

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0395**

*Affirmed*  
*Late Request to Reopen Denied*

**PROCEDURAL HISTORY:** On June 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$7,532.00 overpayment, a \$1,129.80 monetary penalty and 52 penalty weeks (decision # 200649). On July 14, 2014, decision # 200649 became final without claimant having filed a request for hearing.

On October 21, 2014, claimant filed a late request for hearing by phone. On November 26, 2014, ALJ Kangas issued Hearing Decision 14-UI-29431, dismissing claimant's request subject to his "right to renew" the request by responding to an appellant questionnaire within 14 days after the decision was mailed. Claimant's response was considered timely.<sup>1</sup>

On January 2, 2015, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for January 20, 2015 at 10:45 a.m. On January 20, 2015, ALJ Vincent issued Hearing Decision 15-UI-32138, dismissing claimant's request for hearing for failure to appear. Hearing Decision 15-UI-32138 became final on February 10, 2015 without claimant having filed a timely request to reopen.

On February 16, 2015, claimant filed a late request to reopen. On February 24, 2015, OAH mailed notice of a hearing scheduled for March 10, 2015. On March 10, 2015, ALJ Vincent held a hearing, and on March 18, 2015 issued Hearing Decision 15-UI-35354, denying claimant's late request to reopen. On April 7, 2015, claimant filed a timely application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision. Even if we had, the outcome of this decision would remain the same for the reasons explained.

<sup>1</sup> Claimant's response was stamped as received by OAH on November 18, 2014, but, despite being received before Hearing Decision 14-UI-29431 was issued, was apparently considered by OAH as a timely response, as demonstrated by OAH's decision to schedule the January 20th hearing regarding claimant's late request for hearing on decision # 200649.

**FINDINGS OF FACT:** (1) On January 20, 2015 at approximately 9:30 a.m., ALJ Vincent convened a hearing in case number 2014-UI-24531.<sup>2</sup> Claimant attended the hearing. When the ALJ ended the hearing, the Department's witness asked the ALJ about the hearing in this matter, which was scheduled for 10:45 a.m. the same day. The ALJ instructed the parties to call again at 10:45 a.m. to participate in the hearing in this matter. Case number 2014-UI-24531, January 20, 2015 hearing, Audio recording at ~ 31:20. Claimant then asked the ALJ if he could ask a question. The ALJ replied, "as long as it's just something about maybe appearing at the next hearing." Case number 2014-UI-24531, January 20, 2015 hearing, Audio recording at ~ 31:35.

(2) After claimant failed to appear at the 10:45 a.m. hearing, the ALJ dismissed claimant's request, and, on January 21, 2015, issued Hearing Decision 15-UI-32138 that was mailed to claimant at his address of record. The decision stated on page 2 that the request to reopen must "either be filed within 20 days of when the order from the hearing you missed was mailed, or else show that factors or circumstances beyond your reasonable control prevented you from filing your reopen request within that time." Hearing Decision 15-UI-32138 at 2.

(3) Hearing Decision 15-UI-32138 also included a form titled "Application for Review." The materials claimant submitted with his February 16, 2015 request to reopen included this "Application for Review" form and a letter from claimant dated February 5, 2015, as well as an additional letter dated February 16, 2015 that stated,

I have been waiting 2 weeks to get a letter from my doctor to accompany my letter to you. You should get this on the 17th. With all that has gone on it would have been nice to get this in early but it was not to be.

*See* February 16, 2015 Request to Reopen. The enclosed letter from claimant's doctor stated that claimant has chronic migraines and a history of significant depression. Claimant had suffered from a period of ill health connected to those conditions that affected his work separation and ability to file a timely request for hearing. By approximately January 2015, the severity of claimant's symptoms had decreased and he started feeling better. Case number 2014-UI-24533, March 10, 2015 hearing, Audio recording at ~ 47:15.

