



1 IS DECIDED AND ORDERED AS FOLLOWS:

2 **FINDINGS OF FACT**

3 1. In July of 2014, Mr. Drew Markell was hired to work for Physicians Accountable  
4 Care Organization (“PACO”) by Dr. Philip Briggs, who was the owner of multiple entities  
5 engaged in the business of providing health care services in New Mexico, including Santa Fe  
6 Medical Group, LLC. [Direct Examination of Mr. Markell]

7 2. At all relevant times, Mr. Markell resided in Arizona, from where he performed a  
8 significant amount of his work for PACO and commuted when necessary to New Mexico.  
9 [Direct Examination of Mr. Markell]

10 3. During the initial first six months of his employment, Mr. Markell’s work  
11 concentrated primarily on PACO. [Direct Examination of Mr. Markell]

12 4. Near the end of 2014, Mr. Markell reached an agreement with Dr. Briggs to serve  
13 as chief executive officer (CEO) for other entities which he also owned including: (1) Atrinea  
14 Health, LLC; (2) Atrinea Ruidoso, LLC; (3) Corazon Family Health, PC; and (4) Santa Fe  
15 Medical Group, LLC (collectively referred to as the “entities”). [Direct Examination of Mr.  
16 Markell]

17 5. Dr. Briggs pursued Mr. Markell to establish an executive office with the objective  
18 of “turn[ing] the entit[ies] around” because they were having significant problems stemming  
19 from poor management. [Cross Examination of Mr. Markell]

20 6. It was subsequently determined during the ensuing bankruptcy proceeding that the  
21 entities had been insolvent since 2013. [Cross Examination of Mr. Markell]

22 7. At the time Mr. Markell began his tenure as CEO, he had approximately 15 years  
23 of experience in the health care field, yet the duties he incurred as CEO for the various entities

1 represented the most complex work of his career. [Cross Examination of Mr. Markell]

2 8. Each entity was separate and distinct from each other and individually registered  
3 to pay taxes in the State of New Mexico. [Direct Examination of Mr. Markell]

4 9. The issues at hand in the present matter stem exclusively from Santa Fe Medical  
5 Group, LLC. [Administrative File]

6 10. At the time he assumed the role of CEO, Mr. Markell was aware that the various  
7 entities had significant problems but did not appreciate the breadth and depth of those problems  
8 until he began his work as CEO. [Direct Examination of Mr. Markell]

9 11. Mr. Markell identified a variety of issues that he would attempt to resolve during  
10 his tenure as CEO, including the systemic failure to collect co-payments from patients, failure to  
11 bill patients for services not covered by insurance, inaccuracy in submissions to insurance  
12 providers, failure to follow up on rejected insurance claims, lack of adequate financial safeguards  
13 and controls, lack of inventory control, employee incompetence, and financial mismanagement  
14 or impropriety, all of which contributed to the poor condition of the entities' financial affairs,  
15 and ultimately, their insolvency. [Cross Examination of Mr. Markell]

16 12. Mr. Markell commenced efforts to accomplish his objectives by initiating several  
17 personnel changes, the most relevant for present purposes being at the position of chief financial  
18 officer for the entities. [Direct Examination of Mr. Markell]

19 13. Mr. Markell recommended an individual who was eventually hired by Dr. Briggs  
20 to serve as chief financial officer (CFO)<sup>1</sup>. [Direct Examination of Mr. Markell]

21 14. Mr. Markell and the CFO had known each other for several years as peers when

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<sup>1</sup> The Hearing Officer will not refer to the CFO by name in this Decision and Order. The individual's name is, however, referenced frequently in the evidentiary record.

1 they previously worked for separate companies. Their relationship for the entities would  
2 represent the first time they would occupy the positions of CEO and CFO for the same employer.

3 [Cross Examination of Mr. Markell]

4 15. The new CFO commenced employment in January of 2015. [Direct Examination  
5 of Mr. Markell; Taxpayer Ex. 4]

6 16. Shortly after the CFO commenced employment, in consultation with accounting  
7 and legal professionals, the decision was made that Atrinea Health, LLC, Atrinea Ruidoso, LLC,  
8 Corazon Family Health, PC, and Santa Fe Medical Group, LLC would commence bankruptcy  
9 proceedings under Chapter 11 of the U.S. Bankruptcy Code. [Direct Examination of Mr.  
10 Markell]

