carrigan*, 31 F.3d at 134 (1994)(concluding that employee with check-signing authority may not have been a "responsible person" insofar as his control over the affairs of the company was "significantly circumscribed" by others)...<sup>92</sup>

In this case, the appeal tribunal relied on *Adams, supra*, and what it called the "final word doctrine" when it determined that only Kevin Breslin had the "final word" control over the payment of the taxes. The department argues that the statute is written broadly such that "any person" with responsibility and control can be found liable and that all of the putative debtors had significant authority and control over the employer's financial affairs by the nature of their job duties to be found liable. According to the department, the *Adams* decision does not mean that only the highest-ranking official can be found liable. Rather, the department asserts that the *Adams* decision means that the personal liability statute must be construed to include all those "so connected with the business as to be responsible for the performance of the act in respect of which the violation occurs"<sup>93</sup> and may include more than one individual. The critical question, according to the department, is whether the individual assumed significant control over the payment of funds. The department argues that the individuals' responsibilities in this case should be consonant with their duties in the corporation; if they failed to know of the of the corporation's difficulties, it was because they secluded themselves from the operations.

The department also argues that applying a strict interpretation of the "final word doctrine," as the appeal tribunal did, deviates from longstanding commission decisions, federal case law, and the legislative intent of the statute. The department argues that the appeal tribunal erred when it found that "*Only* the highest-ranking official with *exclusive* control and an ownership interest can be found personally liable."<sup>94</sup> According to the department, the purpose of the law is to give the department wide latitude to recover unemployment contributions owed by employers to include any person who had or who "should have had significant control."<sup>95</sup>

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<sup>92</sup> *Sandberg v. Wis. Dep't of Revenue, supra*.

<sup>93</sup> DWD Brief, p. 9, citations omitted.

<sup>94</sup> DWD Brief, p. 13; emphasis in original.

<sup>95</sup> DWD Brief, p. 12.

a. *Kevin Breslin*

The department argues that, as managing partner and CEO, Kevin Breslin owed a fiduciary obligation to ensure timely remittance of the unemployment contributions, and he could not absolve himself of that liability by delegating his duty to someone else. The department points out that Mr. Breslin spoke with the department to discuss the past due contributions, which demonstrated his status as a responsible person and his ability to control and delegate payment to Mr. Carriero and Mr. Mignano. He had first-hand knowledge of the debt and was aware that the cash transfers were placing the company on a path toward insolvency. He oversaw cash payments of at least \$29 million to himself and other members of KBWB Operations, LLC. The department also argues that Kevin Breslin failed to appear personally at the hearings and asserted a Fifth Amendment privilege from which the commission should draw a negative inference that he was a responsible person with control who willfully failed to pay the delinquent unemployment taxes to the department.

Based on the totality of the evidence, the commission finds that Kevin Breslin was not only responsible for supervising the people who handled the unemployment insurance taxes, but under the KBWB Operations, LLC, Operating Agreement, he was the only Manager and “Tax Matters Member,” and that gave him the authority to exercise managerial control over the business, including handling tax matters. He was the first in command and had the authority to see that the taxes in question were paid.<sup>96</sup> Mr. Breslin had the “final word” as to which bills were to be paid and when, including the unemployment taxes. He directed which payments were to be made on at least a weekly basis, and he directed his staff to negotiate a payment agreement with the department, and then to cease negotiating and cease payments. Mr. Breslin was an owner of the business, held corporate office, had nearly exclusive control of the financial affairs of the business and ability to disburse company funds, and had the ability to hire and fire employees. The commission credits Robert Parkins, Mary Jo Parkins, Gino Mignano, and Anthony Carriero that Kevin Breslin had total control over which bills to pay and when because their testimony was essentially corroborated by various witnesses (Ray Thivierge, Todd Myzeka, Michael Braun, Miriam Mian, and Terri Rowe) who had no interest in these matters. In addition to the evidence in the record, the commission draws a negative inference from Mr. Breslin’s personal nonappearance that he was a responsible person with significant control, supervision, and responsibility for filing the reports and making payments to the department, and that he had the absolute and final word on whether and when to pay the unemployment taxes. Accordingly, the commission finds that Kevin Breslin was a responsible person who had nearly exclusive control or supervision of or responsibility for filing reports or making payments to the department during the quarters at issue in these matters. **Therefore, the second condition is met for Kevin Breslin for the fourth quarter of 2016 through the third quarter of 2018.**

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<sup>96</sup> See, e.g., *Masonry Specialists II, LLC (Froode)*, UI Dec. Hearing No. S1500379MW (LIRC Apr. 18, 2018).

