

In the Matter of

MICHAEL D. CHENEY and Persogenics Corporation,

Case No. 37-02

Final Order of Commissioner Jack Roberts

Issued June 17, 2002

SYNOPSIS

The Agency sought unpaid wages and penalty wages for a claimant who filed a wage claim with the Idaho Department of Labor, which issued a Determination in claimant's favor and obtained a judgment, then assigned the case to BOLI under an interstate agreement for reciprocal enforcement and collection of wage claims. The Commissioner dismissed the complaint based on the doctrine of claim preclusion and instructed the Agency to use the same means of enforcing the wage claim that it would use to enforce a judgment on a wage claim originating with the Agency where a Final Order had been issued. ORS 652.140, ORS 652.150, ORS 652.420, ORS 652.425, ORS 652.435.

The above-entitled case was set for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David K. Gerstenfeld, case presenter and an employee of the Agency. Respondents were represented by Michael D. Cheney, who represented himself and acted as authorized representative for Persogenics Corporation.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-7.

Having fully considered the entire record in this matter, I, Jack Roberts, 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 October 3, 2001, the Agency issued Order of Determination No. 01-2198 in which it alleged that Carlee S. Ackerman (“Claimant”) was owed \$3750 in unpaid wages and \$750 in penalty wages based on her employment with Respondents between November 20 and December 29, 2000.

2) On November 8, 2001, Respondents filed an answer and request for hearing.

3) On March 21, 2002, the Hearings Unit issued a Notice of Hearing to Respondents and the Agency stating the time and place of the hearing as June 4, 2002, at 10 a.m. at the Hearings Room, 10th Floor, State Office Building, 800 NE Oregon Street, Portland, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled “Summary of Contested Case Rights and Procedures” containing the information required by ORS 183.413, and a copy of the forum’s contested case hearings rules, OAR 839-050-000 to 839-050-0440.

4) On April 30, 2002, the Agency filed a motion for summary judgment through its legal counsel, Stephanie Andrus, Assistant Attorney General, asserting that Claimant’s wage claim had already been adjudicated in Idaho and that the Agency was entitled to prevail as a matter of law based on claim preclusion. The Agency also requested a ruling that “BOLI can enforce [the Idaho Department of Labor’s] final Determinations without having to go through a contested case process.”

5) On May 22, 2002, the ALJ issued an interim order granting the Agency’s motion for summary judgment, ruling in pertinent part as follows:

“INTRODUCTION

“This is a wage claim case in which the Agency seeks \$3,750 in unpaid wages and penalty wages in the amount of \$750 on behalf of Carlee Ackerman, the wage claimant. On April 30, 2002, the Agency filed a motion for summary judgment as to the full amount of unpaid wages and penalty wages. The Agency contends it is entitled to summary judgment

based on the doctrine of claim preclusion. Respondents have not filed a responsive pleading.

“SUMMARY JUDGMENT BASED ON CLAIM PRECLUSION

“A motion for summary judgment may be granted on the basis of claim preclusion. *OAR 839-050-0150(4)(A)*. Claim preclusion is a doctrine that bars litigation of a claim based on the same factual transaction as was or could have been litigated between the parties in a prior proceeding that has reached a final determination. *Drews v. EBI Companies*, 310 Or 134, 142-43 (1990). Where applicable, claim preclusion bars a respondent from using defenses that it may have interposed in a prior proceeding involving the same facts at issue in the prior proceeding. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 257 (1999). Claim preclusion applies to administrative proceedings. *Drews* at 142.

“For claim preclusion to apply, the following elements must exist: (1) There must have been a prior adjudication involving the same parties based on the same factual transaction at issue in the subsequent action or proceeding in which the doctrine of claim preclusion is invoked; (2) The opportunity to litigate the issue, whether or not it was used, must have been present in the former adjudication; and (3) A final determination must have been reached in the prior adjudication. *Drews* at 140.

