

In the Matter of

BUKOVINA EXPRESS, INC.

and

Bukovina Express LLC

Case Nos. 17-05 & 21-05

Final Order of Commissioner Dan Gardner

Issued March 20, 2006

SYNOPSIS

Respondent Bukovina Express, Inc. ("Bukovina Inc.") owed Claimant \$592.20 in unpaid wages when it ceased doing business and subsequently reorganized as Respondent Bukovina Express LLC ("Bukovina LLC"). BOLI determined that Claimant was entitled to receive payment from the Wage Security Fund and paid Claimant in full. The forum concluded the Commissioner was entitled to recover the amount paid to Claimant from the Wage Security Fund and that Bukovina Inc. and Bukovina LLC, as a bona fide successor to Bukovina Inc., were jointly and severally liable to the Wage Security Fund for the unpaid wages paid to Claimant. The forum ordered both Respondents to repay the Wage Security Fund \$592.20, plus a \$200 penalty in accordance with ORS 652.414(3). The forum further concluded that Bukovina Inc. was liable to Claimant for its willful failure to pay Claimant's wages when due and ordered that it pay Claimant \$1,692 in penalty wages, pursuant to ORS 652.150. The forum also concluded that Bukovina Inc. was liable to Claimant for paying him less than the applicable minimum wage and ordered Bukovina Inc. to pay \$1,692 as civil penalties, pursuant to ORS 653.055. Additionally, the forum concluded that Bukovina Inc. willfully failed to keep and maintain records in accordance with ORS 653.045(1) and ordered Bukovina Inc. to pay \$1,000 as a civil penalty, pursuant to ORS 653.256. ORS 652.140; ORS 652.150; ORS 652.332; ORS 652.414; ORS 653.055; ORS 653.045; ORS 653.256.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon ("Commissioner"). The hearing was held on May 10, 2005, in the W. W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries (“BOLI” or “the Agency”). Alexander Sheifer (“Claimant”) was present throughout the hearing and was not represented by counsel. Respondent Bukovina Express LLC’s (“Bukovina LLC”) registered agent, Valentina Zhiryada, appeared as Bukovina LLC’s authorized representative. Respondent Bukovina Express, Inc. (“Bukovina Inc.”) did not appear at the hearing through counsel or an authorized representative and was held in default.

The Agency called Claimant and BOLI Wage and Hour compliance specialist Margaret Trotman as witnesses.

Bukovina LLC called its authorized representative Valentina Zhiryada as its only witness.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-30 (submitted or generated prior to hearing), and
- b) Agency exhibits A-1 through A-30 (filed with the Agency’s case summary) and A-31 (filed prior to hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

- 1) On April 27, 2004, Claimant filed a wage claim form on which he stated that Bukovina Inc. had employed him during the wage claim period of March 23 to March 29, 2004, and failed to pay him all wages that were due when he quit his employment.

2) At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Bukovina Inc.

3) On September 7, 2004, the Agency issued Order of Determination No. 04-1682 ("Order"). In the Order, the Agency alleged Bukovina Inc. had employed Claimant during the period March 23 through March 29, 2004, failed to pay him for all hours worked in that period, and was liable to him for \$592.20 in unpaid wages, plus interest. The Agency also alleged that Bukovina Inc.'s failure to pay all of Claimant's wages when due was willful and Bukovina Inc. was liable to Claimant for \$1,692 as penalty wages, plus interest. In addition to the penalty wages, the Agency alleged that Bukovina Inc. paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 and was therefore liable to Claimant for \$1,692 as civil penalties pursuant to ORS 653.055(1)(b), plus interest. The Order gave Bukovina Inc. 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On September 21, 2004, Bukovina Inc., through its registered agent and authorized representative, Valentina Zhiryada, filed an answer and request for hearing by facsimile transmission. In its answer, Bukovina Inc. denied owing Claimant any wages, contending that it had not hired him or "asked him about any service." The Agency received the original answer and request for hearing on September 22, 2004.

5) On October 11, 2004, the Agency issued a Notice of Intent to Assess Civil Penalties against Bukovina Inc. alleging (1) that Bukovina Inc. failed to maintain and preserve payroll records pertaining to Claimant's employment from on or about March 22 through March 31, 2004, and (2) that Bukovina Inc. failed to make records it was required to maintain and preserve available for inspection by the Commissioner. The

Agency alleged several aggravating circumstances and proposed that a \$1,000 civil penalty per violation be assessed against Bukovina Inc. Bukovina Inc., through its authorized representative, Zhiryada, filed an answer and request for hearing contending that it did not hire Claimant, did not owe him wages, and kept no records pertaining to Claimant.

6) On October 21, 2004, the Agency requested a hearing and filed a motion to consolidate the matters in the Order and Notice of Intent because they involved the “same events, time period, and participant.” On October 26, 2004, the ALJ ordered that the matters be consolidated because she found that both cases had common questions of fact and related questions of law. On the same date, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:30 a.m. on March 9, 2005. The Notice of Hearing included copies of the Order, a Summary of Contested Case Rights and Procedures and a copy of the contested case hearing rules, OAR 839-050-0000 to 839-050-0440.

7) On November 1, 2004, the Agency advised the ALJ that Bukovina Inc.’s counsel notified the case presenter that she no longer represented Bukovina Inc. and that all correspondence should be directed to Bukovina Inc.

8) On November 17, 2004, the Hearings Unit mailed Bukovina Inc. a copy of the amended contested case hearing rules along with a revised Summary of Contested Case Rights and Procedures.

9) On February 14, 2005, the Agency filed a motion for a discovery order to compel Bukovina Inc. to provide certain described documents and to respond to three interrogatories. With its motion, the Agency included copies of its informal request, the “Agency’s First Set of Interrogatories,”ⁱ and Bukovina Inc.’s response to the informal discovery request. In its response, Bukovina Inc., through Zhiryada, claimed that it had

no information related to Claimant to provide the Agency. Zhiryada further stated that Bukovina Inc. was “not longer [*sic*] in the business since December 31, 2004,” and that she was no longer its authorized representative.

10) On February 22, 2005, the ALJ granted the Agency’s motion for a discovery order. On the same date, in a separate interim order, the ALJ ordered Bukovina Inc. to retain counsel or file a second letter authorizing a representative to appear on its behalf. In the order, the ALJ stated: “If Respondent fails to appear through counsel or to file a letter authorizing a representative within the time allowed, the forum may find Respondent in default. See OAR 839-050-0330.”

11) On February 24, 2005, the Agency filed a motion to amend the Order of Determination to add Bukovina Express, LLC, as a successor to Bukovina Inc. On March 3, 2005, the hearing was postponed due to the temporary unavailability of the ALJ. On March 17, 2005, the ALJ issued an order granting the Agency’s motion to amend, stating, in pertinent part:

“In an affidavit accompanying the motion, Agency case presenter Cynthia Domas states that she became aware on February 22, 2005, that Respondent Bukovina Express, Inc. ‘may have moved to Washington State and was registered to do business in that state as Bukovina Express LLC.’ Domas included a copy of a Washington Corporations Division’s Registration Data Search that shows Bukovina Express LLC was ‘incorporated’ in Washington on January 1, 2005. (Agency Exhibit A-B) The data search also shows Valentina Zhiryada is listed as the LLC’s registered agent. In a letter to Domas dated February 11, 2005, Respondent’s president and authorized representative, Valentina Zhiryada, stated that Respondent ceased doing business on December 31, 2004. (Agency Exhibit A-A) Additionally, the Agency provided evidence that Respondent was administratively dissolved on February 11, 2005. (Agency Exhibit A-C) Based on its good faith belief that Respondent has continued to conduct business as Bukovina Express, LLC, following its administrative dissolution, and changed only the company name and ‘possibly the address of the company headquarters,’ the Agency seeks to add Bukovina Express, LLC, as a successor in interest to Bukovina Express, Inc., pursuant to ORS 653.310. Respondent had until March 3, 2005, to respond to the motion. To date, the Hearings Unit has received no response from Respondent.

“OAR 839-050-0140, which governs amendments, states in pertinent part:

‘(1) Prior to the hearing a participant may amend its pleading once as a matter of course at any time before a responsive pleading is served. Otherwise, a participant may amend its pleading only by permission of the administrative law judge or by written consent of the other participants. * * * Permission shall be freely given when justice so requires.’

“In this case, the Agency submitted documentation showing that Bukovina Express, LLC, may be a successor to Respondent and possibly liable for wages under ORS 653.310. For that reason, the forum finds that justice is best served in this case by adding Bukovina Express, LLC, as a respondent.”

The ALJ ordered the Agency to serve an amended Order of Determination on Bukovina LLC and the Hearings Unit by March 25, 2005, and instructed Bukovina LLC to file an answer to the amended Order of Determination through counsel or an authorized representative no later than April 4, 2005. In the same interim order, the ALJ rescheduled the hearing to begin at 9:30 a.m. on May 10, 2005.

12) On March 18, 2005, the ALJ ordered the Agency and Respondents each to submit a case summary that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; and a brief statement of the elements of the claim and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by April 29, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

13) On March 22, 2005, the Agency filed a second motion to amend the Order of Determination to seek recovery of the amount of wages paid to Claimant from the Wage Security Fund, plus an additional 25 per cent penalty as provided by statute. The Agency included an affidavit and documents that showed the Agency had determined Bukovina Inc. was no longer in business as of December 31, 2004, and had administratively dissolved on February 11, 2005. The documents also showed that the

Agency paid Claimant \$592.20, less statutory deductions, from the Wage Security Fund.

14) On March 24, 2005, the Hearings Unit received the Amended Order of Determination No. 04-1682 from the Agency.

15) On March 29, 2005, the Hearings Unit received a letter dated March 21, 2005, from Valentina Zhiryada that stated in pertinent part:

“This letter is the answer to your letter regarding Case Number 17-05 & 21-05 INTERIM ORDER – GRANTING AGENCY’S MOTION TO AMEND TO ADD RESPONDENT AND RESCHEDULING HEARING.

“As a former authorized representative of Bukovina Express, Inc., I have to notify You [sic] that I am not agreed with your decision about adding Bukovina Express LLC as a Respondent in this matter because A. Sheifer made his claim against the other company – Bukovina Express Inc. And the other thing that I am not agreed with, you are writing: ‘Respondent had until March 3, 2005, to Respond [sic] to the motion. To date, the Hearings Unit has received No [sic] response from Respondent.’ But this is not a truth, I did send Letter [sic] with certified mail receipt to Cynthia L. Domas, 3865 Wolverine Street N.E. No. E-1, Salem, OR 97305 on February 23, 2005 and I have Domestic Return Receipt, that shi [sic] received it on February 24, 2005. (Copies is [sic] added).”

Zhiryada included a copy of a letter dated February 22, 2005, addressed to Cynthia L. Domas, Case Presenter, and a copy of a “Domestic Return Receipt” signed by Cynthia L. Domas on February 24, 2005. The letter states in pertinent part:

“This letter is the answer to your letter regarding Case Number 17-05 & 21-04 AGENCY’S MOTION FOR A DISCOVERY ORDER. As a former authorized representative of Bukovina Express Inc., I have to notify You [sic] that I am not able to provide You [sic] with information requested by You [sic] regarding Alexander Sheifer because [he] was never employed by company [sic]. So, I never have [sic] any Information regarding him and will never have in the future. Alexander Sheifer made claim against Bukovina Express Inc. and all the information in that matter You [sic] can requested from him [sic]. Finally, all the proves [sic] for unreasonable claim against Bukovina Express Inc. I will provide on the Hearing, which is set up for me on March 9, 2005.”

16) On April 12, 2005, the ALJ issued a second order requiring Respondents to retain counsel or file a letter authorizing a representative to appear on their behalf.

Respondents were informed that failure to do as required might result in the issuance of a default order.

17) On April 12, 2005, the ALJ issued an order that provisionally denied the Agency's second motion to amend, stating in pertinent part:

“If the Agency intends to seek recovery for the Fund, it must either issue a new Order of Determination containing ‘a short and plain statement of the matters asserted or charged’ and references ‘to the particular sections of the statutes and rules involved,’ or file another motion to amend by interlineation that clarifies the issues raised in this Order.”

On the same date, the ALJ issued an order directing the Agency to submit a certificate of service showing “when, where, and on whom the [first] Amended Order of Determination was served.”

18) On April 20, 2005, the Agency submitted information that established that Respondents were served with the Agency's first Amended Order of Determination on March 23, 2005.

19) On April 20, 2005, the Hearings Unit received a letter from the Agency case presenter that stated in pertinent part:

“Enclosed is a copy of a letter that was sent to me by Valentina Zhiryada the former authorized representative for Bukovina Express, Inc. It apparently was intended for you. As pointed out in the ALJ's order dated April 12th, Ms. Zhiryada currently has no standing in this matter and neither respondent is currently represented by an authorized representative or an attorney as required by law. Be that as it may, the Case Presenter is forwarding the letter to the forum.”

The enclosure was a letter from Valentina Zhiryada, addressed to the ALJ and dated April 16, 2005, that stated in pertinent part:

“This letter is the answer to your letter regarding Case Number 17-05 & 21-05 INTERIM ORDER - DIRECTING AGENCY TO SUBMIT CERTIFICATE OF SERVICE . . .

“As a former authorized representative of Bukovina Express Inc., I have to notify You [*sic*] that I am not agreed [*sic*] with your decision about adding Bukovina Express LLC as a Respondent in this matter because A. Sheifer made his claim against the other company – Bukovina Express Inc. As

only member and representative for Bukovina Express LLC I will be present on Hearing rescheduled for me on MAY 10, 2005, at 9:30 a.m. But I am not agreed with all The [sic] penalties at all, because I do not own nothing [sic] to A. Sheifer and Never [sic] will.”

The ALJ treated Zhiryada’s letter as written authorization to appear as Bukovina LLC’s authorized representative.

20) On April 29, 2005, the Agency timely filed a case summary. Respondents did not file a case summary.

21) On April 29, 2005, the Agency filed a third motion to amend the Amended Order of Determination by interlineation to recover from Bukovina LLC, under a successorship theory, \$592.20 in wages paid out of the Wage Security Fund, plus a \$200 penalty, together with interest from May 1, 2004, until paid. Additionally, the Agency moved to recover penalty wages of \$1,692 and civil penalties of \$1,692, including interest, from Bukovina LLC based on the inequity of allowing “an employer to change its name and move in order to avoid paying wages and hence penalty wages and civil penalties.” The Agency attached to the motion and incorporated by reference its “Second Motion to Amend” and “Affidavit of Cynthia L. Domas.”ⁱⁱⁱ

22) On May 10, 2005, the Agency submitted a three-page document, marked Exhibit A-31, which “was inexplicably omitted from the Case Summary.” The Agency case presenter stated that the document was part of the “Employer Response that has already been submitted as Agency Exhibit 8 in the Agency’s Case Summary. * * * There is an actual reference to the document on page 2 line 19 of Agency Exhibit A-8.”