*a. Robert Parkins*

The department asserts that Robert Parkins oversaw the payment of unemployment contributions and had authority to disburse funds from various business accounts, and that he was responsible for supervising the people who handled the unemployment taxes until he left his position on February 24, 2017. However, the directions Robert Parkins gave to them as to what to pay was determined by Kevin Breslin, who had the final word on what bills to pay, and when, and Mr. Breslin had the sole power to compel or prohibit the allocation of corporate funds. Robert Parkins relayed the decisions of Kevin Breslin to his staff. Though the subordinate staff who testified may have thought that Robert Parkins had control over what bills were paid because Mr. Parkins relayed those directions, the staff members were not in a position to know the actual structure of the company's business decision making. Though Robert Parkins had a significant job title, the commission finds him credible that his functions changed in January of 2017 and that he was no longer responsible for overseeing payroll and financial matters as those functions had been transferred to New Jersey. As of January 2017, though he held a corporate office, Robert Parkins was not an owner of the business, and he did not have any significant control over the financial affairs of the business; for even the one quarter of delinquent tax payments that could possibly apply to Mr. Parkins in these cases, the commission finds that he did not have actual authority or effective power to pay the unemployment taxes. Accordingly, the commission finds that Robert Parkins was not a responsible person who had control or supervision of or responsibility for filing reports or making payments to the department during the quarters at issue in these matters. **Therefore, the second condition is not met for Robert Parkins.**

*b. Mary Jo Parkins*

The department argues that Mary Jo Parkins had the "final word" on decision making as the Senior Vice President of Financial Operations and Chief Operating Officer. She had authority to hire and fire staff, sign checks on back accounts, and direct payment of bills. She oversaw the human resources staff, led the accounts receivable division, and had access to financial reports that included the delinquent unemployment contributions. As a certified public accountant (CPA), she knew or should have known of the unpaid unemployment contributions and the financial crisis facing the business.

Mary Jo Parkins argues that she was not responsible for filing unemployment reports or making unemployment tax payments because she did not own any interest in Atrium; the department never sent her any notices of unemployment payments due; her responsibilities never included filing unemployment reports, accessing the online unemployment portal, handling unemployment inquiries, or supervising anyone who had those responsibilities; she oversaw accounts receivable, not accounts payable; she had no check-writing authority to pay company debts or ability to direct payment of the unemployment taxes; though she had an impressive title, her title is not controlling; she had no ability to refinance the employer's debts; and she had no ability to compel or prohibit the allocation of revenue for debts. None of the department's witnesses testified that Ms. Parkins was responsible for filing

unemployment reports or paying the unemployment taxes. The department's witness, Terri Rowe, testified that Ms. Parkins was not involved in making the unemployment payments. The financial reports that Ms. Parkins did see did not show specific tax liabilities.

The commission agrees with Ms. Parkins and credits her that she was not involved in paying the unemployment taxes and was not responsible for supervising the people who handled the taxes. She did not handle the financial end of the business, except for accounts receivable. She did not control or supervise the filing of unemployment contribution reports or payments, nor did she have responsibility to do so. Her job was to keep the nursing homes functioning on a daily basis, which included staffing, licensing, and supplies. Though Ms. Parkins had a corporate title and significant responsibilities, she did not have *any* control, much less significant control, or actual authority or effective power to pay the unemployment taxes. Accordingly, the commission finds that Mary Jo Parkins was not a responsible person who had control or supervision of or responsibility for filing reports or making payments to the department. **Therefore, the second condition is not met for Mary Jo Parkins.**

*c. Gino Mignano*

The department argues that Gino Mignano should be found to be a responsible person because he supervised Terri Rowe, the person responsible for ensuring that unemployment contributions were paid after Robert Parkins left the company. Also, as Atrium's Treasurer, Mr. Mignano also was responsible for ensuring that the unemployment insurance taxes were paid. Mr. Mignano argues that he did not have the "final word" on whether or when to make the tax payments. Only Kevin Breslin did, and he prevented Mr. Mignano from paying the taxes. The only testimony that indicated Mr. Mignano had control over the finances was from the department's witness, Terri Rowe, who indicated that she believed he had independent authority "to some degree." However, she speculated that he had this authority because he was in New Jersey; she actually admitted that she "had no idea what went on in New Jersey." Moreover, the Operating Agreement specifically provides that the officers exercise authority only subject to the direction and control of the Manager, Kevin Breslin.