11 17. Upon suggestion or advice of counsel, the individual entities merged within a new  
12 entity called Atrinea Holdings, LLC, and thereafter initiated bankruptcy proceedings. The  
13 bankruptcy petition was rejected and each entity was required instead to proceed individually,  
14 although they were ultimately granted leave for a joint administration. [Direct Examination of  
15 Mr. Markell]

16 18. Despite the apparent convenience of a joint administration, Mr. Markell perceived  
17 the administration of the bankruptcy to be rather complex because each individual entity's  
18 separate obligations to maintain multiple financial accounts, separate accounting records, and  
19 adhere to separate reporting obligations. [Direct Examination of Mr. Markell]

20 19. During pendency of the bankruptcy, Mr. Markell relied extensively and  
21 exclusively on the CFO to provide fiscal oversight and perform all fiscal obligations which  
22 allowed Mr. Markell to concentrate on other business-related matters, although Mr. Markell  
23 recognized that he nevertheless retained the ultimate responsibility to assure that financial

1 obligations continued to be satisfied. [Direct Examination of Mr. Markell]

2           20.     Mr. Markell retained and exercised significant control of the various entities'  
3 operations and implemented various policies intended to improve financial controls. For  
4 example, payment of any expenditures exceeding \$5,000 needed to be personally approved by  
5 Mr. Markell, and he managed the control of inventory. [Cross Examination of Mr. Markell;  
6 Department Ex. G]

7           21.     Although the entities had previously utilized the services of a third-party certified  
8 public accountant (CPA), Mr. Markell terminated the certified public accountant because that  
9 individual was behind schedule and unable to meet deadlines. [Cross Examination of Mr.  
10 Markell]

11           22.     The terminated CPA was not replaced because the CFO believed that the CFO,  
12 with the assistance of other staff could get the entities' accounts back in good order. [Cross  
13 Examination of Mr. Markell]

14           23.     Mr. Markell could not recollect whether the terminated CPA ever raised issues  
15 with regard for outstanding withholding tax liabilities. [Cross Examination of Mr. Markell]

16           24.     Mr. Markell perceived his substantial reliance on the CFO as reasonable under the  
17 circumstances, and denied any reason to believe that withholding taxes, as well as other financial  
18 obligations were not being satisfied. [Direct Examination of Mr. Markell]

19           25.     Mr. Markell believed he was well informed of all issues. Mr. Markell and the  
20 CFO met on a weekly basis to discuss the status of various accounts and issues relating to cash  
21 flow, and particularly the status of various financial obligations as detailed on an aging report  
22 prepared by the CFO. [Direct Examination of Mr. Markell]

23           26.     The aging report was manually created by the CFO and listed outstanding debts

1 and the length of time the debt had been outstanding. It assisted Mr. Markell and the CFO in  
2 prioritizing payments of obligations based on the length of time the obligation had been  
3 outstanding. [Direct Examination of Mr. Markell]

4 27. Mr. Markell relied exclusively on the accuracy and completeness of the  
5 information provided by the CFO and never reviewed any of the underlying financial  
6 documentation or data. [Cross Examination of Mr. Markell]

7 28. At no time during his ongoing communications with the CFO did Mr. Markell  
8 ever recall the CFO disclosing that there were any outstanding liabilities or concerns for tax  
9 obligations to the State of New Mexico. [Direct Examination of Mr. Markell]

10 29. Examples of the documents prepared by the CFO submitted for Mr. Markell's  
11 review are provided in the spreadsheets identified as Taxpayer Exhibits 1, 2, 3, 5, and 7. The  
12 spreadsheets were manually created and were not generated by any accounting software known  
13 to Mr. Markell. [Direct Examination of Mr. Markell]

14 30. In or around May of 2015, Ms. Margaret Duenas, payroll specialist for Santa Fe  
15 Medical Group, stated in a sworn statement that she participated in preparing financial reports.  
16 "These reports showed that payroll taxes were a growing liability[.]" She went on to explain that  
17 the reports "were then presented to Drew Markell, who would ask questions, review, and then  
18 sign off on the reports." [Department Ex. F-02]

19 31. Department records similarly reflect communications including Mr. Markell and  
20 the CFO in the early portion of 2015 (March 3, 2015 and April 1, 2015) regarding the  
21 outstanding tax liability and options for entering a payment plan. [Direct Examination of Mr.  
22 Pacheco; Taxpayer Ex. 10-3; Taxpayer Ex. 10-04]

23 32. Mr. Markel disclaimed knowledge of a withholding tax liability until the latter

1 portion of 2015. [Direct Examination of Mr. Markell]

