

**In the Matter of**  
**TYREE OIL, INC.,**  
**Respondent.**

Case Number 10-98  
Final Order of the Commissioner  
Jack Roberts  
Issued June 10, 1998.

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**SYNOPSIS**

Complainant, an injured worker, was on temporary disability when his employer sold its assets to respondent. When complainant was released to return to work, he demanded to be reinstated by respondent to his former position. Respondent rejected his demand. Applying the successorship doctrine, the commissioner held that respondent was a successor employer and failed to reinstate complainant to his former position, in violation of ORS 659.415(1). The commissioner ordered respondent to reinstate complainant and pay him back wages and damages for mental suffering. ORS 659.415(1), (3)(b)(D); OAR 839-006- 0115(2), 839-006-0130(1).

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The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 7, 1998, in Suite 220 of the State Office Building, 165 East Seventh Avenue, Eugene, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Blair Fountain (Complainant) was present

throughout the hearing. Tyree Oil, Inc. (Respondent) was represented by Dennis Percell, Attorney at Law. Ron Tyree, Respondent's president, was present throughout the hearing.

The Agency called the following witnesses: Jesse Aday, Respondent's former employee; Blair Fountain, Complainant; Darlene Fountain, Complainant's wife; and Ron Tyree, Respondent's president.

Respondent called the following witnesses: Lisa Allender, Respondent's office manager; Dan Cumberland, owner of Cumberland Distributing, Inc. (Cumberland); Sherry Stemmerman, of Stalcup Trucking; and Ron Tyree, Respondent's president.

Administrative exhibits X-1 to X-39, Agency exhibits A-1 to A-6 and A-8 to A-14, and Respondent exhibits R-1 to R-6 and R-8 to R-11 were offered and received into evidence. The Agency withdrew exhibit A-7. Exhibit R-7 did not exist. Exhibits X-37, X-38, and X-39 are Respondent's addition to its case summary, its hearing memorandum, and the Agency's response to the memorandum, respectively, which are hereby received. The record closed on April 10, 1998.

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

#### **RULING ON MOTION**

During its closing argument, the Agency moved to amend the Specific Charges to request the additional remedy of reinstatement. Respondent opposed the amendment because it was untimely and prejudicial, and there was insufficient evidence on the record concerning the participant's positions on the issue. The ALJ reserved ruling on the motion until the Proposed Order.

The Agency's motion is granted, pursuant to OAR 839-050-0140. Complainant's right and eligibility for reinstatement were central issues in this case. The ALJ received evidence on these issues. While the Agency's motion was made very late in the process and after the evidentiary record was closed, Respondent's argument that additional evidence was necessary was not persuasive. Nor can I find that Respondent is substantially prejudiced by allowing the motion, since the remedy requested is exactly what the law had required it to provide.

#### **FINDINGS OF FACT -- PROCEDURAL**

1) On September 23, 1996, Complainant filed a verified complaint with the Civil Rights Division of the Agency. He alleged that he suffered an on-the-job compensable injury while working for Respondent's predecessor, Cumberland Distributing, Inc.; before he got a full release to return to work, Respondent became the new owner; and Respondent failed to reinstate him to his former job after he was fully released to return to work.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence of an unlawful employment practice by Respondent in violation of ORS 659.415.

3) On October 2, 1997, the Agency prepared and duly served on Respondent Specific Charges alleging that Respondent failed to reinstate Complainant to his former position of employment. The Specific Charges alleged that Respondent's action violated ORS 659.415.

4) With the Specific Charges, the forum served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the

contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On October 16, 1997, Respondent filed an answer in which it denied the allegation mentioned above in the Specific Charges, and stated affirmative defenses.

6) On October 16, 1997, Respondent's attorney, Dennis Percell, requested a postponement of the hearing because he intended to file a motion for summary judgment. He asserted that there was insufficient time to prepare the motion, for the Agency to respond, to obtain a ruling, and to complete discovery in the event the motion was denied. The Agency did not object to the motion and the ALJ granted it, pursuant to OAR 839-050-0150(5). The ALJ reset the hearing for April 7, 1998.

7) On December 11, 1997, Respondent filed a motion for summary judgment with exhibits. Respondent argued that (1) it was not Complainant's employer, for purposes of ORS 659.415; (2) it was not responsible for Cumberland's obligation to Complainant; and (3) it was not a successor in interest of Cumberland. After extensions of time, an Assistant Attorney General responded to the motion on behalf of the Agency. Respondent and the Agency filed supplemental responses. On February 17, 1998, the ALJ denied the motion, concluding that genuine issues of material fact existed, which precluded summary judgment. OAR 839-050-0150(4)(a)(B)

8) On February 26, 1998, Respondent requested an order authorizing the deposition of Complainant. The Agency did not object and the ALJ granted the request.

9) On March 11, 1998, Respondent filed a second motion for summary judgment, with stipulated facts. Respondent argued that Complainant was not eligible for reinstatement, pursuant to ORS 659.415(3)(b)(D). Through the Attorney General's office, the Agency responded. On March 20, 1998, the ALJ denied the motion because Complainant was not ineligible under the statute. See the opinion below.

10) On March 11, 1998, the Agency requested an order authorizing the deposition of Ron Tyree. Respondent did not object and the ALJ granted the request.

11) On March 23, 1998, the Agency requested a discovery order concerning documents it had earlier requested from Respondent. In a telephone conference with the ALJ, counsel for Respondent did not object to the motion, and the ALJ granted it.

12) Pursuant to OAR 839-050-0210 and the ALJ's order, the Agency and Respondent each filed a Summary of the Case and later filed supplements

13) A pre-hearing conference was held on April 7, 1998, at which time the Agency and Respondent stipulated to certain facts. Those facts were read into the record by the ALJ at the beginning of the hearing.

14) At the start of the hearing on April 7, 1998, the attorney for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

15) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) During the hearing and pursuant to OAR 839-050-0140(2)(b), the Agency moved to amend the Specific Charges to request that Respondent reinstate Complainant to his former position of employment. The ALJ reserved ruling on the motion until the proposed order. See the "Ruling on Motion" section of this order, above.