“THE PERTINENT FACTS IN THIS CASE

“The Agency submitted an affidavit and six exhibits in support of its motion. Respondent did not file a response. The Agency’s affidavit and exhibits establish the following pertinent facts:

“(1) On February 20, 2001, the Idaho Department of Labor (“IDOL”) received a ‘Statement of Claim’ from Carlee Ackerman (“Claimant”) stating she had been employed by Michael D. Cheney and Persogenics Corporation (“Respondents”), located at 14138 SE Rolling Meadows Court, Portland, OR 97236; that she was paid a salary of \$36,000 per year based on an eight hour day, five day workweek; that she earned \$3750 in wages from November 20 to December 29, 2000; and that Respondents had not paid those wages to her.

“(2) The IDOL sent a copy of the claim to Respondents and telephoned Respondents on February 20, 2001, leaving a voice mail message of the claim. As of March 19, 2001, Respondents did not respond.

“(3) The IDOL investigated Claimant’s wage claim and, on March 19, 2001, it issued a Determination and Demand for Payment (“Determination”) pursuant to Idaho Code Section 45-617(4).ⁱ The Determination found that Claimant was owed \$3750 in unpaid wages, and that Claimant’s wages were ‘withheld willfully, arbitrarily, and without just cause,’ entitling her to penalty wages of \$750, the maximum amount available under Idaho Code Section 45-607.ⁱⁱ

“(4) The IDOL’s Determination provided notice that Respondents had 14 days from the Date of Mailing to appeal the Determination and that Respondents had until April 3, 2001, in which to file a written appeal. The Determination notified Respondents that if an appeal was not filed, the Determination would be enforced pursuant to Idaho Code Sections 45-608, 45-620, and 45-621.ⁱⁱⁱ Under Idaho Code 45-617(7), an employer who appeals a Determination issued by the IDOL must be afforded ‘reasonable opportunity for a fair hearing.’

“(5) Respondents did not file a written appeal, and the IDOL’s Determination became final on April 3, 2001.

“(6) Pursuant to Idaho Code 45-620, the IDOL filed a notice of lien with the Idaho Secretary of State on April 4, 2001, based on the IDOL’s Determination of Claimant’s wage claim. Idaho Code 45-620 provides that ‘[s]uch lien may be enforced by the director or by any sheriff of the various counties in the same manner as a judgment of the district court duly docketed and the amount secured by the lien shall bear interest at the rate of the state statutory legal limit on judgments.’ Once this notice of lien was filed, the IDOL’s Determination became fully enforceable under Idaho law with the same force and effect as a final court judgment in Idaho.

“(7) As of March 12, 2002, Respondents had not paid any amounts towards satisfying the IDOL’s Determination and the full amount (\$3,750 in unpaid wages and \$750 in penalty wages) remained due and owing.

“(8) The IDOL and BOLI have entered into an agreement for the reciprocal enforcement and collection of wage claims. Under that agreement, BOLI may accept from the IDOL ‘assignments of claims for wages, penalties * * * and of judgments obtained by the Director whenever the Director is of the opinion that the employer or former employer has removed himself/herself/itself from the State of Idaho and that said employer or assets belonging to said employer can be located in the State of Oregon.’

“(9) On April 30, 2001, the IDOL assigned Claimant’s wage claim to BOLI ‘for collection as provided by law.’

“CLAIM PRECLUSION APPLIED TO THE FACTS

“A. Prior adjudication involving the same parties.

“There must have been a prior adjudication of Claimant’s wage claim involving the same parties for claim preclusion to apply. Here, the BOLI seeks judgment on the same wage claim that Claimant filed with the IDOL and that the IDOL assigned to BOLI based on an agreement for reciprocal enforcement and collection of wage claims. That claim for wages and penalty wages was previously adjudicated by the IDOL through its investigation and issuance of a Determination. The parties were Respondents and the IDOL, which has now assigned its claim to BOLI. For claim preclusion purposes, when BOLI acts on an assigned wage

claim, it stands in the same position as the wage claim assignor. *In the Matter of Staff, Inc.*, 16 BOLI 97, 120-21 (1997). This satisfies the first requirement of claim preclusion.

“B. Opportunity to litigate allegations in Claimant’s wage claim.”

