In the Matter of:

ELAINE L. CHAO,
SECRETARY OF LABOR,

COMPLAINANT,

v.

A-ONE MEDICAL SERVICES, INC.,
and LORRAINE BLACK,

RESPONDENTS.

ARB CASE NO. 02-067

ALJ CASE NO. 01-FLS-27

DATE: September 23, 2004

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant Administrator, Wage and Hour Division:
Lois R. Zuckerman, Esq., Paul L. Frieden, Esq., Steven J. Mandel, Esq., Howard M. Radzely, Esq., Solicitor, *U.S. Department of Labor, Washington, D.C.*

For the Respondents, A-One Medical Services, Inc., and Lorraine Black:
Elizabeth Zink Pearson, Esq., *Pearson & Bernard PSC, Covington, Kentucky*

FINAL DECISION AND ORDER

This case is pending before us pursuant to the petition for review of the Respondents, A-One Medical Services, Inc., and Lorraine Black, (hereinafter, A-One) of an Administrative Law Judge's Decision and Order Granting Motion for Summary Decision (D. & O.). The Administrative Law Judge (ALJ) granted the motion for summary decision filed by the Complainant, the Wage and Hour Administrator on behalf of the Secretary of Labor and ordered A-One to pay $5,100 in civil money penalties under Section 16(e) of the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C.A. § 216(e) (West 1998), for willful violations of the overtime provisions of the FLSA, 29 U.S.C.A. § 207 (West 1998), and the implementing regulations at 29 C.F.R. §§ 18, 578, and 580 (2003). We affirm the ALJ's decision.

BACKGROUND

A-One and Alternative Rehabilitation Home Health Care, Inc. (hereinafter, Alternative Rehabilitation), are separately owned companies that provide in-home health care services in the state of Washington. Lorraine Black is the director, president and was sole shareholder of A-One, while Hanahn Korman is the director, president and sole shareholder of Alternative Rehabilitation. A-One entered into an agreement to purchase Alternative Rehabilitation in 1996, but the sale was not consummated, in part, due to Alternative Rehabilitation's unresolved tax liabilities. As a result of mediation in 1998 or 1999, Korman discontinued her management of Alternative Rehabilitation and Black began managing Alternative Rehabilitation as well. Both companies shared various employees and shared one scheduler, who scheduled employees to work for both companies.

An employer becomes responsible for overtime under the FLSA once its employees exceed forty hours in one workweek. 29 U.S.C.A. § 207(a)(2)(C).[1] If, as here, the facts establish that the employee is employed jointly by two or more employers, all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the FLSA and all joint employers are responsible, both individually and jointly, for compliance with the overtime provisions of the FLSA, with respect to the entire employment for the particular workweek. 29 C.F.R. § 791.2(a) (2003). An employer who violates the overtime law is liable not only for the unpaid overtime compensation but also "in an additional equal amount as liquidated damages." 29 U.S.C.A. § 216(b).

In 2001, the Secretary of Labor filed a civil action on behalf of eight former employees who worked for both A-One and Alternative Rehabilitation in United States District Court. The Secretary of Labor alleged that A-One and Alternative Rehabilitation were the former joint employers of the eight former employees under the FLSA and, based on the aggregation of the hours that they worked for both joint employers, the action sought to recover unpaid overtime wages for the hours that they worked in excess of forty hours per week, to which they were entitled under the FLSA. The FLSA requires an employer or joint employers to pay each of its employees "at a rate not less than the one and one-half times the regular rate at which he is employed" for all hours worked in excess of forty hours a week. 29 U.S.C.A. § 207(a)(1). Thus, the Secretary of Labor alleged that A-One and Alternative Rehabilitation had violated the overtime provisions of the FLSA at 29 U.S.C.A. § 207 and that the violation was knowing and willful pursuant to 29 U.S.C.A. § 255(a) (West 1998).

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[1] The Congressional intent behind the FLSA's overtime requirement is that overtime was intended as a means to "spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the Act. . . . [T]he Presidential message which initiated the legislation . . . referred to a 'general maximum working week,' [and to] the evil of 'overwork' as well as 'underpay.'" *Overnight Motor Transp. Co. v. Missel,* 316 U.S. 572, 578 (1942).