17) On May 26, 1998, the ALJ issued a Proposed Order in this matter. On June 4, 1998, the Hearings Unit received Respondent's timely exceptions, which are addressed in the Opinion section of this Final Order.

## **FINDINGS OF FACT -- THE MERITS**

1) At all times material herein, Respondent was a domestic corporation with its principal place of business in Eugene, Oregon, and it employed six or more persons in Oregon.

2) Respondent was in the business of selling and distributing petroleum products, primarily from Eugene and Roseburg. Respondent's president was Ron Tyree. Before June 1996, Respondent had customers in Washington, Idaho, northern California, and Oregon, including some customers in Florence, Reedsport, and Coos Bay. Among its business activities, Respondent serviced trucking, mining, railroad, and construction customers, and some retail gasoline stations. It sold heating oil and acted as a common carrier for hire. It performed chemical analyses for customers. It distributed industrial products such as diesel additives and environmental cleanup products.

3) Cumberland Distributing, Inc. (Cumberland) operated a business primarily engaged in the sale and distribution of fuel and petroleum products. It serviced customers along the coast from south of Bandon to north of Florence, and east to Coquille and Elkton. It serviced the trucking, logging, and fishing industries along the coast. It sold heating oil. Before June 1996, Cumberland had no financial interest in Respondent, and Respondent had no financial interest in Cumberland. Cumberland was owned by Dan and Colleen Cumberland. Dan Cumberland was the president. Cumberland's principal office was in Reedsport, and it had another office in Coos Bay. During the second quarter of 1996, Cumberland employed fewer than 20 employees.

4) Complainant was hired by Cumberland on or about January 3, 1996, as a driver of Cumberland's tanker truck.

5) At all times material, Complainant lived in Florence.

6) Before May 1996, Dan Cumberland told Complainant and the other employees that he planned to sell Cumberland's assets to Respondent. In April 1996, Ron Tyree met with Cumberland's employees, including Complainant. He told them that things would not really change after the sale, and the employees did not need to worry about their jobs.

7) On Thursday, May 30, 1996, Complainant suffered an on-the-job injury to his lower back. He first saw a doctor on June 3, 1996. He called Dan Cumberland, who told him to stay home until he recovered. He filed a workers' compensation insurance claim form on June 6, 1996. The claim was accepted by SAIF Corporation (Cumberland's workers' compensation insurance company) on July 16, 1996. The insurer paid Complainant for temporary total disability from June 7 to July 7, 1996, and closed the claim on August 1, 1996.

8) Soon after Complainant was injured on May 30, 1996, Cumberland re-employed Jesse Aday to drive the tanker truck Complainant had been driving. Until February 1996, Aday had worked for Cumberland driving the same truck, and he had trained Complainant. When Aday was re-employed, he had an agreement with Dan Cumberland to work for around two weeks, until Complainant returned from his injury.

9) Respondent purchased some assets of Cumberland in June 1996.

10) Before it purchased Cumberland's assets, Respondent employed around 30 employees, 23 in Eugene and 7 in Roseburg.

11) On June 16, 1996, Cumberland assigned a franchise agreement for a Pacific Pride fueling system territory to Respondent. Further, Cumberland signed a covenant not to compete for two years with Respondent in any capacity in any automated commercial fueling business located within five miles of the boundaries of the franchise agreement territory.

12) Before June 17, 1996, Ron Tyree did not know that Complainant had been injured on May 30, 1996.

13) On June 17, 1996, Cumberland sold to Respondent substantially all of the assets used or useful in the operation of Cumberland's business. The assets included equipment, rolling stock (including about a dozen trucks, tankers, and trailers), tools, office equipment and furniture, and fixtures; inventories of supplies and merchandise; equipment leases, real property leases, distributorship agreements, and other contracts; certain leasehold improvements; Cumberland's rights under sales orders and purchase orders and contracts; and Cumberland's goodwill. One of the assets Respondent purchased was the 96,000 pound tanker truck that Complainant drove. Respondent knew before June 17, 1996, that Complainant was the driver of that truck. Respondent did not assume Cumberland's accounts receivable or accounts payable. Respondent did not specifically assume any liability regarding Cumberland's employees. Section six of the sale agreement, entitled "Adjustments," states in part:

"Expenses, including but not limited to utilities, personal property taxes, rents, real property taxes, wages, vacation pay, payroll taxes, and fringe benefits of the employees of [Cumberland], shall be prorated between [Cumberland] and [Respondent] as of the close of business on the closing date, the proration to be made and paid, insofar as reasonably possible, on the closing date \* \* \*." (Emphasis added.)

In section 10.3 of the agreement, entitled "Employee Matters," Cumberland promised to give to Respondent a list of all employees, along with amounts paid each employee during the previous and current fiscal years, and a schedule of other material compensation or personnel benefits or policies in effect. Cumberland also promised that, before the closing date, it would not enter into any "material agreement" with its employees, increase their pay or bonuses, or make any changes in personnel policies or employee benefits without Respondent's prior written consent. Cumberland promised to "terminate all of its employees not having employment agreements transferable to

[Respondent] and will pay each employee all wages, commissions, and accrued vacation pay earned up to the time of termination, including overtime pay" as of the closing date. Cumberland and Dan and Colleen Cumberland also agreed not to compete with Respondent in the distribution of fuel or petroleum products for five years in Lane, Douglas, and Coos Counties. Respondent agreed to pay Cumberland for the assets in monthly installments from July 1996 to June 2003.

14) When Respondent purchased Cumberland's assets in June 1996, it added about 1,000 customers. However, many of these were inactive. Around 350 were active customers. Respondent continued to operate out of Cumberland's former locations in Reedsport and Coos Bay. Respondent serviced the same areas that Cumberland had. There was no interruption in service to Cumberland's former customers. Respondent offered some new services and did not provide some services that Cumberland had. For example, Respondent discontinued the sale of oil filters, the recycling of additives and antifreeze, and the repair of customers' equipment. Sales related to the acquisition of Cumberland amounted to around 15 percent of Respondent's gross sales.