The commission finds that even though Gino Mignano was the company's Treasurer, he did not have an ownership interest in the business. The commission credits Mr. Mignano that he did not have control over the financial affairs of the business, the "final word," or even significant authority to decide what bills should or should not be paid; Kevin Breslin exclusively made those decisions. Mr. Mignano did not have the power to compel or prohibit the allocation of company funds, and he did not have actual authority or effective power to pay the taxes. Accordingly, the commission finds that Gino Mignano was not a responsible person who had control or supervision of or responsibility for filing reports or making payments to the department. **Therefore, the second condition is not met for Gino Mignano.**

*d. Anthony Carriero*

Anthony Carriero argues that he was an Assistant Controller who had no designated or actual authority to make payments on his own for any company debt. He had no authority to write checks except in limited circumstances that did not involve unemployment taxes. He asserts that there is no evidence that he had any role in paying the unemployment taxes other than communicating information to the department in a few instances at the direction of Mr. Breslin. He had no authority to control the company's affairs, no authority to disburse corporate funds, no ability to retain or discharge employees, no access to the online unemployment portal, and no ability to pay the unemployment taxes. Though he may have been aware that taxes were owed, he argues that he had no ability to act on that awareness. He describes himself as "an accounting employee" and a "cog in the machine that was KBWB Operations" who had no real connection to payroll and unemployment issues. Simply because he was directed to reach out to the department at one time does not establish responsibility for the unemployment insurance taxes such that personal liability should attach. Mr. Carriero did communicate with Jessica Durso at the department on a few occasions, but he did so at the specific direction of Kevin Breslin. He had no authority to set compensation for employees, to hire or fire, to borrow money, or to determine which bills to pay.

The commission agrees that Anthony Carriero was a lower-level employee who had a ministerial or mechanical duty to pay the unemployment taxes when directed to do so, or to contact the department when directed to do so, but he did not have *any* authority, much less significant authority, to decide what bills were paid or when. That was decided solely by Kevin Breslin. Though he communicated with the department about the unemployment taxes, the commission credits Mr. Carriero that he did so at the direction of Mr. Breslin and that he did not have the power to compel or prohibit the allocation of company funds, and he did not have actual authority or effective power to pay the taxes. Accordingly, the commission finds that Anthony Carriero was not a responsible person who had control or supervision of or responsibility for filing reports or making payments to the department. **Therefore, the second condition is not met for Anthony Carriero.**

*3. The person must willfully have failed to file reports or willfully failed to pay the amounts due.*

The term "willfulness" in a civil matter, such as under Wis. Stat. § 108.22(9), requires only a conscious, voluntary, and intentional decision on the actor's part to act in violation of a known duty; and it also includes a reckless disregard of obvious or known risks.<sup>97</sup> "Reckless disregard" is tantamount to gross negligence, and it is established if the responsible individual clearly ought to have known that there was a grave risk that taxes were not being paid and the individual was in a position to find out for certain very easily.<sup>98</sup> Willfulness "does not require bad faith or evil

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<sup>97</sup> *Monday v. U.S.*, 421 F.2d at 1216; *U.S. v. Pomponio*, 429 U.S. 10, 12, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976).

<sup>98</sup> *Action Express (Fiore)*, UI Dec. Hearing No. S0700097MW (LIRC Dec. 17, 2008); *Cory Wilson, supra*, citing *U.S. v. Running*, 7 F.3d 1293, 1298-99 (7<sup>th</sup> Cir. 1993).

design, but simply means that there was an intentional choice to pay available funds to a creditor other than the department.”<sup>99</sup> Where, for instance, the employer preferred other creditors to the department when the employer had funds to pay the taxes, including paying management salaries and rent, the commission has found that the failure to pay unemployment taxes was willful.<sup>100</sup> The “awesome power” granted to the government to pursue personal liability from any or all of a number of possible responsible persons is “tempered by this requirement that there be a finding of a *willful* failure to collect, account for, and pay over the tax,” which is considered strong evidence that it was not intended to impose liability without personal fault.<sup>101</sup>

The willfulness requirement is met where a responsible individual either knows or reasonably should know of the failure to make the payments.<sup>102</sup> The requirement does not require actual knowledge, as one may not avoid a finding of willfulness simply by delegating responsibility for payment to another.<sup>103</sup> Indeed, a willful failure can include a failure from ignorance, if the ignorance is the result of the debtor’s reckless disregard of the matter.<sup>104</sup> Where a responsible individual made so little effort to determine the validity of a corporation’s treatment of unemployment contributions, the commission has found that the effort constituted a reckless disregard of the legal sufficiency of the payments.<sup>105</sup> When determining whether to impute knowledge of taxes owed when the responsible person should have had knowledge of the matter, the question is whether the individuals in question in performing their duties would have led to the acquisition of the requisite knowledge.<sup>106</sup> Thus, the question of whether a particular person willfully failed to carry out the responsibility of causing an employer to pay taxes depends upon the facts and circumstances of each case.<sup>107</sup>