Concurrently, the Wage and Hour Administrator assessed a civil money penalty against A-One under Section 16(e) of the FLSA for willful violations of the overtime provisions under Section 207 of the FLSA in regard to the eight former employees. Section 16(e) of the FLSA provides that "[a]ny person who repeatedly or willfully violated section 206 or 207 ... shall be subject to a civil penalty of not to exceed $1,000 for each such violation." 29 U.S.C.A. § 216(e); *see also* 29 C.F.R. § 578.3(c)(for determining whether a violation was willful). A-One filed an exception requesting a hearing before a Department of Labor ALJ and the Administrator sent an Order of Reference to the Office of Administrative Law Judges directing that a hearing be held to determine whether A-One was also liable for $5,100 in civil money penalties under Section 16(e) of the FLSA for willful violations of the overtime provisions under Section 207 of the FLSA, and the implementing regulations at 29 C.F.R. §§ 578 and 580.[2]

On November 28, 2001, the United States District Court issued an order in the civil action brought by the Secretary that granted, in part, the Secretary's motion for summary judgment. *Chao v. A-One Med. Services, Inc.*, 2001 U.S. Dist. LEXIS 25320. In relevant part, the district court's order held that A-One and Alternative Rehabilitation were one "enterprise" and "joint employers" under the FLSA, that Lorraine Black attempted to maintain separateness of the two companies, in part, to avoid paying the employees overtime, that undisputed and unrebutted evidence in the record showed that they "knew or should have known" that the FLSA prohibited their conduct and that they,

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[2] The Administrator assessed the civil money penalties in accordance with 29 C.F.R. § 578.4, with the Administrator considering: the seriousness of the violations, the size of the employers' business, whether the employers had demonstrated a good faith effort to comply with the FLSA, the employers' explanations for the violations found during the course of the investigation which led to the assessment of the civil money penalties, the employers previous history of violations under the FLSA, the employers' commitment (if any) to future compliance, the time period between the violations found during the underlying instant investigation and the employers' previous violations, the number of affected employees and whether or not there was a pattern to the violations. Petitioner's Motion for Summary Decision [before the ALJ] at 2. The Administrator indicated:

> The Administrator's formula for any enforcement for repeated violations of the FLSA is $600.00. The regulatory scheme allows for a reduction by 15% based on the size of the employer ($510.00). Further, the national enforcement structure provides for a 25% increase to address the employer's refusal to pay the backwages ($637.50). Based on this formula and when applied to each of the eight violations which were found for each undercompensated employee, a CMP [civil money penalty] of $5,100.00 was assessed.

Petitioner's Motion for Summary Decision [before the ALJ] at 3.

at least, have shown reckless disregard for the requirements of the FLSA. Thus, the district court held that A-One's and Alternative Rehabilitation's violation of the FLSA was willful pursuant to 29 U.S.C.A. § 255(a) and the standard enunciated in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). Consequently, the district court held that they were subject to a three year, rather than the normal two year, statute of limitations for their violations, *see* 29 U.S.C.A. § 255(a), and that they must pay a total of $7,294.85 in back wages and an equal amount in liquidated damages to the employees who they had not properly paid for their overtime work.

Subsequently, in the D. & O. at issue herein, the ALJ determined that the district court's finding that A-One's violation of the FLSA was willful was sufficient to satisfy the definition of willfulness at 29 C.F.R. § 578.3(c) in the instant civil money penalty case, i.e., that the "employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act." Thus, even though an appeal of the district court's decision was pending, the ALJ held that the doctrine of collateral estoppel or "issue preclusion" applied and, therefore, determined that as A-One had not raised any other issue as to the amount of the civil money penalty and the Administrator had shown that the amount of the penalty was appropriate for the violations, there was no genuine issue of material fact in the case. Consequently, the ALJ granted the Administrator's motion for summary judgment pursuant to 29 C.F.R. § 18.41(a) and ordered A-One to pay a civil money penalty of $5,100.[3]

A-One appealed the district court's decision in the civil action brought by the Secretary to the United States Court of Appeals for the Ninth Circuit. Thus, subsequent to A-One's appeal of the ALJ's D. & O. in this civil money penalty case to the Board, the Board granted A-One's motion to stay the proceedings before the Board, by order issued July 11, 2002, pending the outcome of its separate appeal of the district court's decision to the Ninth Circuit. In the Ninth Circuit's decision issued on October 6, 2003, the court affirmed in part and reversed in part the district court's decision. *Chao v. A-One Med. Services, Inc.*, 346 F.3d 908 (9th Cir. 2003). In relevant part, the Ninth Circuit held that the district court properly identified A-One and Alternative Rehabilitation as a single enterprise and joint employers for purposes of the FLSA. 346 F.3d at 916, 918.