“The second requirement of claim preclusion is that Respondents must have had the opportunity to litigate Claimant’s wage claim, whether or not Respondents took that opportunity, in the former adjudication. After Respondents failed to respond during the IDOL’s initial investigation, the IDOL issued a Determination. Under Idaho Code 45-617(6), Respondents had an opportunity to request a hearing to challenge the IDOL’s Determination. Had Respondents requested a hearing, they would have been afforded ‘reasonable opportunity for a fair hearing’ under Idaho Code 45-617(7). At hearing, Respondents would have had opportunity to subpoena witnesses to testify at a hearing presided over by an appeals examiner and to cross examine any witnesses called to testify by the IDOL and to present argument on any issue. The hearing would have been on the record, and Respondents would have had a further opportunity to seek judicial review of the appeals examiner’s decision had they desired. In conclusion, Respondents had the opportunity to litigate Claimant’s wage claim, but failed to take advantage of that opportunity, satisfying the second requirement of claim preclusion.

“C. Final determination.”

“The third requirement of claim preclusion is that a final determination must have been reached in the prior adjudication. When Respondents failed to challenge the IDOL’s Determination, it became final under Idaho law, with no further right of appeal. This satisfies the third requirement of claim preclusion.

“CONCLUSION

“The Agency is **GRANTED** summary judgment as to the total amount of unpaid wages due and owing (\$3,750) and total amount of penalty wages sought (\$750). **The hearing set for June 4, 2002, is canceled.** (Emphasis in original)

“Pursuant to OAR 839-050-150(4)(b), this portion of the interim order ruling on the Agency’s motion for summary judgment will become part of a Proposed Order that will be issued by the undersigned ALJ.

“AGENCY’S REQUEST FOR RULING THAT AGENCY CAN ENFORCE IDOL’S FINAL DETERMINATIONS WITHOUT HAVING TO GO THROUGH CONTESTED CASE PROCESS.

“The Agency additionally seeks a specific ruling that ‘Respondents are not entitled to re-litigate the merits of this wage claim dispute and that BOLI can enforce IDOL’s final Determinations without having to go through a contested case process.’ The Agency’s request is in the nature of a request for a declaratory ruling relating to BOLI’s authority to collect on an

Idaho judgment lien in the state of Oregon outside of the contested case process. The forum declines to rule on the Agency's request because it relates to filing the IDOL's lien for Claimant's unpaid wages and penalty wages in Oregon courts and the question of whether or not the IDOL's lien has the legal effect of a judgment, an issue this forum lacks the jurisdiction to consider."

The ALJ's award of summary judgment to the Agency based on claim preclusion was in error and is reversed. Claim preclusion applies to this proceeding, but in a manner contrary to that urged by the Agency. In its motion for summary judgment, the Agency established that the factual transaction at issue in Agency's Order of Determination had already been litigated in Idaho and a final judgment obtained. Where there is an opportunity to litigate the subject in question and a final judgment obtained, as in this case, neither party may later litigate the subject. *Drews v. EBI Companies*, 310 Or 134, 140 (1990). Therefore, the Agency, as well as Respondents, is foreclosed from relitigating the factual circumstances originally alleged in the IDOL's Determination and subsequently re-alleged in the Agency's Order of Determination.

The remainder of the ruling is confirmed.

6) The ALJ issued a proposed order on May 28, 2001, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On May 29, 2002, the Agency filed exceptions to the portions of the proposed order that denied Respondents' liability for interest on the unpaid wages and penalty wages. Inasmuch as this Final Order dismisses the Agency's Order of Determination, the Agency's exceptions are also denied.

FINDINGS OF FACT – THE MERITS

1) From November 20 to December 29, 2000, Respondents were employers located in Oregon that employed Claimant in the State of Idaho.

2) Claimant worked as a salesperson for Respondents. Respondents agreed to pay Claimant \$36,000 per year on the basis of working an eight hour day, five days per week.

3) Claimant earned \$3750 between November 20 and December 29, 2000.

4) Claimant voluntarily left Respondents' employment on January 4, 2001. She requested her wages on January 2, 2001.