The department argues that the debtors made conscious and voluntary choices not to pay the unemployment contributions when each was aware, or should have been aware, by the nature of their positions, that the taxes were due. The department asserts that the corporation had sufficient funds to cover the unemployment debt, and points to revenue of \$47,320,731.73 from one source, the monthly Medicaid Fee-

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<sup>99</sup> *Mazo v. U.S.*, 591 F.2d 1151, 1154, (5<sup>th</sup> Cir. 1979); *Mortgage Specialists, Inc.*, UI Dec. Hearing No. S9200409MW (LIRC Aug. 31, 1994).

<sup>100</sup> *David M. Zuehlke & Assoc., Inc.*, UI Dec. Hearing No. S0300206AP (LIRC Nov. 29, 2005); *Carl E. Olson*, UI Dec. Hearing No. S9900256GB (LIRC Jan. 31, 2002); *Michael A. Pharo*, UI Dec. Hearing No. S9900158MD (LIRC Dec. 28, 2001); *SBR, Inc. supra*; *Herbert B. Zien*, UI Dec. Hearing No. S9100221MW (LIRC Apr. 29, 1992); *Charles A. Harvey*, UI Dec. Hearing No. S9100691MW (LIRC Dec. 18, 1992).

<sup>101</sup> *Feist*, 607 F.2d at 962.

<sup>102</sup> *Thomas R. Holter*, UI Dec. Hearing No. 8287, S (LIRC Apr. 4, 1990).

<sup>103</sup> *Hornshy v. I.R.S.*, 588 F.2d 952, 953 (5<sup>th</sup> Cir. 1979).

<sup>104</sup> *Champion Envtl. Serv., Inc. (Gorniak)*, UI Dec. Hearing No. S1400026MD PL (LIRC Dec. 8, 2016).

<sup>105</sup> *Henry A. Warner, supra*.

<sup>106</sup> *Kohl v. F.J.A. Christiansen Roofing & Co.*, 95 Wis. 2d 27, 36, 289 N.W.2d 329 (Ct. App. 1980); *Leslie A. Foster*, UI Dec. Hearing No. S0500006EC (LIRC Aug. 4, 2006); *aff’d sub nom., Leslie Foster v. LIRC*, No. 06-CV-538 (Wis. Cir. Ct. Eau Claire Cnty. July 9, 2007).

<sup>107</sup> *Feist, supra*.

For-Service revenue, during the relevant quarters. Moreover, the parent company, KBWB Operations, LLC, paid at least \$29,801,627.00 in cash distributions for its members between 2016 and 2018. According to the department, the putative debtors knew of and facilitated the millions of dollars of cash distributions instead of objecting to what they believed was unsustainable, and each continued to collect their salaries and bonuses and paid other creditors at the expense of the department. The department asserts that having an overbearing boss does not negate a person's responsibility to pay unemployment contributions, and Mr. Breslin's hostile personality is an inadequate reason to justify failing to hold the individuals personal liable. Similarly, according to the department, following orders and fear of termination are not acceptable defenses against personal liability. Here, the putative debtors chose to do nothing, and the department asserts that "no responsible person has license to break the law based on their fear of possible termination."<sup>108</sup>

*a. Kevin Breslin*

Kevin Breslin was aware that the unemployment taxes were unpaid and talked to the department about the unpaid taxes. He directed his staff to contact the department to work out a payment plan. He directed his staff not to pay the taxes, and he specifically told Gino Mignano not to pay the unemployment insurance taxes.<sup>109</sup> He also paid other corporate debts, including payments to himself and other "guaranteed payments" on Atrium's accounts throughout the entire period the taxes were owing. The amounts paid were each nearly large enough to pay off the entire tax bill. Yet, Mr. Breslin argues that he should not be found personally liable because he reasonably delegated and relied on Mr. Carriero and Mr. Mignano to carry out their duties and see that the unemployment insurance taxes were paid. He asserts that there is no credible testimony to prove his awareness of the outstanding obligation and that they failed to fulfill their responsibilities and keep him apprised of the status of the delinquency, which should negate the willfulness on his part.<sup>110</sup> Mr. Breslin argues that Mr. Carriero and Mr. Mignano are not credible when they assert that he was the only one to make financial decisions for Atrium. He points to the fact that when Jessica Durso contacted Atrium to try to reach someone who could address the unemployment tax issues, it did not occur to the people Ms. Durso spoke with to refer her to Mr. Breslin as the only person who could resolve the issue. Though Ms. Durso ultimately spoke with Mr. Breslin, she did so only once, and then worked with Mr. Carriero and Mr. Mignano on the issue. Mr. Breslin also asserts that Mr. Mignano was inconsistent in his testimony as to whether he told Mr. Mignano not to pay the unemployment insurance taxes.