23) At the start of hearing, Zhiryada stated that Bukovina Inc. no longer exists and that Bukovina LLC is a “different entity” of which she is the sole member and representative.

24) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

25) On February 2, 2006, the ALJ issued a proposed order and notified the participants they were entitled to file exceptions to the proposed order. The Agency did not file exceptions. Respondent timely filed exceptions to the proposed order that are addressed in the Opinion section of this Final Order.

RULING ON AGENCY'S THIRD MOTION TO AMEND

Neither Respondent filed a response to the Agency's April 29, 2005, motion to amend the Amended Order of Determination. The Agency's motion sought to recover \$592.20 in wages paid out of the Wage Security Fund, plus a \$200 penalty and interest from Bukovina LLC under a successorship theory. Additionally, the Agency moved to recover penalty wages of \$1,692 and civil penalties of \$1,692, including interest, from Bukovina LLC based on equitable principles. Absent objection, and in the interest of justice, the Agency's motion was granted, subject to the Agency's burden of proving the allegations and establishing joint and several liability for any violations found at hearing.

FINDINGS OF FACT – THE MERITS

1) At times material until February 11, 2005, Respondent Bukovina Express, Inc. ("Bukovina Inc.") was an Oregon corporation engaged in interstate trucking. Its principal place of business was located at 3540 SE 157th Avenue, Apartment A, in Portland, Oregon.

2) At times material, Valentina Zhiryada was Bukovina Inc.'s president, secretary, and registered agent, and resided at 3540 SE 157th Avenue, Apartment A, in Portland, Oregon.

3) Zhiryada's husband, Valery Zhiryada, and two other family members were long haul truck drivers for the company. Valery Zhiryada holds a current Oregon Class

C commercial driver's license that includes the following endorsements: "Passenger vehicle designed to carry more than 15 people; Double or Triple Trailers; [and] Combined Hazardous Material (H) and Tank Vehicle (N)." The Zhiryadas owned four trucks that they used to transport goods to and from the East Coast. They hired "outside" drivers and "rented" the trucks to the drivers for \$1.00 in order to establish the drivers as "independent contractors." The Zhiryadas conducted their trucking business from their apartment in Portland, Oregon.

4) Sometime in March 2004, Claimant heard from an acquaintance that Bukovina Inc. needed truck drivers. The acquaintance, who worked as a trucker for Valentina Zhiryada's brother, told Claimant enough about the job to pique his interest and, with Claimant's permission, gave Claimant's telephone number to the Zhiryadas. A few days later, Valery Zhiryada called Claimant and asked him if he wanted a job. When Claimant said yes, Zhiryada scheduled Claimant for an interview.

5) When Claimant arrived for the interview, Valery Zhiryada asked him about his truck driving experience and told him that Bukovina Inc. paid their truckers on a percentage basis. Claimant told him that his experience included seven years as a truck driver in Russia, four years driving locally in Portland, and six months as a long haul driver.

6) At the interview, Valentina Zhiryada asked Claimant to fill out some paperwork and provide copies of his driver's license, social security number, U.S. Passport, and his DMV driving record. She gave Claimant a Federal Drug Testing Custody and Control Form and sent him to a laboratory for a drug and alcohol test that took place on March 17, 2004. On the U.S. Department of Transportation Alcohol Testing Form Claimant received after he took the drug test, the "Alcohol Technician" designated "Bukovina Express" as the "Employer Name" located at "3450 SE 157th Ave,

Portland, OR 97236.” “Valentina” was listed as the “DER Name” and the “Pre-employment” box was checked as the “Reason for the Test.”

7) A few days after the drug test, Valentina Zhiryada called Claimant and told him that his tests were “all good” and that he was ready for his first trip. She assigned him to ride with another driver named “Slavic” and pick up a load of pears from Hood River and transport the load to New Jersey. When he agreed to make the trip, Claimant understood that he would receive 12 percent and Slavic 14 percent of the gross amount paid for the delivery.

8) On March 23, 2004, Slavic arrived at Claimant’s home early in the morning and drove him to Columbia Boulevard in Portland where they attached a refrigerated trailer (“reefer”) to the truck and drove to Hood River. While in Hood River, Claimant assisted Slavic with obtaining the paperwork at the “main office” because Slavic spoke little English. They used a forklift to load the pears and proceeded to drive, non-stop, to New Jersey. During the trip, they drove alternating five-hour shifts and ate and rested in the truck.

9) Before entering New Jersey, Claimant and Slavic stopped at a truck stop with two other Bukovina Inc. trucks. Six drivers made the trip, two drivers per truck, including Valery Zhiryada and Valentina’s brother. At the truck stop, the drivers rested and had a shower. Valery did not eat with the drivers, but he paid for their meal. After they ate, Slavic and Claimant drove to a warehouse in New Jersey where they were charged a \$20 fee to enter the warehouse. They waited several hours for someone to bring a forklift and unload the pears. Several pallets contained two different types of pears and Claimant and Slavic had to separate the pears by hand before the pears were unloaded. During this time, Slavic and Claimant had at least one telephone contact with Valery Zhiryada who was unloading his truck elsewhere. After the pear

delivery, Claimant and Slavic drove to New York to pick up a load of European foods to haul back to Portland. They had to wait until 7:30 p.m. to load. They used a forklift to load the pallets. The other Bukovina Inc. drivers, including Valery, were loading their trucks at the same warehouse. After loading, they drove straight back to Oregon. They drove 3,000 miles one way from Portland to New York and the entire round trip took one week. During the trip, Slavic maintained and Claimant signed logbooks that were left in the truck at the end of the trip.

10) When they returned to Portland, Slavic parked the trailer on Foster Road, dropped Claimant off at his home, and told Claimant to meet him at the trailer in the morning. The next day, March 29, 2004, Claimant and Slavic delivered goods to eight different locations in Oregon and Washington. Most of the deliveries were to Russian and German markets. That day, Claimant used Slavic's cell phone to call Valery Zhiryada and tell him that he could not continue working for the company. He explained that his wife had medical problems while he was gone and she did not want him to be away from home for that length of time again. Valery was unloading his truck when Claimant called and did not indicate when or if Claimant would be paid. From March 23 through March 29, 2004, Claimant worked approximately 12 hours per day.

11) March 29, 2004, was Claimant's last day of work. Thereafter, Claimant called the Zhiryadas several times to ask about his wages but could not reach them. Although he left a message each time, his calls were not returned. He finally went to the Zhiryada's apartment to ask for his wages and spoke to both of them. He apologized for not being able to work for them anymore. Valentina would not speak to him. Valery was "very mad" at him and told him that he would not pay for only one week of work. Valery then "kicked [Claimant] out."

12) Claimant filed a wage claim on April 27, 2004. Sometime thereafter, Valery Zhiryada called Claimant and asked him about a letter Valentina had received from the BOLI Wage and Hour Division and asked Claimant what he was doing. Claimant said to him, “you owe me money and you need to pay me.”

13) Wage and Hour compliance specialist Margaret Trotman was assigned to investigate Claimant’s wage claim. She reviewed Claimant’s documentation, which included his wage claim, calendar of hours worked, and Federal Drug Testing documents. Trotman sent Bukovina Inc. a Notice of Wage Claim, along with a request for records pertaining to Claimant’s employment. In May 2004, Bukovina Inc. returned the Employer Response form to Trotman on which Valentina Zhiryada claimed that Bukovina Inc. had not hired Claimant. Later, Bukovina Inc.’s counsel at the time told the Agency that Claimant was on a “ride along” and was not entitled to any pay because he did not provide any “services.” Counsel further stated that “[a]fter that trip, [Claimant] indicated he did not want to drive a truck for [Bukovina Inc.] for family reasons and because he did not want to be on the road for long periods.” In a subsequent telephone call with Trotman, Valentina Zhiryada acknowledged that she had sent Claimant for a drug test and that Claimant rode in a Bukovina Inc. truck with another driver during the March 2004 trip to New Jersey and New York.

14) In February 2005, Claimant observed Valery Zhiryada’s truck in a Goodyear Tire shop with “Bukovina Express LLC” inscribed on the door. During the same period, he observed Valentina Zhiryada’s brother unloading a truck at the Roman Russian Food Store on SE Division in Portland. He noticed that truck also had “Bukovina Express LLC” inscribed on the doors. When he worked for Bukovina Inc., the inscription on the same trucks was “Bukovina Express, Inc.” He took photographs of

the truck he observed at the Russian food store and provided them to the Agency during the wage claim investigation.

15) Zhiryada told Trotman that she closed her business on December 31, 2004, and had started a new business in February 2005. Trotman thereafter determined that Bukovina Inc. had ceased doing business as of December 31, 2004, and that the corporation was administratively dissolved on February 11, 2005.

16) The Zhiryadas moved to Ridgefield, Washington, and Valentina Zhiryada formed a limited liability company named Bukovina Express LLC ("Bukovina LLC") on January 1, 2005. Bukovina LLC is registered with the Washington State Corporations Division and Valentina Zhiryada is the LLC's registered agent and sole member. The principal place of business for Bukovina LLC is 20913 NW 6th Ct., Ridgefield, Washington.

17) The Zhiryadas continue to deliver goods to their long-term Oregon customers, including the Good Neighbor European Deli and Market at SE 82nd Avenue in Portland, through Bukovina LLC.

18) During the wage claim investigation, Trotman sent Valentina Zhiryada letters dated July 13 and August 13, 2004, requesting "readable copies of [Slavic's and Claimant's] Daily Driver's Log Sheets and a complete list of the pick-up and drop-off points" for the "entire trip between Portland and New Jersey." Trotman also requested that Zhiryada provide the Agency with the "[f]ull name, address, and telephone number of the other driver of the truck known as 'Slevic.'" Trotman received no response from Zhiryada or any other Bukovina Inc. representative. Bukovina Inc. provided no records of any kind to the Agency and Trotman relied on Claimant's estimated work hours to calculate his wages based on the minimum wage rate of \$7.05 per hour.

19) The Oregon Department of Transportation Motor Carrier Transportation Division has promulgated rules that govern the maintenance and preservation of motor carrier records. OAR 740-055-0120 provides as follows:

“(1) All carriers must maintain records of their motor vehicle operations and make reports on forms approved by the Department. Such records must be:

“(a) Stored at the carrier's principal office or place of business;

“(b) Made available for inspection by the Department or its representatives upon request; and

“(c) Retained for a period of three (3) years unless otherwise authorized by the Department.

“(2) All carriers must maintain records containing the following information for each vehicle:

“(a) Origin and destination points;

“(b) Oregon entry and exit points;

“(c) Actual Oregon miles for each trip;

“(d) Pickup and delivery points in Oregon for each trip;

“(e) Routes for travel for each trip;

“(f) Dates of each trip;

“(g) Daily beginning and ending odometer or other mileage recording device readings for each vehicle;

“(h) Load tickets and/or bills of lading for each shipment transported;

“(i) Identification of any exempt miles claimed, which shall include beginning and ending odometer or other mileage recording device readings for the exempt portion of each trip.

If repeated trips are made to and from the same locations, a one-time recording of odometer or other mileage recording device readings for the exempt portion of those trips may be applied to the total number of trips. * * *

20) Claimant estimated he worked 84 hours from March 23 through March 29, 2004. Trotman determined that Claimant's wage claim was valid and that he was owed at least \$592.20 for those hours worked (\$7.05 per hour multiplied by 84 hours).

21) Based on Trotman's determination that Bukovina Inc. had ceased doing business, the Agency caused the WSF to pay Claimant's unpaid wages of \$592.20, less statutory deductions, on March 17, 2005.

22) Claimant and Trotman were credible witnesses.

23) Valentina Zhiryada's brief testimony tended to bolster Claimant and Trotman's testimony. However, her statements that Claimant did not have permission to drive and that "we did not ask for his services, so we owe him nothing" were not credible and not given any weight.

ULTIMATE FINDINGS OF FACT

1) In 2004, Bukovina Inc. directly engaged the personal services of one or more employees in Oregon. During that time, Claimant rendered personal services to Bukovina Inc. in Oregon.

2) From January 1, 2005, to the present, Bukovina LLC has continued to conduct the same business in Oregon as its predecessor, Bukovina Inc., utilizing the same trucks and servicing the same customers.

3) At times material, Valentina Zhiryada was Bukovina Inc.'s registered agent and sole principal and Bukovina LLC's registered agent and sole member.

4) Between March 23 and March 29, 2004, Bukovina Inc. suffered or permitted Claimant to render personal services to Bukovina Inc. and Claimant worked approximately 84 hours during that period.

5) The state minimum wage in 2004 was \$7.05 per hour.

6) Claimant's last day of work was March 29, 2004, the same day he quit his employment without notice.

7) When Claimant's employment ended, Bukovina Inc. owed Claimant \$592.20 in wages for the hours he worked between March 23 and March 29, 2004.

8) Claimant filed a wage claim and after investigation the Agency determined that the wage claim was valid.

9) The Agency determined that Bukovina Inc. had ceased doing business on December 31, 2004, and based on that determination, the Agency paid Claimant \$592.20, less statutory deductions, from the Wage Security Fund.

10) Bukovina Inc. willfully failed to pay Claimant wages owed to him and is liable for penalty wages.

11) Penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470(1)(c), equal \$1,692 (\$7.05 per hour X 8 hours per day X 30 days).

12) Bukovina Inc. paid Claimant less than the minimum wage to which he was entitled and is liable for civil penalties.

13) Civil penalties, computed in accordance with ORS 652.150 and OAR 839-001-0470(1)(c), equal \$1,692 (\$7.05 per hour X 8 hours per day X 30 days).

14) Bukovina Inc. did not make or maintain records required pursuant to ORS 653.045(1) and is liable for a \$1,000 civil penalty.

15) Twenty five percent of \$592.20 is \$148.50.

CONCLUSIONS OF LAW

1) At times material herein, Bukovina Inc. was an Oregon employer subject to the provisions of ORS 652.110 to 652.414 and ORS 653.010 to 653.261 and Claimant was Bukovina Inc.'s employee.

2) Bukovina LLC is a successor to Bukovina Inc. and therefore an employer under ORS 652.310(1) and subject to the provisions of ORS 652.310 to 652.405, 652.409 to 652.414.

3) The actions, inaction, statements, and motivations of Valentina Zhiryada, Respondent Bukovina Inc.'s president and Respondent Bukovina LLC's sole member, are properly imputed to Bukovina Inc. and Bukovina LLC.