2 33. In December of 2015, less than one year after hiring the CFO, Mr. Markell  
3 terminated the CFO's employment. Mr. Markell determined that the CFO failed to satisfactorily  
4 perform the CFO's job duties, including the failure to adequately inform Mr. Markell of various  
5 matters that were essential to his decisions as CEO, including the failure to make timely  
6 payments toward employee 401(k) plans. [Direct Examination of Mr. Markell]

7 34. After the CFO's termination, Mr. Markell determined that information provided  
8 to him by the CFO on a variety of financial matters was inaccurate, which also included  
9 information that had been provided in the bankruptcy proceedings. [Direct Examination of Mr.  
10 Markell]

11 35. Subsequent to the CFO's termination, Mr. Markell discovered correspondence in  
12 the CFO's office suggesting that the CFO was aware of an outstanding New Mexico state tax  
13 liability for which Mr. Markell was allegedly unaware. [Cross Examination of Mr. Markell]

14 36. Santa Fe Medical Group reported, but did not pay, withholding taxes in the  
15 periods between April 30, 2015 and November 30, 2015. After November 30, 2015, Santa Fe  
16 Medical Group ceased reporting altogether. [Direct Examination of Mr. Pacheco]

17 37. Under the policy implemented by Mr. Markell, the CFO should have promptly  
18 notified him of any issues of which he was made aware with regard for liabilities exceeding  
19 \$5,000, including state tax liabilities, but that the CFO had not done so in this instance. [Cross  
20 Examination of Mr. Markell]

21 38. On at least one prior occasion, the CFO was admonished for failure to bring bills  
22 exceeding \$5,000 to Mr. Markell's attention. [Cross Examination of Mr. Markell]

23 39. Mr. Markell indicated that he was uninformed of the particulars of New Mexico

1 tax law, such as the distinction between gross receipts tax and withholding tax. [Cross  
2 Examination of Mr. Markell]

3 40. Mr. Markell denied having any knowledge regarding the method through which  
4 state withholding taxes are paid in New Mexico. [Cross Examination of Mr. Markell]

5 41. Mr. Markell was authorized to write checks for expenditures, and after the CFO's  
6 termination, managed the effort to return the employee 401(k) plan to good standing. [Cross  
7 Examination of Mr. Markell]

8 42. Mr. Markell, in addition to his executive functions for the entities, was wholly  
9 involved and intimately familiar with the bankruptcy proceedings, estimating that he testified no  
10 fewer than a dozen times in the U.S. Bankruptcy Court. [Cross Examination of Mr. Markell]

11 43. With concern for the bankruptcy proceedings, Mr. Markell signed all monthly  
12 operating reports submitted to the U.S. Bankruptcy Court. The reports were initially prepared by  
13 the CFO and submitted for Mr. Markell's review with tabs indicating where he should affix his  
14 signature. Mr. Markell relied heavily on the CFO to inform him of any significant issues in the  
15 reports. [Cross Examination of Mr. Markell]

16 44. Mr. Markell signed all monthly operating reports as "President/CEO." [Cross  
17 Examination of Mr. Markell; Department Exs. A - B]

18 45. Even though monthly operating reports identified the Department as a creditor,  
19 Mr. Markell had no specific recollection of reviewing or making further inquiry in reference to  
20 Department's status as a creditor in the bankruptcy proceedings, even though various bankruptcy  
21 reports and pleadings made specific and express reference to outstanding New Mexico state tax  
22 liabilities. [Cross Examination of Mr. Markell; Department Ex. B-06; Department Ex. B-11;  
23 Department Ex. B-14; Department Ex. C-06 – C-07; Department Ex. C-14; Department Ex. C-

18; Department Ex. D-03 – D-04; D-06 – D-07; Department Ex. E-04]

46. At some point while the bankruptcy was pending, Mr. Markell made an offer to purchase the entities, but the offer was rejected by the creditors in bankruptcy. [Cross Examination of Mr. Markell]

47. During the proceeding, Mr. Markell became aware that Dr. Briggs<sup>2</sup> may have initiated various transactions which were not recorded in any accounts of the entities in bankruptcy, including transfers of funds to third-party individuals that may have been improper. [Direct Examination of Mr. Markell]

48. Based in part on those revelations, the bankruptcy was eventually converted to a proceeding under Chapter 7 of the U.S. Bankruptcy Code. [Direct Examination of Mr. Markell]