5) Respondents' next regularly scheduled payday after Claimant's separation was January 15, 2001.

6) Respondents have not paid Claimant for any of the work she performed between November 20 and December 29, 2000. Respondents' failure to pay Claimant's wages was willful.

7) Under Idaho Code 45-607, Claimant is entitled to a maximum of \$750 in penalty wages.

8) The Idaho Department of Labor ("IDOL") investigated Claimant's wage claim and issued a Determination on March 19, 2001, that Respondents owed Claimant \$3,750 in unpaid wages and \$750 in penalty wages, and that Claimant's wages were withheld willfully. When Respondents did not appeal IDOL's Determination, the Determination became final by act of law and was registered as a lien in Idaho.

9) The IDOL and BOLI have entered into an agreement for the reciprocal enforcement and collection of wage claims. Under that agreement, BOLI may accept assignments of wage claims from the IDOL.

10) On April 30, 2001, the IDOL assigned Claimant's wage claim to BOLI for collection.

ULTIMATE FINDINGS OF FACT

1) From November 20 to December 29, 2000, Respondents were employers located in Oregon that employed Claimant in the State of Idaho.

- 2) Respondents agreed to pay Claimant \$36,000 per year for her work.
- 3) Respondents willfully failed to pay Claimant for work she performed between November 20 and December 29, 2000. Claimant earned \$3,750 during that time period.
- 4) Under Idaho law, Claimant is entitled to \$750 in penalty wages.
- 5) The IDOL investigated Claimant's wage claim and issued a Determination on March 19, 2001, concluding that Respondents owed Claimant \$3,750 in unpaid wages and \$750 in penalty wages, and that Claimant's wages were withheld willfully. When Respondents did not appeal IDOL's Determination, the Determination became final by act of law and was registered as a lien in Idaho. (Exhibit X-3)
- 6) The IDOL transferred Claimant's wage claim to BOLI under a reciprocal agreement that gives BOLI the authority to enforce Claimant's wage claim.

CONCLUSIONS OF LAW

- 1) ORS 652.420 provides:

“(1) As used in ORS 652.420 to 652.445:

“(a) ‘Labor bureau’ includes any agency, bureau, commission, board or officer in another state which performs functions substantially corresponding to those of the Commissioner of the Bureau of Labor and Industries.

“(b) ‘Commissioner’ means the Commissioner of the Bureau of Labor and Industries.

“(2) The definitions of ORS 652.310 and 652.320 shall apply to ORS 652.420 to 652.445, but nothing contained in those sections shall be construed to preclude reciprocal enforcement of wage claims under ORS 652.420 to 652.445, where the services of the employee were rendered in another state.”

ORS 652.425 provides:

“The Commissioner of the Bureau of Labor and Industries may enter into agreements with the corresponding labor bureau of another state for the reciprocal enforcement and collection of wage claims, if the other state has a reciprocal statute similar to ORS 652.420 to 652.445 or otherwise authorizes the reciprocal enforcement and collection of wage claims in a manner substantially similar to ORS 652.420 to 652.445.”

ORS 652.435 provides:

“Whenever a labor bureau in another state, which has entered into a reciprocal agreement under ORS 652.425 with the Commissioner of the Bureau of Labor and Industries and the agreement is in effect at the time, takes an assignment of a wage claim from an employee residing in the other state for services rendered in the other state to an employer or former employer who has removed to Oregon, the Commissioner of the Bureau of Labor and Industries may take an assignment of the wage claim from such labor bureau and enforce the collection thereof as provided in the applicable provisions of ORS 652.330 to 652.414.”

Idaho Code 45-601 provides, in pertinent part:

“(1) ‘Claimant’ means an employee who filed a wage claim with the department in accordance with this chapter and as the director may prescribe.

“(2) ‘Department’ means the department of labor.

“(3) ‘Director’ means the director of the department of labor.”

“(4) ‘Employee’ means any person suffered or permitted to work by an employer.

“(5) ‘Employer’ means any individual * * * corporation * * * employing any person.”