The commission is not persuaded. The evidence shows that Mr. Breslin was aware of the obligation because he specifically communicated with the department representative about it, and he cannot absolve himself of liability by delegating it or leaving it to someone else to perform. A fiduciary cannot absolve himself merely by

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<sup>108</sup> DWD Brief, p. 20.

<sup>109</sup> Tr. 3, pp. 227, 230.

<sup>110</sup> Breslin Brief, p. 3.



disregarding his duty and leaving it to someone else to discharge.<sup>111</sup> In addition, the evidence shows that he directed payments to himself and others instead of to the payment of the unemployment taxes even after knowing the unemployment taxes were unpaid. It is no defense that the entity was in financial distress and spent the funds to keep the business operating with the expectation that sufficient revenue would later become available.<sup>112</sup> He had the means to pay the taxes, but failed to do so and favored other creditors. Thus, the evidence is sufficient to establish that he willfully paid other creditors, and no more is necessary to establish willfulness under the statute.<sup>113</sup> Accordingly, the commission finds that Kevin Breslin willfully failed to make the unemployment contribution payments to the department. **Therefore, the third condition is met for Kevin Breslin.**

*b. Robert Parkins, Mary Jo Parkins, Gino Mignano, and Anthony Carriero*

Though the commission has found that Robert Parkins, Mary Jo Parkins, Gino Mignano, and Anthony Carriero were not responsible persons under the law, it addresses the department's further arguments that they acted willfully to complete the analysis. The department argues that Robert Parkins was responsible for the payment of unemployment contributions, that he was aware of the debt, and that he prioritized other creditors over the department, which makes his failure to pay the contributions willful. He would have known of the January 31, 2017, deadline for the fourth quarter 2016 contributions and chose not to pay them. According to the department, Mr. Parkins "willingly chose to turn a blind eye toward insolvency he saw looming on the horizon."<sup>114</sup> He chose not to say anything when it was within his rights to do so. The department points to the testimony of Terri Rowe that it was Mr. Parkins who told her when to pay the unemployment contributions.

Even if Robert Parkins were a responsible person under the law, the commission is not persuaded that his actions could be construed as willfully failing to pay the unemployment taxes. Mr. Parkins resigned his employment with the employer on January 31, 2017, the due date of the first tax bill at issue in this case. He left his employment with Atrium on February 24, 2017. Though Mr. Parkins was an employee during two of the quarters at issue in these cases (the fourth quarter of 2016 and first quarter of 2017), the only quarter for which he could possibly be found personally liable is for the fourth quarter of 2016, which came due while he was still employed with the employer. This would be for a small portion of the amounts due in the determinations for UI Hearing Nos. S1900262MW, S1900272MW, and S1900270MW. *All of the other determinations and hearing numbers are for time periods where Mr. Parkins was not employed by the employer, and there is no basis in the evidence to support any of the other determinations for the other hearing numbers vis-à-vis Mr. Parkins.* For the taxes due for the fourth quarter of 2016,

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<sup>111</sup> *HGS Catering, Inc. (Skemp)*, *supra*, citing *Hornsby*, *supra*.

<sup>112</sup> *Champion Envtl. Serv., Inc. (Gorniak)*, *supra*, citing *Greenberg v. U.S.*, 46 F.2d 239, 244 (3<sup>rd</sup> Cir. 1994).

<sup>113</sup> See, e.g., *Carl E. Olson*, *supra*; *David M. Zuehlke & Assoc., Inc.*, *supra*; *Leo J. Schilz*, UI Dec. Hearing No. S0100133MW (LIRC Dec. 10, 2001).