49. In hindsight, nothing on Mr. Markel’s personal payroll documents indicated that there were any issues with respect to his personal withholdings. However, state withholdings for Mr. Markell were paid to the state of Arizona, not New Mexico. [Direct Examination of Mr. Markell; Taxpayer Ex. 9; Direct Examination of Mr. Pacheco]

50. The Department’s GenTax software system indicates that Mr. Markell was identified as a corporate officer in 2016 upon the suggestion of another Department employee presumably based on information obtained through the bankruptcy proceeding. [Direct Examination of Mr. Pacheco; Taxpayer Ex. 12]

51. As of May 16, 2019, the balance of outstanding withholding tax, penalty, and interest for Santa Fe Medical Group, LLC was:

<b>Period</b>	<b>Tax</b>	<b>Penalty</b>	<b>Interest</b>	<b>Total</b>
4/30/2015	\$8,848.48	-	-	\$8,848.48
5/31/2015	\$8,027.17	\$1,605.40	\$1,294.20	\$10,926.77
6/30/2015	\$5,295.07	\$1,059.00	\$840.62	\$7,194.69

<sup>2</sup> The parties did not dispute that Dr. Briggs is deceased.

7/31/2105	\$6,744.97	\$1,348.99	\$1,052.79	\$9,146.75
8/31/2015	\$3,779.07	\$755.80	\$579.43	\$5,114.30
9/30/2015	\$782.19	\$156.40	\$119.75	\$1,058.34
	<b>\$33,476.95</b>	<b>\$4,925.59</b>	<b>\$3,886.79</b>	<b>\$42,289.33</b>

1 [Department Ex. H]

2 52. On October 2, 2017, the Department issued a Notice of Assessment of Taxes and  
3 Demand for Payment under Letter ID No. L0510542640 (“Assessment”) claiming a total amount  
4 due of \$40,336.03. [Administrative File]

5 53. The Assessment was issued to “Drew Markell Corp. Officer for Santa Fe Medical  
6 Group[.]” [Administrative File]

7 54. Mr. Markell submitted his Formal Protest of the Assessment to the Department on  
8 January 2, 2018. [Administrative File]

9 55. The Department acknowledged Mr. Markell’s protest on January 17, 2018 under  
10 Letter ID No. L0167471920. [Administrative File]

11 56. The Department requested a scheduling hearing on Taxpayer’s protest on April  
12 17, 2018.

13 57. On April 18, 2018, the Administrative Hearings Office entered a Notice of  
14 Telephonic Scheduling Hearing which set an initial hearing for May 8, 2019. [Administrative  
15 File]

16 58. A telephonic scheduling hearing occurred on May 8, 2019 at which time the  
17 Hearing Officer noted the following: (a) Taxpayer’s protest was received in the Department’s  
18 Protest Office on January 2, 2018; (b) the Department acknowledged Taxpayer’s protest on  
19 January 17, 2018; (c) the Department requested a scheduling hearing in this matter with the  
20 Administrative Hearings Office on April 17, 2018; (d) ninety calendar days elapsed from January  
21 17, 2018 to April 17, 2018; (e) the Administrative Hearings Office had no knowledge of

1 Taxpayer's protest prior to April 17, 2018; (f) the 90<sup>th</sup> day from the date upon which the  
2 Department acknowledged Taxpayer's protest was April 17, 2018; (g) the Department's delay in  
3 filing a hearing request deprived the Administrative Hearings Office of the opportunity to set a  
4 hearing on or before April 17, 2018. [Administrative File]

5 59. On May 10, 2018, the Administrative Hearings Office entered a Notice of Second  
6 Telephonic Scheduling Conference setting a hearing for June 22, 2018 upon the request of the  
7 parties that they might benefit from conferring and exchanging documents prior to proceeding  
8 with scheduling. [Administrative File]

9 60. On June 26, 2018, the Administrative Hearings Office entered a Scheduling Order  
10 and Notice of Administrative Hearing which in addition to establishing various prehearing  
11 deadlines, set a hearing on the merits to occur on April 1, 2019. [Administrative File]

12 61. On April 1, 2019, Mr. Markell failed to appear due to his misunderstanding that  
13 his hearing was set to occur in person at the Administrative Hearings Office in Santa Fe, NM.  
14 With the concurrence of counsel for the Department, the merits hearing was converted to a  
15 telephonic scheduling hearing and the matter was reset for May 16, 2019. [Administrative File]

## 16 **DISCUSSION**

17 The issue in the protest is whether Mr. Markell is personally liable pursuant to NMSA  
18 1978, Section 7-3-5 (2010) for that amount of withholding tax that Santa Fe Medical Group,  
19 LLC deducted from compensation paid to its employees, but not remitted to the Department, plus  
20 associated penalty and interest. Santa Fe Medical Group, LLC was one of several entities for  
21 which Mr. Markell served as CEO and the only entity at issue in the present matter.

### 22 **Presumption of Correctness & Burden of Proof.**

23 Under NMSA 1978, Section 7-1-17 (C) (2007), the Assessment from which this protest

1 arises is presumed correct and the burden rests on Taxpayer to overcome the presumption. *See*  
2 *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428, 504 P.2d 638. Unless otherwise  
3 specified, for the purposes of the Tax Administration Act, “tax” includes interest and civil  
4 penalty. *See* NMSA 1978, Section 7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the  
5 presumption of correctness under Section 7-1-17 (C) similarly extends to the Department’s  
6 assessment of penalty and interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep’t of Taxation &*  
7 *Revenue*, 2006-NMCA-50, ¶16, 139 N.M. 498, 503, 134 P.3d 785, 791 (agency regulations  
8 interpreting a statute are presumed proper and are to be given substantial weight).

9 For that reason, Taxpayer carries the burden to present countervailing evidence or legal  
10 argument to show that it is entitled to an abatement of an assessment. *See N.M. Taxation &*  
11 *Revenue Dep’t v. Casias Trucking*, 2014-NMCA-099, ¶8, 336 P.3d 436. “Unsubstantiated  
12 statements that the assessment is incorrect cannot overcome the presumption of correctness.” *See*  
13 *MPC Ltd. v. N.M. Taxation & Revenue Dep’t*, 2003-NMCA-021, ¶13, 133 N.M. 217, 62 P.3d  
14 308; *See also* Regulation 3.1.6.12 NMAC. If a taxpayer presents sufficient evidence to rebut the  
15 presumption, then the burden shifts to the Department to re-establish the correctness of the  
16 assessment. *See MPC*, 2003-NMCA-021, ¶13.

### 17 **The Withholding Tax Act.**

18 Payment of withholding taxes is controlled by the Withholding Tax Act, which at NMSA  
19 1978, Section 7-3-3 (A), requires that every “employer” deducting and withholding a portion of  
20 an employee’s wages for payment of income tax under the provisions of the Internal Revenue  
21 Code also deduct and withhold an amount for each payroll period for state tax.

22 The Withholding Tax Act defines “employer” as “a person or an officer, agent or  
23 employee of that person having control of the payment of wages, doing business in or deriving

1 income from sources within the state for whom an individual performs or performed any service  
2 as the employee of that person, except that if the person for whom the individual performs or  
3 performed the services does not have control over the payment of the wages for such services,  
4 ‘employer’ means the person having control of the payment of wages” *See* NMSA 1978, Section  
5 7-3-2 (C).

6 Section 7-3-5 goes on to require that “[e]very withholder shall be liable for amounts  
7 required to be deducted and withheld by the Withholding Tax Act regardless of whether the  
8 amounts were in fact deducted and withheld.” The definition of “withholder” includes  
9 “employer.” *See* NMSA 1978, Section 7-3-2 (M).

10 Considering the totality of the evidence presented, the Hearing Officer was persuaded  
11 that despite the complexity of the circumstances underlying Mr. Markell’s tenure as CEO, he  
12 was ultimately a person having control over the payment of wages and is therefore liable under  
13 the Withholding Tax Act pursuant to Section 7-3-5.

14 The term “having control of the payment of wages[.]” as utilized in Section 7-3-2 (C) is  
15 dispositive, and although Mr. Markell understandably assigns substantial fault to others,  
16 primarily the CFO he supervised, Mr. Markell undeniably retained the ultimate responsibility to  
17 the employees of Santa Fe Medical Group, LLC to assure that money withheld from their wages  
18 was properly paid to the State, despite his delegation of responsibility to others.

19 The term “having control of the payment of wages” has been subject of prior discussion  
20 at the federal level, which similarly requires employers to withhold employee wages for the  
21 payment of personal income taxes due. *See* 26 U.S.C. Section 3403. Similar to the use of the  
22 term in New Mexico, “the term ‘employer’ means the person for whom an individual performs  
23 or performed any service, ...except that ... if the person for whom the individual performs or

1 performed the services does not have control of the payment of the wages for such services, the  
2 term ‘employer’ (except for purposes of subsection (a)) means the person having control of the  
3 payment of such wages...” See 26 U.S.C. Section 3401 (d).

4 The United States Supreme Court considered “control of the payment of wages” in *Otte*  
5 *v. United States*, 419 U.S. 43 (1974), affirming a lower court judgment that a bankruptcy trustee  
6 was in control of the payment of wages, and therefore liable for federal wage withholdings,  
7 during the pendency of a bankruptcy proceeding. The Court reasoned that Congress intended to  
8 place responsibility at the point of control. See *Southwest Restaurant Systems Inc. v. I.R.S.*, 607  
9 F.2d 1237 (9<sup>th</sup> Cir. 1979); *Abel v. United States (In re Abel)*, 200 B.R. 816, 822 (E.D. Pa. 1996).

10 In the present case, although Santa Fe Medical Group, LLC was also in bankruptcy, it  
11 operated as debtors in possession pursuant to Sections 1107 and 1109 of the Bankruptcy Code  
12 and retained primary control of its own finances subject to the court’s oversight.

13 Section 1107 of the Bankruptcy Code elevates a debtor in possession to a fiduciary  
14 position, having all authority of a Chapter 11 trustee, including accounting of property,  
15 evaluating claims and stating objections, and filing informational reports, such as monthly  
16 operating reports. See 11 U.S.C. Sections 1106 & 1107; Fed. R. Bankr. P. 2015 (a). Among other  
17 fiduciary obligations, a debtor in possession retains responsibility for filing tax returns and  
18 reports which are either necessary or ordered by the court.

19 Mr. Markell suggested that by virtue of the pending bankruptcy, a variety of other  
20 individuals shared in the responsibility to assure that taxes were being paid, including the  
21 Department, the bankruptcy trustee, and even the presiding bankruptcy judge to name a few. The  
22 Hearing Officer, although empathetic to Mr. Markell’s predicament, remains unpersuaded by his  
23 reasoning. Responsibility to make withholding payments rested with Santa Fe Medical Group,

1 LLC and its executives, and Mr. Markell was the executive to whom all others answered. He was  
2 intimately familiar with the progress of the bankruptcy, having testified numerous times on  
3 various issues, and having signed all reports, even if his testimony suggested that the depth of his  
4 reviews may have been superficial at times. He also had unrestricted access to all financial  
5 records and authority over all finances, not to mention the authority within the organization to  
6 direct the responsibilities and obligations of others, oversee inventory of supplies or equipment,  
7 or to retain the professional services of accountants or attorneys as he believed necessary. There  
8 was simply no reliable or persuasive evidence to support any conclusion to the contrary that Mr.  
9 Markell was not the person having control over the payment of wages. *See Abel v. United States*  
10 *(In re Abel)*, 200 B.R. 816, 821 (E.D. Pa. 1996) (hallmarks of control include signing or the  
11 ability to sign checks and tax returns, the power to hire and fire employees, and directing when  
12 and which creditors are to be paid ahead of the government).

13 This is not to insinuate that Mr. Markell was the only individual having control, but the  
14 fact that others could have exercised control does not alleviate or discharge Mr. Markell from  
15 liability just as Mr. Markell's liability may not have any effect on the liability of others.  
16 However, the liability of others is not before the tribunal in this protest.

17 In *Southwest Restaurant*, the Federal Circuit Court of Appeals considered whether having  
18 shared control of an account reduced liability and determined that the share control of a few did  
19 not lessen the responsibility of the individual whose primary function was to assure that the task  
20 was accomplished.

21 Previous cases before this tribunal have reached comparable results under similar facts.  
22 *In the Matter of the Protest of Bryan Templeton*, Decision and Order #10-03  
23 (N.M.Tax.Rev.Dept., Hearings Bureau, March 18, 2010; non-precedential), the hearing officer

1 held that a chief accounting officer was an “employer” under the statute and liable for unpaid  
2 withholding tax. The evidence in that case included publicly available corporate documents that  
3 showed the taxpayer’s role as a director, evidence he signed employees’ paychecks, evidence he  
4 signed income tax returns, and evidence he held himself out to be the “Taxpayer or agent” of the  
5 organization. *In the Matter of the Protest of Eugene Baker*, Decision and Order # 01-30 (N.M.  
6 Tax. Rev. Dep’t., Hearings Bureau, November 1, 2001; non-precedential), is consistent with the  
7 reasoning in *Templeton* (there is no question that a person is liable, in the instance when a person  
8 admits he was the corporate officer, was primarily responsible for business operations, and had  
9 authority to sign tax returns and make payments on behalf of the organization).