The Ninth Circuit further noted that a violation of the FLSA is willful if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]," citing the Supreme Court's holding in *Richland Shoe*, 486 U.S. at 128, 133. *Id*. Ultimately, the court found that the uncontroverted evidence, "even viewed in the light most favorable" to A-One in reviewing the district court's grant of summary judgment, supports a finding of willfulness "to evade the FLSA, not to comply with it." *Id.* at 919 n.7. Moreover, unlike the district court, the circuit court found probative A-One's previous FLSA violations, even if they were different in kind from the

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[3] After issuing the D. & O., the ALJ issued a Decision and Order Granting Motion for Reconsideration on April 9, 2002, in which he granted the Administrator's motion to modify nunc pro tunc the caption of the case and delete as named parties and respondents in the case Alternative Rehabilitation and Korman.

instant one and not found to be willful, and that when they were combined with the other undisputed evidence, proved, "at the very least, reckless disregard" on A-One's part in regard to complying with the overtime provisions of the FLSA. *Id.* The court found no "material doubt" as to A-One's reckless disregard and did "not believe that there is any genuine issue of fact" about A-One's willfulness. *Id*.

By order dated December 10, 2003, the Board lifted the stay in the instant civil money penalty case. A-One subsequently filed a petition for a writ of certiorari, however, seeking review of the Ninth Circuit's decision in the civil action brought by the Secretary with the United States Supreme Court. Specifically, A-One sought review, in part, of the Ninth Circuit's finding that A-One committed a willful violation of the FLSA. Thus, subsequent to A-One's petition, the Board granted A-One's motion to stay the proceedings before the Board, by order issued March 15, 2004, pending the outcome of A-One's litigation before the Supreme Court. The Supreme Court ultimately denied A-One's petition for writ of certiorari. *Chao v. A-One Med. Services, Inc.*, 346 F.3d 908 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 2095, 158 L.Ed.2d 710, 41 U.S.L.W. 3685, 41 U.S.L.W. 3688, 72 U.S.L.W. 3507 (U.S. May 3, 2004)(No. 0-111). Consequently, by order dated July 9, 2004, the Board lifted the stay in the instant civil money penalty case and, furthermore, ordered A-One to show cause why the Ninth Circuit's decision is not dispositive on the issue of A-One's willful violation of the FLSA.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated to the Administrative Review Board the authority and responsibility to act for her in civil money penalty cases arising under the overtime provisions of the FLSA. Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002); see 29 U.S.C.A. § 216(e). The Board has jurisdiction, inter alia, to hear and decide appeals taken from the ALJ's decisions and orders. 29 C.F.R. § 580.13.

Section 16(e) requires that administrative hearings in cases involving civil money penalties for violations of the overtime provisions be conducted in accordance with Section 554 of the Administrative Procedure Act (APA). 5 U.S.C.A. § 554 (West 1996). See 29 U.S.C.A. § 216(e). Section 557(b) of the APA states, in pertinent part, that "[o]n appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision ...." 5 U.S.C.A. § 557(b). Thus, the Board has the authority to review the ALJ's decision under a de novo standard. 5 U.S.C.A. §§ 554, 557; *see Administrator v. Sizzler Family Steakhouse*, 90-CLA-35, slip op. at 4 (Sec'y 1995).

DISCUSSION

The FLSA requires covered employers to pay their employees overtime pay. 29 U.S.C.A. § 207(a)(1). Section 16(e) of the FLSA provides that "[a]ny person who repeatedly or willfully violated section 206 or 207 ... shall be subject to a civil penalty of not to exceed $1,000 for each such violation." 29 U.S.C.A. § 216(e); *see also* 29 C.F.R. § 578.3(c)(for determining whether a violation was willful).