<sup>114</sup> DWD Brief, p. 24.

though Mr. Parkins had overseen the payment of unemployment insurance taxes in the past, the finance and payroll functions had been transferred to the New Jersey office in early January 2017, before the payment for the quarter became delinquent. There is no credible evidence that by the time Mr. Parkins left his employment a few weeks later that he had any knowledge or should have known that Atrium had failed to pay the unemployment taxes for the fourth quarter of 2016. He credibly testified that he did not find out that Atrium was delinquent in its unemployment insurance taxes until he received the determination in September of 2019.

The commission also agrees with the appeal tribunal that even if he could have known of their non-payment for some reason, Mr. Parkins would have been powerless to make any such payment given Kevin Breslin's control of Atrium's finances, combined with his subsequent conduct after Mr. Parkins departure, i.e., specifically refusing to allow others to pay the taxes, as well as the transfer of those functions to the New Jersey office. When he had been responsible for overseeing the payment of the unemployment insurance taxes, Mr. Parkins ensured that they were paid and that the newly acquired accounts were brought current.<sup>115</sup> The department's witness, Michael Braun, corroborated this when he testified that he did not discuss any of the delinquencies at issue in this case with Mr. Parkins because his employment had ended before the delinquencies arose.<sup>116</sup> Another department witness, Terri Rowe, indicated that she was unaware of the delinquent unemployment insurance taxes before the second quarter of 2017, more than four months after Mr. Parkins had left his employment.<sup>117</sup> None of the department's witnesses testified that Mr. Parkins was aware of the delinquent unemployment insurance taxes while he was employed with the employer. Indeed, they testified that Mr. Breslin made the decisions on which bills to pay.<sup>118</sup> Accordingly, the commission finds that even if Robert Parkins could be considered a responsible person, he did not willfully fail to pay the unemployment taxes in the two quarters at issue when he was employed with the employer. **Therefore, the third condition is not met for Robert Parkins for any of the quarters at issue in this matter.**

Likewise, even if Mary Jo Parkins were a responsible person under the law, the commission is not persuaded that her actions could be construed as willfully failing to pay the unemployment taxes. The department asserts that as a CPA, Mary Jo Parkins knew or should have known of the unpaid unemployment contributions and the financial crisis facing the business, she was aware of the payments to the members of the LLC, and did nothing to ensure that the payments were made. According to the department, her actions were willful because she recklessly disregarded a risk that taxes were not being paid to the department. Given her access to the financial records, the department asserts that she should have made herself aware about delinquent unemployment contributions. The department argues that her failure to push for payment or resign makes her actions willful, and that she was

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<sup>115</sup> Tr. 1, pp. 34-41.

<sup>116</sup> Tr. 1, p. 100.

<sup>117</sup> Tr. 1, pp. 166-67.

<sup>118</sup> Tr. 1, pp. 102-103, 167-168, 227-228, 302-303, Tr. 3, pp. 166, 231-232.

a responsible person on notice of the company's insolvency and had to take action, advocate for change, or step down. The fact that she continued to accept a salary and bonuses while knowing the unemployment contributions were unpaid establish her personal liability.

The commission disagrees. Mary Jo Parkins' job did not involve payment of Atrium's debts of any kind. She had no legal power to write checks to pay any of Atrium's debts or to secure financing to pay them. She, therefore, cannot be deemed to have willfully failed to pay the outstanding unemployment insurance taxes. And, even if she should have known of their non-payment for some reason, Ms. Parkins would have been powerless to make any such payments given Kevin Breslin's control of Atrium's finances, combined with his subsequent conduct, i.e., specifically refusing to allow other to pay the taxes. Accordingly, the commission finds that even if Mary Jo Parkins could be considered a responsible person, she did not willfully fail to pay the unemployment taxes. **Therefore, the third condition is not met for Mary Jo Parkins.**

Similarly, even if Gino Mignano were a responsible person under the law, the commission is not persuaded that his actions could be construed as willfully failing to pay the unemployment taxes. The department argues that Gino Mignano asserts that he was only following Mr. Breslin's orders, but following orders is not a defense. He was aware of the unpaid taxes and discussed them with Mr. Breslin but paid only what Mr. Breslin told him to pay. As Treasurer, he owed a fiduciary duty to the company to ensure that the taxes were paid. He was aware of the unemployment contributions owed and was in contact with the department. The department asserts that Mr. Mignano is not credible that he had to request approval for every payment from Kevin Breslin. Even if Mr. Breslin told Mr. Mignano not to pay the unemployment contributions, the department argues that Mr. Mignano's preference for continued employment does not allow him to escape liability.