10 By comparison, the decision *In the Matter of the Protest of Andrew Winton*, Decision and  
11 Order #15-32 (N.M. Administrative Hearings Office, September 29, 2015; non-precedential)  
12 acknowledges that the factual posture of each case requires focused consideration. In that case,  
13 the taxpayer, who appeared as a director in corporate documents for the limited liability  
14 company, but who had no check-writing authority and no role in the business was not found  
15 liable as an “employer.”

16 The evidence related to the control of payment of wages in this protest more closely  
17 resembles the facts in *Templeton* and *Baker*. Mr. Markell was the chief executive officer of Santa  
18 Fe Medical Group, LLC. He had oversight and control over all aspects of Santa Fe Medical  
19 Group, LLC’s management, including its fiscal operations. These powers included implementing  
20 and enforcing policies for prioritizing and paying debts, writing checks, processing mail, and  
21 managing personnel, including the authority to hire and fire. Mr. Markell then reported the  
22 condition of Santa Fe Medical Group, LLC’s finances to the bankruptcy court under the title  
23 “President/CEO.”

1           Therefore, the Hearing Officer was ultimately persuaded by a preponderance that Mr.  
2 Markell was a person having control of wages and therefore, an “employer.”

3           The Hearing Officer considered whether any of the circumstances presented by Mr.  
4 Markell might except him from personal liability under Section 7-3-5 (B) which states “if the  
5 withholder's failure to deduct and withhold the required amounts was *due to reasonable cause*,  
6 the withholder shall not be liable for amounts not deducted and withheld.” The term “lack of  
7 reasonable cause” has been previously equated with “negligence.” *See Gathings v. Bureau of*  
8 *Revenue*, 1975-NMCA-016, 87 N.M. 334, 533 P.2d 107. Thus the “lack of reasonable cause”  
9 may be construed as the equivalent to “negligence”. Therefore, the term “due to reasonable  
10 cause” may be alternatively construed as a “lack of negligence” or “nonnegligence” as that term  
11 is used in Regulation 3.1.11.11 NMAC.

12           The Department, in other contexts, has defined “negligence” as follows:

13                   3.1.11.10 NEGLIGENCE: Taxpayer “negligence” under  
14                   Subsection 7-1-69A NMSA 1978 means:

15                   A. failure to exercise that degree of ordinary business care and  
16                   prudence which reasonable taxpayers would exercise under like  
17                   circumstances;

18                   B. inaction by taxpayers where action is required;

19                   C. inadvertance, indifference, thoughtlessness, carelessness,  
20                   erroneous belief or inattention.

21                   [11/5/85, 8/15/90, 10/31/96; 3.1.11.10 NMAC - Rn & A, 3 NMAC  
22                   1.11.10, 1/15/01]

23           Although not explicitly applicable to Section 7-3-5, the definition of negligence is  
24 instructive in considering whether Mr. Markell’s actions were negligent or lacking reasonable  
25 cause. The Hearing Officer concluded that even if viewing the evidence in the light most  
26 favorable to Mr. Markell, that he failed to exercise that degree of ordinary business care and

1 prudence which reasonable taxpayers would exercise under like circumstances.

2 All the information he needed to evaluate the status of Santa Fe Medical Group, LLC's  
3 withholdings was readily available to him, and he retained the authority to pay as necessary once  
4 he was aware that Santa Fe Medical Group, LLC's withholding taxes were delinquent. Despite  
5 several filings with the Bankruptcy Court which reported liabilities to the Department, all which  
6 Mr. Markell signed, he nevertheless remained ignorant or indifferent to the mounting liability.

7 The Hearing Officer is unpersuaded that Mr. Markell was genuinely ignorant. Even if the  
8 CFO failed to keep him reasonably informed, a plethora of indicators existed that should have  
9 individually, if not collectively, demanded his immediate attention, including a personal visit  
10 from a Department employee at which time the subject of a payment plan was raised with him  
11 and the CFO. Even Ms. Duenas' sworn statement indicated that Mr. Markell was made aware of  
12 a mounting withholding tax liability midway through 2015.