4) The Commissioner has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to ORS 652.332; ORS 652.409 to ORS 652.414.

5) Bukovina Inc. violated ORS 652.140(2) by willfully failing to pay Claimant \$592.20 in earned and unpaid wages after he left Respondent's employment.

6) As a successor employer, Bukovina LLC is jointly and severally liable for Bukovina Inc.'s failure to pay Claimant all wages earned and unpaid after Claimant's employment terminated.

7) Under the facts and circumstances of this record, and according to applicable law, the Commissioner has the authority to order Bukovina Inc. and Bukovina LLC to jointly and severally reimburse the Wage Security Fund in the amount of \$592.20, the amount paid to Claimant from the Wage Security Fund, plus a \$200 penalty on that sum, plus interest at the legal rate on both sums until paid. ORS 652.414.

8) Bukovina Inc. is liable for \$1,692 in penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation due Claimant when his employment terminated, as provided in ORS 652.140(2).

9) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner has the authority to order Bukovina Inc. to pay Claimant penalty wages, plus interest until paid, pursuant to ORS 652.332.

10) Bukovina Inc. violated ORS 653.025 by failing to pay Claimant at least the applicable minimum wage rate required for each hour of work time.

11) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner has the authority to order Bukovina Inc. to pay Claimant civil penalties as set forth in ORS 652.150, plus interest until paid, pursuant to ORS 652.332.

12) Bukovina Inc.'s failure to make and keep required records pertaining to Claimant's employment in violation of ORS 653.045(1) was willful and Bukovina Inc. is liable for \$1,000 as a civil penalty under ORS 653.256.

13) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner has the authority to order Bukovina Inc. to pay a \$1,000 civil penalty for its willful violation of ORS 653.045(1). ORS 653.256.

OPINION

Procedurally, this case evolved from a claim for wages, penalty wages, and civil penalties against Respondent Bukovina Express, Inc. ("Bukovina Inc.") to a Wage Security Fund ("WSF") recovery action against Bukovina Inc. and alleged successor in interest, Respondent Bukovina Express, LLC ("Bukovina LLC"). In its amended charges, the Agency alleges that Respondents are jointly and severally liable to the Commissioner for \$592.20, the amount paid to Claimant from the WSF, a \$200 penalty, and interest on both amounts, pursuant to ORS 652.414(3). The Agency also seeks penalty wages of \$1,692, pursuant to ORS 652.150, and civil penalties of \$1,692, pursuant to ORS 653.055(1)(b), from both Respondents. Finally, the Agency seeks a \$2,000 civil penalty, pursuant to ORS 653.256, from Bukovina Inc. for recordkeeping violations. Bukovina Inc. did not appear at the hearing with counsel or an authorized representative and was found in default. In its unsworn answer to the charges, Bukovina Inc. admitted that it did not make or maintain records pertaining to Claimant, but claimed it did not hire him and therefore was not required to keep any records and did not owe him wages. Bukovina LLC, through its authorized representative, Valentina Zhiryada, appeared at the hearing and denied that it was liable for unpaid wages or "penalties" because Claimant "made his claim against the other company – Bukovina Express Inc.," and denied that it owed Claimant wages.

WAGE SECURITY FUND RECOVERY

Pursuant to ORS 652.414(3), the Agency is entitled “to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Fund under subsection (1) of [the statute].” The Agency is also entitled to recover a penalty of 25 per cent of the wages paid from the WSF or \$200, whichever is greater. *Id.* The Agency must show that (1) Bukovina Inc. was Claimant’s employer; (2) an amount was paid to Claimant from the WSF as unpaid wages; and (3) Bukovina Inc., its successor, or both are liable for the amounts paid from the WSF.ⁱⁱⁱ The Agency established and Respondents did not dispute that Claimant was paid \$592.20, less statutory deductions, from the WSF on March 17, 2005.^{iv}

The only issues are whether Bukovina Inc. employed Claimant and, if so, whether Bukovina LLC is a successor to Bukovina Inc. and jointly and severally liable for Claimant’s unpaid wages under ORS 652.414(3).

A. Bukovina Inc. employed Claimant

When a respondent defaults, as Bukovina Inc. did in this case, the Agency is required to present a prima facie case on the record to support the allegations in its charging document. ORS 183.415(6). When making factual findings, the forum may consider unsworn assertions contained in a defaulting respondent’s answer, but those assertions are overcome whenever controverted by other credible evidence. *In the Matter of Barbara Blair*, 24 BOLI 89, 96 (2002).

The Agency alleged and established through credible witness testimony that Bukovina Inc. employed Claimant during March 2004. Claimant credibly testified that Bukovina Inc., through Valery Zhiryada, interviewed him for a truck driving job, and that its corporate president, Valentina Zhiryada, sent him for a drug test and subsequently assigned him to ride with another driver to deliver Hood River pears to New Jersey, pick

up a load in New York, and make deliveries in Oregon and Washington upon his return. Claimant's testimony was bolstered by Valentina Zhiryada's admissions to the Agency investigator that she sent him for a drug test and that he rode along with another driver in a Bukovina truck on a cross country trip. Additionally, Zhiryada's testimony at hearing that the truckers worked for a percentage of the profits was consistent with Claimant's testimony that he understood he would receive a percentage of the gross amount earned for the deliveries. From those facts, the forum concludes that Claimant rendered personal services to Bukovina Inc. for an agreed amount and therefore was Bukovina Inc.'s employee as defined in ORS 652.310(2), during the wage claim period. Nothing in the record contradicts or overcomes the Agency's prima facie case and the forum concludes that Bukovina Inc. employed Claimant during the wage claim period.

B. Bukovina LLC is a successor to Bukovina Inc. and is liable for Claimant's unpaid wages.

The test to determine whether an employer is a "successor" under ORS 652.310(1) is whether it conducts essentially the same business as conducted by the predecessor. The elements to consider include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; whether the same or substantially the same work force is employed; whether the same product is manufactured or the same service is offered; and, whether the same machinery, equipment, or methods of production are used. Not every element needs to be present to find a successor employer. All of the facts must be considered together to make a determination. *In the Matter of Mermac, Inc.*, 26 BOLI 218, 225 (2005), *citing In the Matter of Fjord, Inc.*, 21 BOLI 260, 286 (2001). *See also In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 256 (1999).

Undisputed evidence shows that 1) Bukovina Inc. ceased doing business in December 2004 and administratively dissolved in February 2005; 2) Valentina Zhiryada,

the same principal who owned and operated the corporation, immediately reorganized as an LLC retaining the name of Bukovina Express after dissolving the corporation; and 3) although Zhiryada relocated the business to Ridgefield, Washington, the LLC continues as a trucking operation, using the same trucks, and servicing the same clientele in Oregon as its predecessor. Based on those facts, the forum finds that Bukovina LLC continues to conduct essentially the same business as its predecessor, Bukovina Inc., and that, as a matter of law, Bukovina LLC is a successor within the meaning of ORS 652.310(1).

As the successor to Bukovina Inc., Bukovina LLC is liable for the wages Claimant earned in March 2004 before the corporation was dissolved and, therefore, is subject to the Agency's recovery action under ORS 652.414(3). See *In the Matter of Fjord, Inc.*, 21 BOLI 260, 293 (2001) (concluding that the respondent conducted essentially the same business as the actual employer and as a successor respondent was liable for the unpaid wage amounts paid out by the WSF).

C. Bukovina Inc. and Bukovina LLC are jointly liable for Claimant's unpaid wages and both are subject to the Agency's recovery action under ORS 652.414(3).

The Agency asks the forum to impose joint and several liability upon Respondents Bukovina Inc. and Bukovina LLC, contending that both entities have a common sole principal and that, despite Bukovina Inc.'s status as a dissolved corporation, one or both entities may be available to repay the WSF. Ordinarily, when the actual employer is available and has the apparent ability to pay a wage obligation, primary responsibility for the payment of wages rests with that employer. When existing circumstances give rise to uncertainty about the actual employer's ultimate ability to fully recompense a wage claimant, then "furtherance of the legislative emphasis on protection of the employee (in relation to the payment of wages) requires that liability for

wages owed be placed also on the successor.” See *In the Matter of Gerald Brown*, 14 BOLI 154, 168-69 (1995) (when the uncertainty about the eventual property or asset distribution was brought on by the “extraordinary entanglement of assets” between the actual employer and its successor, the forum found it appropriate to impose joint and several liability upon both respondents for wages owed to the wage claimants). The same principles apply to WSF recovery actions.

In this case, the Agency made a determination that Bukovina Inc. had ceased doing business and was without sufficient assets to pay the wages owed to Claimant and that his wage claim could not otherwise be “fully and promptly paid.” Based on the Agency’s determination, Claimant’s unpaid wages were paid out of the WSF. Therefore, as a practical matter, Bukovina Inc. must be considered a defunct corporation that is unable to recompense the WSF for the amount paid in unpaid wages. Under those circumstances, responsibility for full recompense usually falls upon the bona fide successor. See *In the Matter of Fjord, Inc.*, 21 BOLI 260, 293 (2001). However, the forum takes official notice that in Oregon an administratively dissolved corporation has five years from the date of dissolution to apply to the Secretary of State for reinstatement. ORS 60.654. In the meantime, an administratively “dissolved” corporation continues its corporate existence and can conduct activities necessary “to wind up and liquidate its business and affairs.” ORS 60.651(3). Thus, Bukovina Inc. has the potential for reinstatement at any time within the next five years. Given the common principal, Valentina Zhiryada, and the close timing of the asset transfer, the forum finds there is uncertainty about the eventual property or asset distribution between the two Respondents. To ensure that the WSF is not left without a remedy, the forum concludes that this is an appropriate case to impose joint and several liability upon both Respondents for repayment to the WSF for Claimant’s unpaid wages.

Based on the evidence presented, the forum concludes that Bukovina Inc. was “the employer” for the purpose of ORS 652.414(3), Bukovina LLC is a bona fide successor to Bukovina Inc., and both are liable for the amount paid to Claimant from the WSF. Additionally, under the statute, the Commissioner is entitled to recover a 25 percent penalty on the amount paid or \$200, whichever is greater, from “the employer, or other persons or property liable for the unpaid wages.” In this case, \$200 is greater and Respondents are jointly and severally liable to the Commissioner for that amount.

PENALTY WAGES UNDER ORS 652.150

In its amended Order of Determination, the Agency alleged that Bukovina Inc. willfully failed to pay Claimant the wages due after he quit his employment and that 30 days had elapsed since the wages became due and owing, pursuant to ORS 652.140. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission willfully if he or she acts, or fails to act, intentionally, as a free agent, and with knowledge of what is being done or not done. *In the Matter of Kilmore Enterprises, Inc.*, 26 BOLI 111, 124 (2004).

Here, Bukovina Inc., through its principal Valentina Zhiryada, admitted that it did not pay Claimant any wages for the work he performed in March 2004. The evidence established that Zhiryada, acting on Bukovina Inc.’s behalf, assigned Claimant to make a delivery to the East coast and that she knew he had made the trip and additional deliveries upon his return one week later. Evidence also shows that she refused to pay Claimant the wages he earned during that period despite his repeated requests. The forum infers from those facts that Bukovina Inc., through its principal, Zhiryada, voluntarily and as a free agent failed to pay Claimant all of the wages he earned between March 23 and March 29, 2004, when his employment with Bukovina Inc. ended. Zhiryada’s claim at hearing that Claimant “did not have permission to drive” and

therefore was not entitled to wages is not a defense. Any work that is “suffered” or “permitted” is work time. *In the Matter of Elisha, Inc.*, 25 BOLI 125, 153 (2003), *affirmed without opinion, Elisha, Inc. v. Bureau of Labor and Industries*, 198 Or App 285 (2005), *appeal pending*. Evidence shows that Claimant performed duties as a long haul truck driver for one week with Bukovina Inc.’s knowledge and from which Bukovina Inc. received a benefit. A respondent’s ignorance or misunderstanding of the law does not exempt that respondent from a determination that it willfully failed to pay wages earned and owed. *In the Matter of Danny Vong Phuoc Trong*, 21 BOLI 217, 231 (2001). Having considered all of the facts found herein, the forum concludes that Bukovina Inc. acted willfully and is liable for penalty wages under ORS 652.150.

At hearing, the Agency urged the forum to hold Bukovina LLC jointly liable for penalty wages as Bukovina Inc.’s successor. The Agency acknowledged that its argument was contrary to Agency precedent, but contended that the particular circumstances in this case and equity require that both entities be held responsible for penalty wages. Essentially, the Agency argues that this case is an exception to current precedent which is based on the Agency’s longstanding policy of not holding successor employers liable for penalty wages. See *In the Matter of Stephanie Nichols*, 24 BOLI 107, 122 (2002), *citing In the Matter of Anita’s Flowers*, 6 BOLI 258, 267 (1987). Generally, the policy makes sense because ORS 652.150 compels penalty wages “if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases.” Such language requires an intention that in most cases cannot be reasonably imputed to a successor employer.^v *But see In the Matter of Waylon & Willies, Inc.*, 7 BOLI 68, 76-77 (1988) (determining that the policy of not holding successor employers liable for penalty wages is not applicable in cases involving an individual successor who is personally responsible for unpaid wages that accrued due

to that individual's willful failure to pay the wages earned). In this case, the successor is an LLC, albeit a closely held entity owned and operated by the same principal that owned and operated its predecessor. That same principal was directly responsible for the unpaid wages that accrued during Claimant's employment. The Agency, however, has not asked the forum to disregard a legally established corporate entity and hold the principal personally liable for penalty wages. Instead, the Agency argues that Bukovina LLC, through its sole principal, had actual knowledge of Bukovina Inc.'s penalty wage liability when the LLC was created and that the principal's choice to dissolve the corporate entity and establish a new entity that merely continued its predecessor's business is an apparent attempt to evade the wage and hour laws. Thus, the Agency argues, the only equitable remedy is to hold the LLC jointly liable for penalty wages. The Agency does not seek to change its policy of not holding successor employers liable for penalty wages, but rather only asks that an exception be made in this particular case based on equitable principles. This forum, however, does not have the authority to fashion an equitable remedy. *Oregon Occupational Safety and Health Division v. Don Whitaker Logging, Inc.*, 123 Or App 498, 501 (1993) ("Administrative agencies * * * are creatures of statute and do not have the powers of a court of equity. Rather, they are limited to the authority conferred on them by statute"). Consequently, the forum declines to reverse or modify longstanding precedent.

The Agency sought penalty wages in the amount of \$1,692, computed by multiplying the applicable minimum wage rate of \$7.05 by 8 hours per day and multiplied by 30 days, in accordance with ORS 652.150 and OAR 839-001-0470(1). Based on the evidence and the Agency's calculations, the forum concludes that Bukovina Inc. is solely liable for \$1,692 in penalty wages.