15) After Respondent bought Cumberland's assets, Respondent moved most of Cumberland's office and bookkeeping functions to Respondent's Eugene office. Respondent's financial operations were different from those that Cumberland had used, and Respondent did not use most of Cumberland's office and bookkeeping methods.

16) In March 1998, Respondent had around 3,000 customers. Of those, around 1,000 customers were serviced from Respondent's facilities in Reedsport and Coos Bay and around 2,000 were serviced from Respondent's facilities in Eugene and Roseburg. Respondent had around 50 trucks, trailers, tankers, and tank trucks. Eleven

of those assets were operated out of Respondent's Reedsport-Coos Bay facilities; 10 of them were assets acquired from Cumberland in June 1996.

17) Just before the sale of its assets, Cumberland had 11 employees (including Dan and Colleen Cumberland). Around June 17, 1996, Dan Cumberland terminated the employment of all Cumberland employees, including Complainant. However, Dan Cumberland never told Complainant he was terminated or that he would have to apply with Respondent to be hired. Beginning June 17, 1996, Respondent employed 8 of the 11 Cumberland employees. Respondent did not employ Complainant, Dan Cumberland, or Colleen Cumberland. At first, the eight employees earned the same rate of pay as they had with Cumberland. Over time, Respondent slowly changed their pay rates to match Respondent's pay scales. Respondent treated these employees as new hires with respect to health and other benefits. Respondent provided employment policies and benefits that Cumberland had not provided. For a while after June 17, these eight employees continued to perform their same jobs; that is, the drivers continued to drive and the office workers continued to perform office work. In time, the duties of some of the eight employees changed. For example, Respondent gave the mechanic more driving duties, and the maintenance and repair work was phased out. Likewise, over time, Respondent changed the use and location of some of the rolling stock and other assets. Jesse Aday was one of the workers Respondent employed. Aday agreed to work for Respondent for \$10.50 per hour. Aday told Ron Tyree that he didn't want to take Complainant's job. Tyree said that Aday was not taking Complainant's job, because there was a place for Complainant with Respondent. Tyree expected to hire Complainant full time once he was released for work. Aday worked continuously for Respondent for one and a half years. During the first five weeks, Aday worked from 40 to 50 hours per week.

18) In 1996, Respondent paid Jesse Aday gross wages of \$12,409. In 1997, Respondent paid him gross wages of \$24,845.

19) On June 17, 1996, Complainant's doctor released him to return to light duty work with a 25 pound lifting restriction and limitations on the number of hours he could sit, walk, and stand per day. Complainant called Dan Cumberland, who told him to talk to Ron Tyree. Complainant called Tyree, who said to come in. Complainant met Tyree at the Reedsport office. Tyree changed his mind about putting Complainant to work when he learned that Complainant had been injured and had a 25 pound lifting restriction. Tyree told Complainant he needed to wait until he had a full (unrestricted) release to return to work from his doctor.

20) On July 1, 1996, Tyree told Complainant that he (Tyree) had hired Aday. Complainant had other conversations with Tyree and showed he was very interested in returning to work. Tyree told Complainant he needed a full work release before he could come to work.

21) On July 8, 1996, Complainant's doctor, Dr. Pearson, released him to return to regular work without restriction. In a letter to SAIF Corporation, Dr. Pearson wrote, "[Complainant] tells me that he is completely recovered now and is released to go back to work full capacity."

22) On July 11, 1996, Complainant got a copy of Dr. Pearson's July 8 letter and faxed a copy to Ron Tyree. Tyree faxed the letter to Phil Swinford with SAIF Corporation. Tyree was unsure whether Dr. Pearson's letter constituted a sufficient work release because it was based only on what Complainant said. Complainant talked to Tyree three more times, and Tyree said he was still talking to SAIF, but not to worry. Tyree also told Complainant's wife that Complainant should not worry. Complainant also called SAIF, to try to get the matter resolved. On July 17, 1996, Swinford sent Tyree a

fax with another letter from Dr. Pearson, dated July 12, 1996. Swinford thought this second letter was an adequate work release.

23) On July 17, 1996, Tyree was in the Reedsport office. He called and left a message for Complainant to come in and talk about the job. An office worker, Karen, told Tyree that Complainant had gotten the message and had stopped in when Respondent was not there. Respondent called and left another message for Complainant. Respondent told Karen to contact him if Complainant came to the office, so they could meet. Between July 17 and 23, 1996, Respondent did not hear from Complainant

24) Complainant became suspicious that he would not get his job back. He talked to an attorney, and on July 23, 1996, attorney C. Randall Tosh sent Respondent a letter demanding that Respondent reinstate Complainant to his former position and demanding back wages.

25) On July 31, 1996, Respondent's attorney wrote to Mr. Tosh that Complainant's former employer was Cumberland, not Respondent, and that Complainant had no right of reinstatement with Respondent.

26) Complainant did not apply for other job openings with Respondent after July 1, 1996. Respondent had job opportunities with wages around what Respondent paid Jesse Aday. Respondent had Complainant's home address. Respondent did not mail Complainant a letter about any job openings.

27) Between early August 1996 and late March 1997, Complainant actively looked for driving jobs and other work in the southern coastal area of Oregon. He found no suitable work. He did not want to move to Eugene for work.

28) Complainant is not seeking and is not entitled to damages after he became self-employed, which was on or about April 1, 1997.

29) From July 10, 1996, to April 1, 1997, Stalcup Trucking, Inc. needed drivers off and on. It hired 11 drivers in the Coos Bay and Reedsport areas during that time. Stalcup's business was located on Highway 101 in Coos Bay, and it had a reader-board along the highway on which it advertised when it was hiring drivers. Complainant did not remember seeing the reader board. He saw Stalcup's help-wanted advertisements in a newspaper and called their office twice. Both times he learned that the available jobs were located in Roseburg. Complainant did not submit a written application. Stalcup paid its drivers 26.2 cents per mile, plus \$6.24 per hour for down time, and \$9.88 per hour for other work. Stalcup provided insurance and vacation benefits.