**CONCLUSIONS AND REASONS:** Claimant's late reopen request is denied.

This case presents several issues, including the Department's decision that claimant was overpaid \$7,532 in benefits and was liable for a \$1,129.80 monetary penalty and 52 penalty weeks, claimant's late request for hearing on that decision, his failure to appear at the January 20th hearing, and his failure to file a timely request to reopen the January 20th hearing. However, each of those issues must be addressed separately, and in order; only if each issue is resolved in claimant's favor would we then have jurisdiction to address the next issue. Specifically, claimant must first establish that he had good cause

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<sup>2</sup> The audio recording from the January 20, 2015 hearing in case number 2015-UI-24531 is admitted into the record as EAB Exhibit 1 to complete the record. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090 (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record at EAB Exhibit 1.

for filing a late request to reopen. Only if claimant showed good cause for missing that filing deadline could we then address whether claimant had good cause to reopen the January 20th hearing. Only if he showed good cause to reopen the January 20th hearing would we have jurisdiction to address whether claimant had good cause for filing a late request for hearing. Only if claimant showed good cause for filing a late request to reopen, failing to attend the January 20th hearing, *and* filing a late request for hearing would we then have jurisdiction to address the merits of the Department's decision that claimant was overpaid benefits and liable for penalties. Regardless, the issue of claimant's disqualification from benefits that is the basis of the overpayment has already been resolved in case number 2014-UI-24531, and claimant is not entitled to any additional process concerning his disqualification from benefits.<sup>3</sup>

As stated, the first issue we must determine is whether claimant had good cause to extend the deadline for filing his request to reopen. OAR 471-040-0041(1) (February 10, 2012) provides that the deadline for filing a request to reopen may be extended if the party had good cause for failing to request reopening within the time allowed, and acts within a reasonable time. "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 471-040-0041(2). "Good cause" does not include not understanding the implications of a decision when it is received. OAR 471-040-0041(2)(b)(B).

The record in this matter shows that claimant received the January 21st decision dismissing his request for hearing no later than February 5th, the date he wrote a letter in response to that decision. The hearing decision informed claimant of the 20-day deadline for filing a request to reopen. There is no evidence suggesting that it was beyond claimant's reasonable control to file a timely request to reopen sometime between February 5th and the February 10th deadline. He had the decision, information about the deadline, and had the physical and mental capacity to draft a cogent letter explaining his position regarding his case.

Claimant did not file a timely request to reopen because he decided to wait for a letter from his doctor before doing so. Claimant did not assert or show that he sought information or advice from the Department or OAH before deciding to allow the deadline to lapse, nor that he acted upon any advice from a Department or OAH employee when he decided to allow the 20-day deadline to lapse. Although claimant's decision to allow the deadline to lapse might have been the result of a mistake, given that the procedural history of claimant's case shows he has had a request for hearing dismissed because he filed it late, and had a hearing dismissed because he failed to appear at the designated time, claimant's decision to allow another deadline to lapse cannot be considered an excusable one.

Claimant's has failed to show good cause to extend the deadline for filing a request to reopen, and his late request must be denied. Therefore, EAB has no jurisdiction to determine whether claimant had good cause for missing the January 20th hearing.<sup>4</sup> Likewise, EAB has no jurisdiction over claimant's

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<sup>3</sup> In that matter, claimant filed a late request for hearing on the Department's decision concluding he was discharged from work with Edge Performance Sports for misconduct and was therefore disqualified from receiving unemployment insurance benefits. The Department's decision became final on July 9, 2014; claimant's late request for hearing was dismissed in Hearing Decision 15-UI-32495, which EAB affirmed in EAB Decision 2015-EAB-0176 on February 27, 2015. EAB Decision 2015-EAB-0176 became final on March 30, 2015 without claimant having filed a Petition for Judicial Review with the Oregon Court of Appeals.

late request for hearing on decision # 200649 or whether claimant was overpaid and is liable for penalties. Decision # 200649 remains undisturbed.

**DECISION:** Hearing Decision 15-UI-35354 is affirmed.

Susan Rossiter and J. S. Cromwell;  
Tony Corcoran, not participating.

**DATE of Service:** April 14, 2015

**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 Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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<sup>4</sup> Even if we did, the outcome of this matter would remain the same. The record shows that OAH mailed notice of the hearing to claimant at his address of record. At a hearing held at 9:30 a.m. the same day, the Department's witness and the ALJ referred to the 10:45 or "next" hearing at least three times. The ALJ also responded to claimant's request to ask a question by stating, "as long as it's just something about maybe appearing at the next hearing." Given those factors, claimant's claim that he was not aware the hearing was scheduled is implausible, and his failure to appear at the January 20th hearing in this matter was not the result of factors or circumstances beyond his reasonable control or an excusable mistake.