CIVIL PENALTY UNDER ORS 653.055

The forum may also award “civil penalties [as] provided in ORS 652.150” to an employee when an employer “pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261.” ORS 653.055. Oregon’s minimum wage requirements fall within the range of wage entitlements encompassed by ORS 653.055. *In the Matter of Adesina Adeniji*, 25 BOLI 162, 174 (2004), *citing Cornier v. Paul Tulacz, DVM PC*, `176 Or App 245 (2001). In its amended charges, the Agency seeks an additional \$1,692 penalty based on its determination that “the employer paid the wage claimant less than the wages to which the wage claimant was entitled under ORS 653.010 to 653.261 and is therefore also liable to the wage claimant for civil penalties pursuant to the provisions of ORS 653.055(1)(b).”

Pursuant to ORS 653.025, Bukovina Inc. was required to pay Claimant at least \$7.05, the applicable minimum wage in March 2004, for each hour he worked for Bukovina Inc. The Agency’s prima facie case included sufficient evidence to show that Bukovina Inc. employed Claimant between March 23 and March 29, 2005, that Claimant worked an estimated 84 hours during that period, and that Claimant was paid nothing for those hours. Bukovina Inc. was required to pay him at least the applicable minimum hourly wage rate in accordance with ORS 653.025 and failed to do so. Consequently, the forum concludes that Bukovina Inc. is liable for \$1,692 as civil penalties for Bukovina Inc.’s failure to pay the minimum amount of wages owed Claimant for the work he performed while in its employ. This figure is computed by multiplying \$7.05 per hour by 8 hours per day multiplied by 30 days pursuant to ORS 652.150.

The Agency also asks the forum to hold Bukovina Inc.’s successor Bukovina LLC jointly liable for the civil penalties. There is no policy or precedent in place that limits the forum’s ability to impose joint liability for civil penalties under ORS 653.055. Moreover,

the statute does not require the same element of intent required under ORS 652.150. The language merely states that “any employer who pays an employee less than the wages to which the employee is entitled” is liable for the same penalties that may be assessed under ORS 652.150. However, the forum *is* limited by ORS 653.010 which states in pertinent part:

“As used in ORS 653.010 to 653.261, unless the context requires otherwise,

“(2) ‘Employ’ includes to suffer or permit to work * * *

“(3) ‘Employer’ means any person who employs another person * * *.”

There is no provision in ORS chapter 653 that includes a successor employer within the definition of “employer” for purposes of ORS 653.010 to 653.261. Thus, in order to hold Bukovina LLC liable for civil penalties under ORS 653.055, the Agency was required to establish independently that 1) Bukovina LLC was an employer as defined in ORS 653.010(3) and that 2) Bukovina LLC paid its employee, in this case, Claimant, less than the wages to which the employee is entitled under ORS 653.010 to 653.261. The evidence clearly established those elements as they pertain to Bukovina Inc., but the Agency never alleged and the evidence does not show that Bukovina LLC suffered or permitted Claimant or anyone else to work after Bukovina Inc. ceased to conduct business. Consequently, the forum concludes that Bukovina LLC is not liable, as a successor or otherwise, for any violation of ORS 653.055.

RECORDKEEPING VIOLATIONS UNDER ORS 653.045

In its Notice of Intent to Assess Civil Penalties, the Agency asks the forum to impose a \$1,000 civil penalty against Bukovina Inc. based on its alleged failure to maintain and preserve required records regarding Claimant’s employment from March 22 through March 31, 2004, in violation of ORS 653.045(1). The Agency also asks the forum to impose a \$1,000 civil penalty based on Bukovina Inc.’s alleged failure to make

records required to be preserved and maintained for the Commissioner's inspection available to the Agency, in violation of ORS 653.045(2).

ORS 653.045 provides in pertinent part:

“(1) Every employer required by ORS 653.025 or by any rule, order or permit issued under ORS 653.030 to pay a minimum wage to any of the employer's employees shall make and keep available to the Commissioner of the Bureau of Labor and Industries for not less than two years, a record or records containing:

“(a) The name, address and occupation of each of the employer's employees.

“(b) The actual hours worked each week and each pay period by each employee.

“(c) Such other information as the commissioner prescribes by the commissioner's rules if necessary or appropriate for the enforcement of ORS 653.010 to 653.261 or of the rules and orders issued thereunder.

“(2) Each employer shall keep the records required by subsection (1) of this section open for inspection or transcription by the commissioner or the commissioner's designee at any reasonable time.”

Bukovina Inc. defaulted by not appearing at the hearing; consequently, no evidence was presented to support the claim in its answer to the Notice of Intent that it “never hired” Claimant and, by implication, was therefore not required to make and keep records under ORS 653.045. In contrast, the Agency presented credible evidence that established Bukovina Inc. employed Claimant in March 2004 and was required to pay him the minimum wage in accordance with ORS 653.025. Additionally, Bukovina Inc., through its principal Zhiryada, steadfastly maintained throughout the Agency's wage claim investigation and in its answer that it kept no records whatsoever for Claimant. Based on those facts, the forum concludes that Bukovina Inc. was required to “make and keep available to the Commissioner” records pertaining to Claimant's employment, including the number of hours he worked each week and each pay period, and failed to do so. Pursuant to ORS 653.256, the forum may assess civil penalties not to exceed \$1,000 for each willful violation of ORS 653.045.

For the purposes of ORS 653.010 to 653.261, “willfully” is defined in OAR 839-020-0004(33) which states:

“‘Willfully’ means knowingly. An action is done knowingly when it is undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person “should have known the thing to be done or omitted” if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of these rules, the employer is presumed to know the requirements of ORS 653.010 to 653.261 and these rules.”

The Agency made a prima facie case that Bukovina Inc. had knowledge of facts and circumstances that put it on notice of its duty to keep and maintain records pertaining to Claimant. There is no credible evidence that suggests otherwise and the forum concludes that Bukovina Inc. willfully failed to make and maintain required records in accordance with ORS 653.045(1).

The Agency’s second claim for civil penalties against Bukovina Inc., essentially, is a request for double penalties based on the same employer misconduct - failure to make and keep records. There is no question that a separate cause of action under ORS 653.045(2) may be maintained when the Agency establishes that a respondent kept records in accordance with ORS 653.045(1) and then willfully refused or failed to make those records available to the Agency, *i.e.*, keep them “open for inspection or transcription by the commissioner or the commissioner’s designee at a reasonable time.” In this case, however, the forum concludes there is no basis for the second claim because the Agency has already established that Bukovina Inc. kept no records pertaining to Claimant. Therefore, the Agency’s claim for a penalty under ORS 653.045(2) is merely an attempt to penalize Bukovina Inc. twice for the identical misconduct that warranted a penalty under ORS 653.045(1). The Agency’s claim for a civil penalty under ORS 653.045(2) fails.

CIVIL PENALTY UNDER ORS 653.256

The actual amount of the civil penalty the Commissioner assesses depends on the mitigating and aggravating circumstances set forth in OAR 839-020-1020. See OAR 839-020-1010. In this default case, Bukovina Inc. presented no mitigating evidence for the forum to consider when determining the amount of the civil penalty. On the other hand, the Agency established several aggravating factors that warrant the maximum penalty allowed. The Agency alleged and the forum finds that Bukovina Inc., as an employer, knew or should have known of the violations and despite numerous opportunities to comply with the law prior to the Order of Determination, Bukovina Inc. failed to avail itself of those opportunities. Moreover, credible evidence showed that the Agency Compliance Specialist gave Bukovina Inc. numerous opportunities to correct the violations and that its failure to make and keep records hampered the Agency's ability to determine Claimant's actual wages owed. As such, the violation is serious and the forum concludes that Bukovina Inc. is liable for a civil penalty and \$1,000 is an appropriate penalty in this case.