13 It is also implausible that Mr. Markell could be called upon to testify no less than a dozen  
14 times in the bankruptcy court, and provide his signature on numerous bankruptcy reports, yet  
15 never be informed that there were significant outstanding liabilities with regard for state  
16 withholding taxes. Then, to the extent any doubt might persist regarding Mr. Markell's  
17 knowledge, he made an offer to purchase the entities in bankruptcy. The Hearing Officer finds it  
18 improbable that Mr. Markell would make such an offer without having fully considered the  
19 extent of the entities' outstanding and delinquent obligations, including state withholding taxes.  
20 As a result, Mr. Markell's testimony that he was ill-informed, perhaps due to the deceit of the  
21 CFO, is simply not credible.

22 This suggests that Mr. Markell's failure to act resulted from inadvertence, indifference,  
23 thoughtlessness, carelessness, erroneous belief or inattention, none of which liken to reasonable

1 cause, even under these circumstances.

2 The Hearing Officer also contemplated the Department’s indicators of nonnegligence at  
3 Regulation 3.1.11.11 NMAC. Although not applicable to Section 7-3-5, they are likewise  
4 illustrative of the circumstances in which the Department observes instances of “nonnegligence”  
5 and by comparison, circumstances that might signify “reasonable cause.” Once again, even when  
6 viewing the evidence in the light most favorable to Mr. Markell, his circumstances simply fail to  
7 satisfy any accepted indicators of nonnegligence.

8 Consequently, the Hearing Officer is not persuaded under the facts of this protest that Mr.  
9 Markell’s failure to assure that withholding taxes were properly withheld, deducted, and paid to  
10 the state should be discharged on the basis that his failure to act was the result of reasonable  
11 cause. Taxpayer’s protest should be DENIED.

12 **CONCLUSIONS OF LAW**

13 A. Taxpayer filed a timely, written protest of the Department’s assessment and  
14 jurisdiction lies over the parties and the subject matter of this protest.

15 B. Due to the Department submitting an overdue request for hearing, the  
16 Administrative Hearings Office was divested of the opportunity to hold a hearing within 90-days of  
17 protest under NMSA 1978, Section 7-1B-8 (2015).

18 C. Taxpayer is an “employer” as that term is defined in NMSA 1978, Section 7-3-2  
19 (C).

20 D. Taxpayer is a “withholder” as that term is defined in NMSA 1978, Section 7-3-2  
21 (M).

22 E. Taxpayer is a liable withholder for amounts deducted and withheld under NMSA  
23 1978, Section 7-3-5.

1 F. Taxpayer's failure to deduct and withhold was not due to reasonable cause under  
2 NMSA 1978, Section 7-3-5 (B).

3 For the foregoing reasons, the Taxpayer's protest **IS DENIED**. Taxpayer shall be liable for  
4 withholding tax, withholding tax penalty, and withholding tax interest in the following amounts as  
5 of May 16, 2019, with applicable penalty and interest accruing until paid in full:

<b>Period</b>	<b>Tax</b>	<b>Penalty</b>	<b>Interest</b>	<b>Total</b>
4/30/2015	\$8,848.48	-	-	\$8,848.48
5/31/2015	\$8,027.17	\$1,605.40	\$1,294.20	\$10,926.77
6/30/2015	\$5,295.07	\$1,059.00	\$840.62	\$7,194.69
7/31/2105	\$6,744.97	\$1,348.99	\$1,052.79	\$9,146.75
8/31/2015	\$3,779.07	\$755.80	\$579.43	\$5,114.30
9/30/2015	\$782.19	\$156.40	\$119.75	\$1,058.34
	<b>\$33,476.95</b>	<b>\$4,925.59</b>	<b>\$3,886.79</b>	<b>\$42,289.33</b>

6 DATED: August 29, 2019

7  
8 

9 Chris Romero  
10 Hearing Officer  
11 Administrative Hearings Office  
12 P.O. Box 6400  
13 Santa Fe, NM 87502

1 **NOTICE OF RIGHT TO APPEAL**

2 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this  
3 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the  
4 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this  
5 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates  
6 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.  
7 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative  
8 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative  
9 Hearings Office may begin preparing the record proper. The parties will each be provided with a  
10 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,  
11 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing  
12 statement from the appealing party. *See* Rule 12-209 NMRA.

13 **CERTIFICATE OF SERVICE**

14 On August 29, 2019, a copy of the foregoing Decision and Order was submitted to the  
15 parties listed below in the following manner:

16 *First Class Mail*

*Interdepartmental State Mail*

17  
18 INTENTIONALLY BLANK

19  
20 \_\_\_\_\_  
21 John Griego  
22 Legal Assistant  
23 Administrative Hearings Office  
24 P.O. Box 6400  
Santa Fe, NM 87502