In order for collateral estoppel or "issue preclusion" to apply, the following requirements must be met: 1) The same issue must have been actually litigated, that is, contested by the parties and submitted for adjudication by the court; 2) the issue to be precluded by collateral estoppel must have been "necessary to the outcome of the first case;" and 3) preclusion of litigation of the contested second matter must not constitute a basic unfairness to the party sought to be bound by the first determination. *Otero County Hosp. Ass'n*, ARB No. 99-038, slip op. at 7-9 (ARB July 31, 2002); *Agosto v. Consol. Edison Co. of New York, Inc.*, ARB Nos. 98-007, 98-152, ALJ Nos. 96-ERA-2, 97 ERA-54, slip op. at 8 (ARB July 27, 1999)(there must have been "full and fair opportunity" for the litigation of the issues in the prior proceeding).

Similarly, the Ninth Circuit has noted that issue preclusion bars the relitigation of issues actually adjudicated in previous litigation between the same parties. *Littlejohn v. United States*, 321 F.3d 915, 923 (9th Cir. 2003), *citing Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir.1992). A party invoking issue preclusion must show: 1) the issue at stake is identical to an issue raised in the prior litigation; 2) the issue was actually litigated in the prior litigation; and 3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action. *Id*. The Ninth Circuit noted that the Supreme Court has elaborated on the "actually litigated" requirement, recognizing that issue preclusion is inappropriate where the parties have not had a full and fair opportunity to litigate the merits of an issue. *See Allen v. McCurry*, 449 U.S. 90, 94-95 (1980).

In the civil action brought by the Secretary, the Ninth Circuit found that A-One had repeatedly violated the FLSA and willfully violated the overtime provisions of the FLSA, citing the Supreme Court's holding in *Richland Shoe*, 486 U.S. at 128, 133. *A-One Med. Services*, 346 F.3d at 918, 919 n.7. As the ALJ determined with the finding by the district court, the Ninth Circuit's determination that A-One repeatedly and willfully violated the FLSA is sufficient to satisfy the definition of willfulness at 29 C.F.R. § 578.3(c) in this civil money penalty case pursuant to the doctrine of collateral estoppel, i.e., that the "employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act." The issue of whether A-One willfully violated the overtime provisions of the FLSA was the same issue addressed and fully litigated by the parties before the Ninth Circuit and was a "necessary" part of the outcome of the civil action brought by the Secretary. *Otero County Hosp. Ass'n*, slip op. at 7-9; *Agosto*, slip op. at 8; *see also Littlejohn*, 321 F.3d at 923; *Clark*, 966 F.2d at 1320. Thus, A-One has not been unfairly precluded from litigating the issue. *Id*. Indeed, A-One sought review of whether the Ninth Circuit's determination that A-One had repeatedly and willfully violated the FLSA was in accord with the Supreme Court's holding in *Richland Shoe*, but the Supreme Court denied A-One's petition for writ of certiorari. *Chao*, 124 S.Ct. at 2095, 158 L.Ed.2d at 710, 41 U.S.L.W. at 3685, 41 U.S.L.W. at 3688, 72 U.S.L.W. at 3507.

In response to the Board's order for A-One to show cause why the Ninth Circuit's decision is not dispositive on the issue of A-One's willful violation of the FLSA in the

instant civil money penalty case, A-One merely has restated the same argument it made in its petition for a writ of certiorari that the Supreme Court denied. A-One has not raised any issue regarding the preclusive effect of the Ninth Circuit's decision on the issue of A-One's willful violation of the FLSA pursuant to the doctrine of collateral estoppel in this civil money penalty case. Consequently, we find that the Administrator, on behalf of the Secretary, has carried her burden of showing that A-One willfully violated the FLSA's overtime provisions under the Supreme Court's standard of willfulness established in *Richland Shoe*, 486 U.S. at 128, 133, and the implementing regulations at 29 C.F.R. § 578.3(c). Moreover, as before the ALJ, because A-One has not raised any other issue as to the appropriateness of the amount of the civil money penalty for the violations of the FLSA, we affirm the amount of the civil money penalty assessed by the Administrator in this case.

Accordingly, we **DENY** A-One's appeal of the ALJ's decision and A-One is ordered to pay the Department of Labor a civil money penalty of $5,100.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge