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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0038

Reversed
Request to Reopen Allowed

PROCEDURAL HISTORY: On August 19, 2013, the Oregon Employment Department (the Department) served seven notices of seven administrative decisions concluding claimant was not available for work from January 27 through February 2, 2013 (decision # 135611), March 17 through 23, 2013 (decision # 140647), April 7 through 13, 2013 (decision # 142156), April 28 through May 11, 2013 (decision # 155750), May 12 through 18, 2013 (decision # 161243), from May 26 through June 1, 2013 (decision # 160736) and May 26 through August 3, 2013 (decision # 133739). On September 4, 2013, claimant filed a request for hearing on all seven decisions. On October 31, 2013, the Office of Administrative Hearings (OAH) issued seven notices of a consolidated hearing scheduled for November 12, 2013 at 9:30 a.m.

On November 18, 2013, ALJ R. Frank issued Hearing Decisions 13-UI-04629, 13-UI-04631, 13-UI-04633, 13-UI-04635, 13-UI-04636, 13-UI-04637 and 13-UI-04643, dismissing claimant's request for hearing for failure to appear. On December 2, 2013, claimant filed a timely request to reopen the hearing. On December 18, 2013, ALJ S. Lee reviewed claimant's request to reopen the hearing and issued Hearing Decisions 13-UI-06766, 13-UI-06767, 13-UI-06768, 13-UI-06770, 13-UI-06771, 13-UI-06773 and 13-UI-06778, denying claimant's request to reopen. On January 6, 2014, claimant filed applications for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 13-UI-06766, 13-UI-06767, 13-UI-06768, 13-UI-06770, 13-UI-06771, 13-UI-06773, and 13-UI-06778. For case-tracking purposes, this decision is being issued in septuplicate (EAB Decisions 2014-EAB-0035, 2014-EAB-0036, 2014-EAB-0037, 2014-EAB-0038, 2014-EAB-0039, 2014-EAB-0040, and 2014-EAB-0041).

FINDINGS OF FACT: (1) On October 18, 2013, claimant fractured and "seriously lacerated" one of his toes, for which he was receiving ongoing medical treatment.

(2) On November 11, 2013, claimant's toe became infected and swollen. Claimant had a fever and was in extreme pain. A nurse advised claimant to double the dose of his prescribed narcotic pain medication, put no weight on his foot, and keep it elevated above his head. Claimant followed the nurse's instructions.

(3) Prior to 9:30 a.m. on November 12, 2013, claimant contacted OAH and requested that the hearing be postponed due to his medical condition. Claimant was instructed to appear at the hearing and ask the ALJ to postpone the hearing.

(4) Claimant called in to the hearing at 9:30 a.m., but there was "no response." Claimant waited five minutes, disconnected, and called back in to the hearing at 9:38 a.m. There again was no response, and claimant again disconnected. At 9:40 a.m., the ALJ checked the "telephone line attendance system," confirmed that claimant was not present, and determined that he had failed to appear.

CONCLUSIONS AND REASONS: The ALJ erred in denying claimant's request to reopen.

ORS 657.270(5) allows ALJs to consider a request to reopen after the hearing decision has been served. In such cases, the request must be in writing, filed within 20 days of the date of mailing of the decision, and explain in detail why the party failed to appear. OAR 471-040-0040(1)(b) and (3) (February 10, 2012) and OAR 471-040-0041(1)(b) and (4) (February 10, 2012). Unless the party demonstrates "good Cause," the hearing may not be reopened. "Good cause" exists when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control. OAR 471-040-0040(2).

In Hearing Decisions 13-UI-06766, 13-UI-06767, 13-UI-06768, 13-UI-06770, 13-UI-06771, 13-UI-06773 and 13-UI-06778, the ALJ concluded claimant had not shown good cause for reopening the hearing because he did not follow the notices of hearing's instructions to hang up and call another number if he was having difficulty calling in for the hearing.¹ However, claimant's medical condition and the doubling of his medication was a factor beyond his reasonable control, as was OAH's refusal to grant his initial request for a postponement, and the lack of a "response" when he called in to the hearing at the scheduled start time, and again eight minutes later. Given those factors beyond claimant's reasonable control, we find his failure to follow the notices of hearing's instruction to hang up and call another number if he was having difficulty calling in for the hearing an excusable mistake.

We therefore conclude that claimant failed to appear at the hearing due to a combination of factors beyond his reasonable control and an excusable mistake. Claimant therefore demonstrated good cause for failing to appear at the hearing, and his request to reopen is allowed.

DECISION: Hearing Decisions 13-UI-06766, 13-UI-06767, 13-UI-06768, 13-UI-06770, 13-UI-06771, 13-UI-06773 and 13-UI-06778 are set aside, as outline above, and these matters remanded for further proceedings.

¹ Hearing Decisions 13-UI-06766, 13-UI-06767, 13-UI-06768, 13-UI-06770, 13-UI-06771, 13-UI-06773, and 13-UI-06778 at 2.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: January 15, 2014

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310, or visit the website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.