30) Complainant suffered financial hardship after he was released to return to work and his temporary disability benefits stopped. He supported his wife and two children. He couldn't pay his bills and had to borrow money from his mother. His wife took house cleaning jobs to help out financially. Complainant felt shocked and confused when he wasn't put back to work by Respondent. He was upset because he was "left hanging." He had never been fired from a job. The stress of waiting to return to work made him "grumpy." He lost confidence in his ability to find work because he was over 40 years old and had suffered a back injury on his last job with Cumberland. He became depressed and felt hopeless when he could not find work. He experienced sleeplessness.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material, Respondent employed 21 or more persons within the state of Oregon.

2) On May 30, 1996, Complainant was injured on the job. On June 3, 1996, Complainant notified Cumberland Distributing, Inc., his employer, of the injury and

sought medical treatment. He applied for and received benefits in accordance with the Oregon workers' compensation procedures.

3) On June 16 and 17, 1996, Cumberland sold substantially all of its assets to Respondent. Thereafter, Cumberland was unable to reinstate Complainant to his former job.

4) Beginning June 17, 1996, Respondent substantially continued Cumberland's business operations. Respondent used the same facilities in Reedsport and Coos Bay and substantially the same work force that Cumberland had used. Initially, the same jobs existed under substantially the same working conditions. Respondent provided different benefits and later changed some of the jobs' duties. Respondent used substantially the same equipment and assets that Cumberland had used, and provided substantially the same services to Cumberland's former customers. Respondent used different supervisory personnel.

5) Effective July 8, 1998, Complainant was fully released by his treating physician to return to his former job.

6) Complainant was physically able to perform the duties of his former position.

7) On July 11, 1996, Complainant made a demand to Respondent for reinstatement to his former position.

8) At the time of Complainant's demand to return to work, his former position existed and was available.

9) Respondent never reinstated Complainant to his former job or offered him another existing position that was vacant and suitable.

10) Complainant made a reasonable effort to obtain employment for which he was qualified and which he was able to perform until April 1, 1997.

11) Between July 17, 1996, and March 31, 1997, Complainant lost wages of \$16,772.

12) Complainant suffered mental and financial distress and prolonged unemployment due to Respondent's failure to reinstate him to his former position.

### **CONCLUSIONS OF LAW**

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.435. See ORS 659.400(3), 659.415(3)(b)(D), and 659.010(12) and (13).

2) Complainant was Respondent's "worker," as that term is used in ORS 659.415.

3) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein. ORS 659.435.

4) The actions, inactions, and knowledge of Ron Tyree, an employee or agent of Respondent, are properly imputed to Respondent.

5) ORS 659.415 provides in part:

"(1) A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of such position. A worker's former position is 'available' even if that position has been filled by a replacement while the injured worker was absent. If the former position is not available, the worker shall be reinstated in any other existing position which is vacant and suitable. A certificate by the attending physician that the physician approves the worker's return to the worker's regular employment or other suitable employment shall be prima facie evidence that the worker is able to perform such duties.

" \* \* \* \* \*

"(3) Notwithstanding subsection (1) of this section:

" \* \* \* \* \*

"(b) The right to reinstatement under this section does not apply to:

" \* \* \* \* \*

"(D) A worker whose employer employs 20 or fewer workers at the time of the worker's injury and at the time of the worker's demand for reinstatement.

"(4) Any violation of this section is an unlawful employment practice."

Respondent violated ORS 659.415.

6) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110 and 659.400 to 659.545, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of the Complainant and other persons similarly situated.

### **OPINION**

#### **Duty to Reinstatement an Injured Worker**

ORS 659.415(1) says that an injured worker "shall be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of such position."

"It is a *per se* violation of ORS 659.415 not to reinstate an employee when reinstatement is required. A discriminatory motive need not be proved to establish a violation of the statute \* \* \*." *Palmer v. Central Oregon Irrigation District*, 91 Or App 132, 136, 754 P2d 601, 603 (1988).

To present a prima facie case of a violation of ORS 659.415 (failure to reinstate an injured worker) the Agency must present evidence that (1) the worker suffered a compensable on-the-job injury; (2) the worker demanded reinstatement to the worker's former position, which existed and was available; (3) the worker was not disabled from

performing the duties of such position; and (4) the employer denied the worker reinstatement. See *In the Matter of Pacific Convalescent Foundation, Inc.*, 4 BOLI 174, 184 (1984).

In this case, there is no dispute that Complainant suffered an on-the-job compensable injury, he demanded reinstatement to his former position, he was not disabled from performing the duties of such position on July 8, 1996, and Respondent denied him reinstatement. Evidence shows that Complainant's job had been filled with a replacement worker (Aday) by Cumberland. Thus, Complainant's position still existed and was available. ("A worker's former position is 'available' even if that position has been filled by a replacement while the injured worker was absent." ORS 659.415(1).) Respondent then hired Aday to continue driving the tanker truck that Complainant had driven, with the assurance that Aday would not take away Complainant's job. There is no evidence that the duties of this position changed or that the position did not exist after Respondent acquired Cumberland's assets. Accordingly, the forum concludes that the position still existed and was available after June 17, 1996, with Respondent.

The issues here are whether Respondent was a successor employer of Cumberland Distributing, Inc. (Complainant's employer at the time of injury) and, if so, whether Respondent had an obligation under ORS 659.415 to reinstate him to his former position. The Agency contends that Respondent is the successor employer and had a duty to reinstate Complainant. Respondent denies that it was and asserts that Complainant was never its employee.

### **Successor Employer**

Ruling on a Respondent motion for summary judgment, the ALJ set out the law of the forum concerning successor employers in civil rights matters, quoting *In the Matter of Palamino Cafe and Lounge, Inc.*, 8 BOLI 32 (1989).