“(6) ‘Wage claim’ means an employee’s claim against an employer for compensation for the employee’s own personal services, and includes any wages, penalties, or damages provided by law to employees with a claim for unpaid wages.

“(7) ‘Wages’ means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece or commission basis.”

The Commissioner of BOLI is authorized to enter into a reciprocal agreement with the IDOL for the enforcement of wage claims. By virtue of that agreement, the Commissioner has the authority to enforce collection of Claimant’s wage claim that was assigned to the Commissioner. However, the Commissioner is precluded from enforcing collection of Claimant’s wage claim through a contested case proceeding.

2) Under the facts and circumstances of this record, and according to the law applicable in this matter, the wage claim and Order of Determination No. 01-2198 issued against Respondents are hereby dismissed.

OPINION

Pursuant to an agreement between Oregon and Washington for the reciprocal enforcement of wage claims, Claimant's wage claim was assigned to BOLI for collection after the IDOL investigated the claim and issued a Determination that became final upon Respondents' failure to file an appeal. The Agency issued an Order of Determination alleging the same facts as were alleged in the IDOL's Determination and Respondents filed an answer and request for hearing. The Agency filed a motion for summary judgment based on the doctrine of claim preclusion that was granted, and the ALJ issued a proposed order awarding Claimant the same wages that were awarded in the IDOL's Determination. However, as explained at the conclusion of Finding of Fact 5 – Procedural, the proposed order misapplied the doctrine of claim preclusion. When properly applied, the doctrine of claim preclusion precludes the Agency from relitigating Claimant's wage claim in a BOLI contested case hearing. As a result, the forum must dismiss the Agency's claim.

When an administrative agency acts in a judicial capacity, as the IDOL did in reaching its conclusion regarding wages and penalties Respondents owed Claimant, its judgments are entitled to recognition and enforcement pursuant to the full faith and credit clause of Art. IV, §1 of the U.S. Constitution. *United Farm Workers of America v. Arizona Agricultural Employment Relations Board*, 669 F. 2d 1249, 1255 (9th Cir. 1982). Since the IDOL's lien has the same effect as a judgment, the Agency should use the same means of enforcing the wage claim assigned to it by the IDOL that the Agency would use to enforce a judgment on a wage claim originating with the Agency where a Final Order had been issued.

In this case, the Agency has thus far eschewed enforcement of the Idaho judgment lien in favor of establishing, for a second time, the Respondents' liability to the claimant. This is not only unnecessary, but also contrary to the doctrine of claim

preclusion as explained in *Drews v. EBI, supra*, which teaches that once a matter is brought to final judicial resolution, that matter is not to be litigated again.

The fact that the prior litigation was in a sister state does not change the result. Rather than require re-litigation in violation of the doctrine of claim preclusion, the prior litigation—and the resultant judgment—simply affords the Agency the opportunity to enforce that judgment in Oregon. For the process of enforcement, it should look not to a new administrative proceeding but, in accordance with the full faith and credit principles of the U.S. Constitution, to Oregon law regarding enforcement of sister-state judgments. See, e.g., ORS 24.105 *et seq.*

ORDER

NOW, THEREFORE, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination No. 01-2198 against Michael D. Cheney and Persogenics Corporation is hereby dismissed.

ⁱ IDOL's Determination is similar to the Order of Determination issued by BOLI in this case pursuant to ORS 652.332, which becomes final if the employer fails "to pay the amount specified in the order of determination or to request a trial in a court of law within the time specified, and upon failure of [the employer] to request a contested case hearing within the time specified[.]" Idaho Code 45-617(4) provides that "If an appeal is not timely filed, the amount awarded by a final determination shall become immediately due and payable to [IDOL]."

ⁱⁱ ORS 652.150 also provides for penalty wages where an employer "willfully" fails to pay a former employee wages owed in a maximum amount of 30 days pay computed at eight hours per day. Under Oregon law, Claimant would have been entitled to a significantly larger amount in penalty wages.

ⁱⁱⁱ These provisions authorize the IDOL to file a lien and to collect on that lien when the IDOL has issued a Determination and it becomes final by virtue of the employer's failure to appeal.