RESPONDENTS' EXCEPTIONS

Respondents, through counsel, filed "primary" and "secondary" exceptions to the ALJ's proposed order. The primary exceptions dispute the ALJ's conclusions that 1) Respondent Bukovina Inc. defaulted by failing to appear at hearing with counsel or an authorized representative and 2) Bukovina Inc. employed Claimant.

OAR 839-050-0330(3) provides, in pertinent part:

*"When a party is in default and the administrative law judge has not granted relief from default, the administrative law judge will not permit the party to participate in any manner in the subsequent hearing, including, but not limited to, * * * filing exceptions to the Proposed Order."* (emphasis added)

At the start of hearing, Bukovina Inc.'s former authorized representative, Valentina Zhiryada, dispelled any doubt about her intention and unequivocally maintained that she was not appearing as Bukovina Inc.'s authorized representative and was only appearing for Bukovina LLC. Based on Zhiryada's representations and Bukovina Inc.'s failure to comply with the ALJ's prior orders to either retain counsel or submit a letter authorizing a representative, the forum held Respondent Bukovina Inc. in default for its failure to appear at hearing with counsel or an authorized representative in accordance with OAR 839-050-0110(1)&(3). Consequently, although Respondents' primary exceptions are included in the record, the forum is barred from giving them consideration in this Final Order.

However, the forum will consider the secondary exception which disputes the ALJ's conclusion that Respondent Bukovina LLC was jointly and severally liable for Bukovina Inc.'s failure to pay wages. Respondents first suggest the ALJ exhibited bias by making a "gratuitous comment regarding Valentina's 'apparent readiness to create a new entity to avoid liability.'" Although the comment was an inference drawn from the underlying facts and not intended to inflame, in retrospect, the forum agrees the comment was not necessary to support the rationale behind the ultimate conclusion that both Respondents are liable for repayment to the WSF for Claimant's unpaid wages. Consequently, the language in that section of the Opinion has been modified to more accurately reflect the forum's rationale for its conclusion.

Respondents next contend that as a "separate legal entity" under Washington law, Bukovina LLC is not "answerable to the Oregon Bureau of Labor and Industries for the wage obligations of [Bukovina Inc.], an Oregon corporation." However, Bukovina LLC's status as a foreign entity is not necessarily a factor when determining whether it conducts essentially the same business as its predecessor. Just as a foreign entity that

conducts business in Oregon is subject to Oregon's wage and hour laws as to its Oregon employees, a foreign entity that succeeds to an Oregon entity and continues to conduct the identical business in Oregon may be held liable for its predecessor's failure to pay wages.

ORS 652.310(1) provides that for the purposes of wage claim enforcement, "employer" includes "*any* successor to the business of *any* employer * * * for the continuance of the same business, so far as such employer has not paid employees in full." (emphasis added) In this case, Bukovina LLC succeeded to Bukovina Inc. for the continuance of Bukovina Inc.'s trucking business in Oregon and Washington, retaining the same name (albeit a different business structure), equipment, and Oregon customers. Bukovina LLC continued to conduct the same business as its predecessor in Oregon and meets the criteria for a bona fide successor. Bukovina LLC's status as a "separate legal entity" under Washington law has no relevance.

Respondents' exceptions are **DENIED**.

ORDER

NOW, THEREFORE, as authorized by ORS 652.414, and as payment of the amounts paid from the Wage Security Fund under ORS 652.414(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Bukovina Express, Inc.** and **Bukovina Express, LLC** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of SEVEN HUNDRED AND NINETY TWO DOLLARS AND TWENTY CENTS (\$792.20), representing \$592.20 of the \$792.20 paid to Alexander Sheifer from the Wage Security Fund and a \$200 penalty on that sum, plus interest at the legal rate on the sum of \$792.20 from May 1, 2004, until paid.

FURTHERMORE, as authorized by ORS 652.332 and ORS 652.150, and as payment of the penalty wages assessed as a result of its violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Bukovina Express, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Alexander Sheifer, in the amount of ONE THOUSAND SIX HUNDRED AND NINETY TWO DOLLARS (\$1,692), representing \$1,692 in penalty wages, plus interest at the legal rate on the sum of \$1,692 from June 1, 2004, until paid.

FURTHERMORE, as authorized by ORS 653.256, and as payment of the civil penalties assessed as a result of Bukovina Express Inc.'s violation of ORS 653.055, the Commissioner of the Bureau of Labor and Industries hereby orders **Bukovina Express, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Alexander Sheifer, in the amount of ONE THOUSAND SIX HUNDRED AND NINETY TWO DOLLARS (\$1,692), representing \$1,692 in civil penalties, plus interest at the legal rate on the sum of \$1,692 from June 1, 2004, until paid.

FINALLY, as authorized by ORS 653.256, and as payment of the civil penalty assessed as a result of Bukovina Express Inc.'s willful violation of ORS 653.045, the Commissioner of the Bureau of Labor and Industries hereby orders **Bukovina Express, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND DOLLARS (\$1,000), plus any interest that

accrues at the legal rate on that amount from a date ten days after the issuance of the Final Order and the date **Bukovina Express, Inc.** complies with the Final Order.

ⁱ The interrogatories included the question: "Provide the name, address, and telephone number of the driver that the Wage Claimant, Alexander Sheifer, drove with during the wage claim period of March 23 through March 29, 2004."

ⁱⁱ The attachments inadvertently were marked as separate exhibits in the official record. The documents marked as Exhibits X-28 and X-29 are actually incorporated by reference in Exhibit X-27.

ⁱⁱⁱ ORS 652.414(1) requires the Commissioner to pay a wage claimant out of the WSF when he has determined that the wage claim is valid, the employer against whom the claim was filed has ceased doing business, the employer is without sufficient assets to pay the wage claim, and the wage claim cannot otherwise be fully and promptly paid. Here, Bukovina Inc. did not appear at the hearing to contest the recovery action and, in the absence of contrary evidence, the forum applies the presumption that an "[o]fficial duty has been regularly performed." ORS 40.135(1)(j). See also *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999).

^{iv} Agency Compliance Specialist Trotman credibly testified that she made a determination that Claimant's claim was valid and she established the means by which she made that determination. She also confirmed that the \$592.20 paid to Claimant from the WSF was based on her determination that the wage claim was valid. See *In the Matter of Lisa Sanchez*, 27 BOLI _ (2005) (in cases involving payouts from the WSF, when (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) BOLI has paid out money from the WSF and seeks to recover that money, a rebuttable presumption exists that the Agency's determination is valid for the sums actually paid out).

^v Also, there are statutory provisions that reduce or provide a defense to the penalty under certain circumstances that are not otherwise available to a successor employer. See ORS 652.150(2); ORS 652.150(3); ORS 652.150(5). Contrast with ORS 652.414(3) that allows the Commissioner to recover amounts paid from the WSF *and* a penalty of 25 percent of the amount of wages paid from the WSF or \$200, whichever is greater, from "the employer or other persons or property liable for the unpaid wages."