"The general rule in discrimination cases under federal law regarding successor liability holds the successor entity liable for the acts of the predecessor unless such a holding would be manifestly unjust to the succeeding entity[.] \* \* \* *EEOC v. MacMillan Boedel Containers, Inc.*, 8 FEP 897, 901, 503 F2d 1086 (6th Cir 1974).

" \* \* \* \* \*

"The *MacMillan* case outlines relevant factors, taken from National Labor Relations Act cases, as being equally applicable to successorship considerations in discrimination cases:

'1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production, and 9) whether he produces the same product.' *Ibid.*, at 902-03.

This nine-point formula was *adopted* by the Ninth Circuit in *Slack v. Havens*, 522 F2d 1091, 11 FEP 27 (9th Cir 1975). [See also *Bates v. Pacific Maritime Assn.*, 744 F2d 705, 709-10, 35 FEP 1806, 1807-08 (9th Cir 1984).]

"This Forum has *previously* considered the successor problem in instances where an owner of a corporation has continued as a proprietorship in place of an insolvent or defunct corporate entity. In *In the Matter of Anita's Flowers & Boutique*, 6 BOLI 258 (1987), the Commissioner determined that in deciding whether an employer is a 'successor,' the test is whether it conducts essentially the same business as the predecessor. The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the same or substantially the same work force employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present to find an employer to be a successor; the facts must be considered together to reach a decision. See, e.g., *NLRB v. Jefferies Lithograph Co.*, 752 F2d 459 (9th Cir 1985). \* \* \* " *Palomino*, 8 BOLI at 43-44.

Since *Palomino* was issued in 1989, the Commissioner has revisited the issue of successor liability in three other civil rights cases and has cited *Palomino* with approval each time. *In the Matter of G & T Flagging Service, Inc.*, 9 BOLI 67, 77 (1990); *In the*

*Matter of Pzazz Hair Designs*, 9 BOLI 240, 250 (1991); and *In the Matter of Gardner Cleaners, Inc.*, 14 BOLI 240, 254-55 (1995).<sup>1</sup>

Respondent criticized the Agency's position because of its reliance on the *NLRB v. Jefferies Lithograph* case. As the ALJ found, however, that criticism is not well founded. "Successorship first developed in the context of obligations under the National Labor Relations Act. 29 USC § 151, *et seq.* (1982). \* \* \* Different policy considerations and enforcement mechanisms are incorporated in Title VII; nonetheless, we have held the successorship doctrine to apply to Title VII obligations." *Bates v. Pacific Maritime Assn.*, 744 F2d 705, 35 FEP at 1808 (citing *Slack v. Havens* and *EEOC v. MacMillan Boedel Containers, Inc.*). See also *Musikiwamba v. ESSI, Inc.*, 37 FEP 821, 825 (7th Cir 1985) (analysis set forth by US Supreme Court to justify successor liability in cases arising under NLRA also justifies successor liability in employment discrimination cases, since overriding federal policy against unfair and arbitrary employment practices is implicated in both types of cases).

The ALJ properly concluded that *Palomino* sets out the factors this forum must consider to decide the successorship issue.

Respondent also asserted that it was not responsible for Cumberland's obligation to Complainant, citing from *Schmoll v. Acands, Inc.*, 703 F Supp 868, 872 (D Or 1988), that "when a corporation purchases all or most of the assets of another corporation, the purchasing corporation does not assume the debts and liabilities of the selling corporation." The ALJ ruled that *Schmoll* was not relevant to the successor employer issue in this case. Likewise, the forum has reviewed Respondent's hearing memorandum and concludes that *Schmoll* and the related cases cited by Respondent are not on point here. The ALJ's ruling is affirmed.

Respondent argued that it had only purchased Cumberland's assets, that Cumberland continued to exist after the acquisition, and that Respondent just "folded the purchased assets into its own larger business." Transferring assets from one company to another does not preclude a finding that the purchasing company is a successor. In *Slack*, the court noted that where one corporation (International) dissolved and its assets were transferred to another corporation (Calgon), "Calgon may well have been liable as International's successor corporation \* \* \*." *Slack v. Havens*, 522 F2d 1091, 11 FEP at 30-31.

Before returning to the nine-point formula adopted in *Palomino*, the forum notes its agreement with the *MacMillan* court that successorship turns on the facts in the case. "Each case \* \* \* must be determined on its own facts. \* \* \* We emphasize that the liability of a successor is not automatic, but must be determined on a case by case basis." *MacMillan Boedel Containers*, 503 F2d at 1090-91, 8 FEP at 900; accord *Bates*, 744 F2d 705, 35 FEP at 1808.

The first inquiry is whether Respondent had notice of the charge. In the *MacMillan* case, the "charges" referred to were EEOC charges alleging race and sex discrimination brought against the predecessor. In the *Slack* case, the "charges" referred to were again EEOC charges alleging race discrimination brought against the predecessor. In the *Bates* case, the court refers to "the notice to the successor employer of its predecessor's legal obligation." *Bates*, 744 F2d 705, 35 FEP at 1809. The legal obligation referred to was a consent decree entered into by an association of companies; one of those companies was defendant's predecessor.

Here, there was no charge against Cumberland. No one has alleged that Cumberland committed an unlawful practice. However, Cumberland had a legal obligation to reinstate Complainant to his former position in accordance with ORS

659.415. On June 17, 1996, Ron Tyree learned from Complainant that he was released to light duty work following a compensable injury. This was also the date that Cumberland transferred its assets to Respondent. The record is silent about whether Tyree learned that Complainant was an injured worker before or after he signed the sale agreements. In any event, notice to Respondent of its predecessor's legal obligation was slim at best. Nevertheless, the record shows that Respondent intended to put Complainant to work, and only delayed the start date until after Complainant got a full work release. As late as July 17, 1996, Tyree was trying to contact Complainant to put him to work. The forum is convinced from the preponderance of the credible evidence in the whole record that Respondent would have reinstated Complainant to his former position if Complainant's attorney had not sent Respondent the letter demanding reinstatement and back pay. Under these circumstances, the late notice to Respondent of Cumberland's legal obligation to Complainant was inconsequential.