It is true that some courts have held under the federal law that someone who is a responsible person, who follows the directions of a supervisor not to pay the taxes, does so at his or her peril and may be found to have willfully failed to pay taxes.<sup>119</sup> However, another court noted that this may put the employee in a position equated with embezzlement, and instead found that a responsible person may be found liable for unpaid federal taxes under another federal law because the payroll taxes at issue are withheld from employees' income to pay the employees' income taxes and Social Security taxes, and they become trust funds of the United States when they are withheld. Under the federal statutes, the responsible officers have a trust obligation to remit those withheld funds to the United States and cannot choose not to do so.<sup>120</sup>

Where, as here, the credible evidence on the whole demonstrates that the chief executive officer had total control whether and when to pay the taxes, and others

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<sup>119</sup> *Gephart v. U.S.*, 818 F.2d 469, 475 (6<sup>th</sup> Cir. 1987); *Howard v. U.S.*, 711 F.2d 729 (5<sup>th</sup> Cir. 1983); *Brounstein v. U.S.*, 979 F.2d 952 (3<sup>rd</sup> Cir. 1992).

<sup>120</sup> *Roth v. U.S.*, 779 F.2d 1567 (11<sup>th</sup> Cir. 1986). By contrast, unemployment taxes are paid by employers and are not paid from taxes withheld from employees.

had no independent authority to expend the funds, the commission is persuaded that the individuals are not liable when they were dominated by the other person's decision making, under the logic of cases like *Heimark* and *Williams, supra*. Gino Mignano came to Atrium after the company was already in default on its Wisconsin unemployment taxes. He advised Kevin Breslin to pay them, but Mr. Breslin refused. Mr. Mignano even tried to work out a payment plan with the department to pay off the debt after Mr. Breslin delegated the task to him to do so. However, his efforts were thwarted when Mr. Breslin revoked that delegated authority. Mr. Mignano had no authority to override Mr. Breslin's decision on that. Accordingly, the commission finds that even if Gino Mignano could be considered a responsible person, he did not willfully fail to pay the unemployment taxes. **Therefore, the third condition is not met for Gino Mignano.**

Finally, even if Anthony Carriero were a responsible person under the law, the commission is not persuaded that his actions could be construed as willfully failing to pay the unemployment taxes. The department argues that Mr. Carriero had responsibility and oversight for the delinquent unemployment contributions, and that he had access to detailed financial reports and knew of the unpaid taxes, but he chose to follow orders and not push for the payments to the department. The department asserts that Mr. Carriero made a conscious, voluntary, and intentional decision to divert funds elsewhere at the expense of the department since he had signing authority on the account used to pay the unemployment contributions and attended weekly meetings to discuss which bills to pay. Since he was aware of the debt owned, communicated with the department about the debt, and reviewed financial reports, the department argues that his failure to pay the unemployment taxes was willful. He took no steps to ask Kevin Breslin to pay the taxes because he thought he would have been fired. According to the department, this was a reckless disregard of his responsibilities.

Anthony Carriero argues that he had no ongoing knowledge of the company's unemployment tax debt and simply served as an intermediary for Mr. Breslin; he argues he did not have anything more than a cursory awareness of the unemployment debt. Moreover, even with what he was aware of in relation to the unemployment debt, he had no authority to make any payment. At Kevin Breslin's instruction, Mr. Carriero worked with the department for a time to try to pay the outstanding back taxes. However, Mr. Breslin thwarted those efforts and removed any negotiating and payment authority that Mr. Carriero may have had, rendering it impossible for Mr. Carriero to strike a deal or to pay the unemployment debt.

The commission agrees with Mr. Carriero and finds him credible that he had no authority to override Mr. Breslin's decision on whether or when to pay the unemployment taxes. Mr. Carriero had no effective choice in paying the taxes after Mr. Breslin told him not to. Mr. Breslin dominated the decision making regarding the payments to creditors, including the unemployment taxes. Accordingly, the commission finds that even if Anthony Carriero could be considered a responsible

person, he did not willfully fail to pay the unemployment taxes. **Therefore, the third condition is not met for Anthony Carriero.**

4. *The department first must have engaged in proper collection efforts against the employer to collect the delinquent contributions.*

The requirement that the department engage in proper collection efforts does not require the department to have exhausted or engaged in all possible proceedings. Proof of competent evidence of a series of actions such as initial determinations to an employer, notices prior to levy and levies against it, payment agreements, and warrants meet this condition of the statute.<sup>121</sup>