The second factor to consider is the ability of the predecessor, Cumberland, to provide relief. Cumberland exists primarily to receive the proceeds from the sale of its assets to Respondent. Cumberland no longer has employees. At the time of hearing, Mr. Cumberland was employed by the Coquille School District. Cumberland could not reinstate Complainant to his former job. Any failure to reinstate the Complainant was Respondent's, not Cumberland's. This factor weighs in favor of finding successorship.

The third factor is whether there has been a substantial continuity of business operations. The forum views this factor from the perspective of Cumberland's business operation, and finds that, for the reasons given below regarding the other factors, there has been substantial continuity. This factor weighs in favor of finding successorship.

The next factor is whether the new employer, Respondent, uses the same plant. The forum finds that it does. Cumberland had facilities in Reedsport and Coos Bay.

Respondent continues to use those facilities. Although it has made changes over time (such as leasing out the repair shop), it still uses Cumberland's former locations for substantially the same purposes. This factor weighs in favor of finding successorship.

The fifth factor is whether Respondent uses the same or substantially the same work force. Cumberland employed 11 employees, including Mr. and Mrs. Cumberland, at the time Respondent bought its assets. Respondent immediately hired eight of those employees. The only ones not employed were Mr. and Mrs. Cumberland and Complainant. The forum finds that this constitutes substantially the same work force. The forum is also mindful that Respondent employed 30 other workers in Eugene and Roseburg. Thus, the former Cumberland employees did not make up a majority of Respondent's total workforce after the purchase of Cumberland. This last fact, by itself, weighs against finding successorship. Nevertheless, this fact must be looked at with all the other facts to make a decision.

The sixth factor is whether Respondent uses the same or substantially the same supervisory personnel. Respondent used different supervisory personnel. This fact weighs against finding successorship.

The seventh factor is whether the same jobs exist under substantially the same working conditions. Immediately after the purchase, the same jobs existed under substantially the same working conditions. Some job duties were later changed, and over time the mechanic's job became a driver's job. The wage rates immediately after the purchase were the same. Respondent offered different benefits than Cumberland had, and Respondent had different employment policies. On the whole, however, I find that the working conditions were substantially the same for the former Cumberland employees. This factor weighs in favor of finding successorship.

The eighth factor is whether Respondent uses the same machinery, equipment, and methods of production. The forum again views this factor from the perspective of Cumberland's business operation. It is undisputed that Respondent bought substantially all of the assets used or useful in the operation of Cumberland's business. Respondent used these assets and continued to service the same customers after the acquisition. There are some exceptions to this. For example, Respondent did not buy Cumberland's antifreeze recycling machine. And after a time, Respondent changed a fueling station to an unattended cardlock operation. Nevertheless, the forum finds that to a very high degree Respondent used the same machinery and equipment and it provided most of the same services as Cumberland had. Respondent presented credible evidence describing the other machinery, equipment, and services it used with a broader range of customers. However, the forum believes the proper focus should be on machinery, equipment, and services that were used and provided by Cumberland. This factor weighs in favor of finding successorship.

The final factor is whether Respondent produces the same product. Here, the inquiry should be whether Respondent provides the same products and services. Cumberland was engaged primarily in the sale and distribution of fuel and petroleum products, such as heating oil. Likewise, Respondent was in the business of selling and distributing petroleum products, including fuel and heating oil. Respondent discontinued some of Cumberland's products and services, but continued most of them. In addition, Respondent provided products and services that Cumberland had not. I find that Respondent provided substantially the same products and services. This factor weighs in favor of finding successorship.

Viewing all the facts together, they weigh in favor of imposing liability on Respondent as a successor employer.

## ORS 659.415 Right to Reinstatement Applies to Complainant

In a motion for summary judgment, Respondent argued that Complainant did not meet the requirements of ORS 659.415 and thus was ineligible for reinstatement. In the following ruling, the ALJ denied the motion.

"ORS 659.415(3) provides in pertinent part:

'Notwithstanding subsection (1) of this section:

' \* \* \* \* \*

'(b) The right to reinstatement under this section does not apply to:

' \* \* \* \* \*

'(D) A worker whose employer employs 20 or fewer workers at the time of the worker's injury and at the time of the worker's demand for reinstatement.'

"Respondent argues that 'in order to be eligible for reinstatement, Complainant must meet two separate requirements. First, his employer at the time of his injury must have employed at least 21 employees. Second, Complainant's employer must employ at least 21 employees at the time he requested reinstatement.' Respondent misreads the statute.

"The Agency argues that, '[i]n order to be ineligible for reinstatement, the complainant must meet two tests: his employer at the time of the injury must have twenty or fewer employees and his employer at the time of demand for reinstatement must have twenty or fewer employees. \* \* \* Both tests must be met to deny a complainant the right to reinstatement.'

"The Agency's interpretation is correct. The Agency properly points out that the first level of analysis of the statute is to examine the text and context of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143, 1146 (1993). Words of common usage typically should be given their plain, natural, and ordinary meaning. *PGE*, 317 Or at 611, 859 P2d at 1146.

"The difference in the participants' interpretations of the statute is that Respondent incorrectly reads it to define a worker's eligibility for reinstatement, while the Agency correctly reads it to define a worker's ineligibility.

"The statute speaks about when a worker's right to reinstatement does not apply, *i.e.*, when the worker is ineligible for reinstatement. The worker's right to reinstatement does not apply when the employer employs 20 or fewer workers at the time of the worker's injury and at the time of the worker's demand for reinstatement. Thus, the employer must employ 20 or

fewer workers at both times before the worker will lose the right to reinstatement.

"In its brief, the Agency also correctly points out that the context of the statute supports this conclusion.

'Subsection (1) of the same statute sets out the general rule that an injured worker is entitled to reinstatement to his former position if it exists, is available and the worker can perform the duties of the position. Subsection (3) is an exception to the general rule. ORS 659.405(2) states in relevant part that:

"The right to otherwise lawful employment without discrimination because of disability where the reasonable demands of the position do not require such distinction \* \* \* are hereby recognized and declared to be the rights of all people of this state. It is hereby declared to be the policy of the State of Oregon to protect these rights and ORS 659.400 to 659.460 shall be construed to effectuate such policy."

'ORS 659.415 is a remedial statute. BOLI's interpretation of subsection (3)(b)(D) supports the remedial nature of the statute by excluding from the right to reinstatement only those employers who had fewer than twenty employees both at the time of the worker's injury and at the time of his request for reinstatement.' (Agency's brief, at 2-3.)

"This interpretation is further supported by the Agency's rules. OAR 839-006-0115(2) provides:

'Employers covered by ORS 659.415 are those employing 21 or more workers at the time of the worker's injury or at the time of the worker's demand for reinstatement.'

"Likewise, OAR 839-006-0130(1) provides in part:

'An employer with 21 or more employees at the time of injury or at the time of demand is required to reinstate an injured worker to the injured worker's former position[.]'

"These rules are consistent with the Agency's interpretation that a worker becomes ineligible for reinstatement (that is, the right to reinstatement does not apply) only when the employer had 20 or fewer employees both at the time of injury and at the time of the request for reinstatement.

"In this case, Complainant's employer at the time of injury (May 30, 1996) had fewer than 20 employees. However, Respondent, the alleged successor employer at the time of the request for reinstatement (July 1996), had more than 20 employees. Therefore, the two conditions of ORS 659.415(3)(b)(D) have not been met, and the right to reinstatement under ORS 659.415 applies to Complainant.

"In reaching this conclusion, I have noted that the rules referred to above were amended to their current form effective December 4, 1996 (BL 10-1996). These rules and others were earlier amended effective March 12, 1996 (BL 4-1996). At that time, OAR 839-006-0115(2) provided:

'Employers covered by ORS 659.415 are those employing 21 or more workers at the time of the worker's injury and at the time of the worker's demand for reinstatement.'

"OAR 839-006-0130(1) provided in part:

'An employer with 21 or more employee both at the time of injury and at the time of demand is required to reinstate an injured worker to the injured worker's former position[.]'

"As written in March 1996, these two rules agree with Respondent's interpretation of ORS 659.415(3)(b)(D). However, for the reasons given above regarding the interpretation of the statute, I find that these two rules conflicted with the language of ORS 659.415(3)(b)(D). Therefore, they were invalid. *Miller v. Employment Division*, 290 Or 285, 620 P2d 1377, 1379 (1980) (rule invalid that conflicts with express language of statute and legislative policy).

"For these reasons, I conclude that Respondent is not entitled to a judgment as a matter of law, and its motion for summary judgment must be denied."

The forum adopts that ruling.

## **Remedies**

### Back Wages

At the latest, Respondent should have reinstated Complainant to his former position on July 17, 1996. Complainant became self employed on April 1, 1997. That date cuts off the period for measuring back wages.

Respondent had the burden of proving that Complainant failed to mitigate his damages. OAR 839-050-0260(5). The forum found that Complainant actively looked for driving jobs and other work in the southern coastal area of Oregon. His testimony was credible that he called Stalcup Trucking a couple of times about job openings, but the available positions were in Roseburg. The forum also notices that Complainant lived in Florence, while Stalcup's highway reader board (advertising job openings) was in Coos

Bay, some 47 miles away. Given that, Respondent's argument that Complainant failed to mitigate his damages was unpersuasive.

In order to compute back wages, the Agency proposed that the forum modify Jesse Aday's earnings to approximate what Complainant would have earned between July 17, 1996, and March 31, 1997. Respondent objected to that and argued that the forum could not impose damages based on guesswork. Respondent argued that the Agency did not meet its burden of proof concerning an amount of back wages. The Agency replied that Respondent failed to produce payroll records that would have allowed the Agency to more accurately estimate Complainant's back wages.

The forum agrees with the Agency that Complainant's back wages can be computed based on Aday's wages, since Aday was employed in Complainant's former position and no evidence suggests that Complainant would not have performed the same work in that position if Respondent had reinstated him. Beginning June 17, 1996, Aday worked for Respondent for one and a half years. The Agency stipulated that, for the purposes of computing back wages, Aday worked 40 hours per week between June 17 and July 16, 1996. That period included four weeks and two days, which the forum calculates to be 176 hours. Aday's hourly rate of pay was \$10.50. Thus, Aday earned \$1,848 in gross wages during that period (176 times \$10.50). During 1996, he earned gross wages of \$12,409. Accordingly, between July 17 and December 31, 1996, Aday earned \$10,561 (\$12,409 minus \$1,848). Aday worked the entire year in 1997, earning gross wages of \$24,845. It is reasonable to infer that he earned one-quarter of that amount in the first quarter of the year, that is, between January 1 and March 31, 1997. One quarter of \$24,845 equals \$6,211. Therefore, the forum concludes, based on these calculations, that Complainant lost wages of \$16,772 (\$10,561 plus \$6,211) during the period July 17, 1996, to March 31, 1997.

## Mental Suffering

It is well settled that the Commissioner may award compensatory damages for mental suffering as an administrative remedy under the Oregon civil rights law. *Williams v. Joyce*, 4 Or App 482, 504, 479 P2d 513, 523, 524, *rev den* (1971); *School District No. 1 v. Nilsen*, 271 Or 461, 484-86, 534 P2d 1135, 1146 (1975); *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, 569-70, *rev den* 287 Or 129 (1979); *Gaudry v. Bureau of Labor and Industries*, 48 Or App 589, 617 P2d 668, 670-71 (1980); *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 690 P2d 475, 484 (1984); *Schipporeit v. Roberts*, 93 Or App 12, 760 P2d 1339, 1342-43 (1988); *aff'd*, 308 Or 199, 778 P2d 953 (1989). See also OAR 839-003-0090(1)(a).

In determining mental distress awards, the Commissioner considers the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, and the type, effects, and duration of the mental distress caused. Also considered is a complainant's vulnerability due to such factors as age and work experience. See *Fred Meyer Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, 571-72 (1979), *rev den* 287 Or 129 (1979); *In the Matter of Pzazz Hair Designs*, 9 BOLI 240, 256-57 (1991).

In this case, the unlawful conduct was Respondent's failure to reinstate an injured worker to his former position as required by ORS 659.415. The duration of that conduct was comparatively brief. At most, it lasted from July 11, 1996, when Complainant demanded reinstatement, to July 31, 1996, when Respondent's attorney wrote that Complainant had no right to reinstatement with Respondent. An unlawful failure to reinstate an injured worker is like an unlawful discharge, which the forum considers a severe form of discriminatory conduct. This type of conduct, unlike harassment, is not measured in terms of frequency and pervasiveness.

The mental suffering Complainant experienced is described in Finding of Fact -- The Merits number 30. Most of his distress came from the financial hardship caused by his unemployment, the difficulty finding other work, and his impaired self esteem. The Commissioner has held many times that the anxiety and uncertainty connected with loss of employment income is compensable when attributable to an unlawful practice. *In the Matter of WS, Inc.*, 13 BOLI 64, 91 (1994). Complainant's mental distress (attributable to Respondent) lasted until he became self employed.

The forum is therefore awarding the Complainant \$10,000 to help compensate him for the mental distress he suffered as a result of Respondent's unlawful employment practice.

#### Reinstatement

Respondent had a duty under ORS 659.415 to reinstate Complainant to his former position. The Agency has requested as a remedy that Respondent reinstate him. The forum finds that this is an appropriate remedy in this case.

Accordingly, the forum will order Respondent to reinstate Complainant to his former position of employment upon demand if the position exists and is available, as defined in ORS 659.415. If the former position is not available, Respondent shall reinstate Complainant in any other existing position which is vacant and suitable. Complainant must make his demand within seven days of the date he receives the Final Order in this case. His right to reinstatement under this order will terminate seven days from the date he receives the Final Order unless he demands reinstatement within that time.

#### **Respondent's Exceptions**

In its exceptions to the proposed order, Respondent alleges the same facts and makes the same legal arguments as it did in its prehearing legal memorandum. The

forum has reviewed the record in this matter and the applicable law. To the extent that Respondent's exceptions are contrary to the facts found and law applied in this order, the forum overrules the exceptions.

Respondent argued that Complainant failed to mitigate his damages because he did not submit an application to Stalcup Trucking, Inc. This does not constitute a failure to mitigate, under the facts of this case. Complainant testified credibly that he contacted Stalcup twice when he learned of job openings. On both occasions, the openings were in Roseburg, which is nearly 100 miles away from Complainant's home town. Under those circumstances, Complainant's failure to submit a job application does not constitute a failure to mitigate his damages.

Respondent argues that if it is considered a successor-in-interest to Cumberland, then every time a company purchases some assets of another company the purchaser will be liable for the seller's obligations to its employees. Respondent claims this will have a chilling effect on business transactions, and that it's bad law and bad business. These are obvious overstatements of the effects of this order. The forum determines whether an employer is a successor on a case-by-case basis, applying the factors adopted in the *Palamino Cafe* case. Applying those factors here, it is the forum's considered opinion that Respondent was a successor employer to Cumberland.

### **ORDER**

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practice found in violation of ORS 659.415, as well as to protect the lawful interest of others similarly situated, the Respondent, Tyree Oil, Inc., is hereby ORDERED to:

- 1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street # 32, Suite 1010, Portland, Oregon 97232-2162, a certified

check, payable to the Bureau of Labor and Industries in trust for Blair Fountain, in the amount of:

a) SIXTEEN THOUSAND SEVEN HUNDRED AND SEVENTY TWO DOLLARS (\$16,772), less appropriate lawful deductions, representing wages Complainant lost as a result of Respondent's unlawful practice found herein; plus,

b) Interest on the foregoing, at the legal rate, accrued between April 1, 1997, and the date Respondent complies herewith, to be computed annually; plus,

c) TEN THOUSAND DOLLARS (\$10,000), representing compensatory damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; plus,

d) Interest on the compensatory damages for mental distress, at the legal rate, accrued between the date of the Final Order and the date Respondent complies herewith, to be computed annually.

2) Reinstatement Complainant to his former position of employment upon demand if the position exists and is available, as defined in ORS 659.415. If the former position is not available, Respondent shall reinstate Complainant in any other existing position which is vacant and suitable. The requirements of this paragraph are conditioned on Complainant making his demand within seven days of the date he receives the Final Order in this case. His right to reinstatement under this order will terminate seven days from the date he receives the Final Order unless he demands reinstatement within that time.

3) Take all appropriate steps to ensure that any worker who has sustained a compensable injury will be reinstated to his or her former job or the first existing job that is vacant and suitable after the employee's demand for such reinstatement, providing that the employee is not disabled from performing the duties of such job.

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<sup>1</sup>Other BOLI final orders addressing this issue are wage claim cases. *In the Matter of Anita's Flowers & Boutique*, 6 BOLI 258 (1987); *In the Matter of Waylon & Willies, Inc.*, 7 BOLI 68 (1988); *In the Matter of Tire Liquidators*, 10 BOLI 84 (1991); *In the Matter of Gerald Brown*, 14 BOLI 154 (1995); and *In the Matter of Susan Palmer*, 15 BOLI 226 (1997). Those cases were decided in part under ORS 652.310(1), which defines an "employer" as "any person who \* \* \* engages personal services of one or more employees and includes any producer-promoter, and any successor to the business of any employer, or any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full \* \* \*." To avoid any confusion those cases might attract here, the forum has not relied on them in reaching a decision.