In this case, the appeal tribunal issued a bench decision finding that the department engaged in proper collection efforts against the employers prior to pursuing personal liability against each of the putative debtors.<sup>122</sup> This was based on lengthy, substantial, and uncontroverted testimony from a department witness, who detailed at least 64 separate attempts to file levy actions against Atrium's various accounts to recoup the unpaid taxes. On appeal, the department argues that the appeal tribunal correctly concluded that this condition was met. The department asserts that it began collection proceedings against the employer on March 21, 2017. It issued contribution liability determinations against the corporation and engaged in several collection efforts, including mailing monthly unemployment contribution statements, making courtesy calls to follow-up on payment, issuing the initial determinations, filing 106 unemployment tax warrants in various circuit courts, sending the IRS tax offset program notices, filing 64 levies against bank accounts, and filing a claim in the receivership proceeding. Despite these efforts, the corporation never satisfied its debt to the department and the department then proceeded with the determinations for personal liability. Based on these extensive efforts, the department argues that this condition was met for all individuals.

The department asserts that, except for Mr. Breslin, the other putative debtors stipulated that the department established proper collection proceedings. The parties variously stipulated that the department sent collection notices to the corporation, but they indicated that the department did not send notices to the individuals.<sup>123</sup> On appeal to the commission, Mr. Carriero argues that he was *not* subject to proper collection efforts by the department. He asserts that it appears that the only basis for the department including him in the personal liability determinations was because they had his contact information from when he spoke with Ms. Durso. Mr. Carriero argues that the department's collection efforts against a corporate employer have targeted an employee who did nothing more than ministerial or perfunctory actions in the scope of his job duties that barely touched on unemployment issues. According to Mr. Carriero, since there is no reasonable basis from the hearing record to think he had any role whatsoever in determining the tax liabilities of the company, there

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<sup>121</sup> *TRC Holdings, Inc. (Trier)*, UI Dec. Hearing No. S1000331MW (LIRC Sep. 11, 2014); *Corley Trucking, Inc. (Corley)*, UI Dec. Hearing No. S1600241MD (LIRC May 31, 2018).

<sup>122</sup> Tr. 3, pp. 347-348.

<sup>123</sup> Tr. 3, pp. 293-294.

is no reasonable legitimate reason to think the department's collection efforts against KBWB Operations should include him in his personal capacity. He asserts that this "liability by department awareness" provides an incentive for employers to conceal the identity of the actual managers responsible for payment of the tax liabilities because the department will simply pursue actions against employees of which the department is aware.<sup>124</sup>

The commission finds that the department presented competent evidence of the actions it took against the employers prior to seeking to find the individuals personally liable, including issuing initial determinations to the employers, sending monthly tax collection statements, sending notices prior to levy and levies, sending notices to intercept federal tax returns, attempting to discuss the delinquent taxes with the employers, entering payment agreements, and issuing warrants. **Therefore, the commission finds that this fourth condition is met for all of the putative debtors.**

**In summary, based on the totality of the circumstances and the record as a whole, and applying the law to the facts in a pragmatic manner, the commission finds that the first condition is met for Kevin Breslin, Mary Jo Parkins, and Anthony Carriero for the fourth quarter of 2016 through the third quarter of 2018; the condition is met for Robert Parkins for only the fourth quarter of 2016 and part of the first quarter of 2017; and it is met for Gino Mignano for the first quarter of 2017 through the third quarter of 2018. The fourth condition is met for all of the putative debtors; and the second and third conditions are met only for Kevin Breslin.** By these findings, the commission does not find that *only* the highest-ranking official and not others with significant authority or control to pay the unemployment taxes can be found liable, or that *only* one person may be found personally liable, just that the facts and credible evidence here demonstrate that Kevin Breslin is the only responsible person in these cases and the other putative debtors did not have significant authority or control to pay the unemployment taxes. The statute requires that all four conditions be met before an individual can be found personally liable for the unpaid unemployment insurance taxes. **All four statutorily required conditions are met only for Kevin Breslin. Therefore, only Kevin Breslin is personally liable for the payment of delinquent unemployment insurance taxes, interest, penalties, and special assessments owed by the above-named employers. Accordingly, the commission modifies and affirms the decisions of the appeal tribunal.**<sup>125</sup>

cc: Atty. Kathleen M. Quinn  
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<sup>124</sup> Carriero Brief, p. 12.

<sup>125</sup> The appeal tribunal did an exceptional job handling the hearings in this matter and is to be commended for creating a clear record, organizing the voluminous materials, and rendering well-analyzed decisions. The commission has rewritten the decisions to clarify the statutory requirements, to ensure that the analyses of the statutorily required conditions more closely reflects the statutory language, and to consolidate the information for the benefit of the parties and the courts in the event of any further appeal.