

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0519

Reversed
OAH to Schedule a Hearing on Decision # 74023

PROCEDURAL HISTORY: On March 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 74023). Claimant filed a timely request for hearing. On March 19, 2015, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for April 2, 2015 at 3:30 p.m. On April 2, 2015, ALJ R. Davis convened a hearing, at which claimant failed to appear, and on April 3, 2015 issued Hearing Decision 15-UI-36277, dismissing claimant's request for hearing for failure to appear. On April 9, 2015, claimant filed a timely request to reopen. On April 15, 2015, ALJ Kangas issued Hearing Decision 15-UI-36906, denying claimant's request. On May 4, 2015, claimant filed an application for review Hearing Decision 15-UI-36906 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The notice of hearing OAH mailed to claimant stated,

At the time of hearing, you must call 1-877-622-4041. Using the telephone keypad, enter the access code **8830567** followed by the '#' key.

(Emphasis in original.) The notice also stated,

If either an administrative law judge or a representative from the Office of Administrative Hearings has not appeared within five (5) minutes of the scheduled start time of the hearing . . . hang up and call 1-800-311-3394.

(2) At 3:29 p.m. on the day of the hearing, claimant and her representative called OAH at 877-622-4041.¹ They entered an incorrect access code. The hearing conference system accepted the incorrect

¹ With her application for review, claimant submitted a written statement from her representative, which we admit into evidence to complete the record, and upon which all facts in this paragraph are based. OAR 471-041-0090(1) (October 29, 2006). Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of

access code and began playing music. Claimant and her representative did not know they had entered an incorrect access code.² After 5 minutes, at 3:34 p.m., claimant's representative called OAH at 800-311-3394 "to find out what was going on with the hearing."³ The representative's call was placed on hold for six or seven minutes by OAH staff, after which OAH staff informed the representative that she and claimant had missed the hearing.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant has shown good cause to reopen the hearing. A hearing on the merits of decision # 74023 should be scheduled.

ORS 657.270(5) provides that parties who fail to appear at the hearing may request reopening within 20 days after issuance of a written decision by the ALJ, and the hearing may be reopened if the party shows good cause for failing to appear. OAR 471-040-0040 defines "good cause" to include an action, delay, or failure to act that arises from an excusable mistake or from factors beyond an applicant's reasonable control.

Claimant failed to appear at the hearing because, after dialing the wrong access code, she was unable to contact OAH staff for assistance before the hearing was dismissed. In Hearing Decision 15-UI-36906, the ALJ concluded that claimant did not show good cause for failing to appear at the hearing because dialing the correct access code was within her reasonable control, and because she waited too long to contact OAH staff when she had difficulty accessing the hearing.⁴ We disagree.

The fact that dialing the correct access code was within claimant's reasonable control is not dispositive. The next question is whether failing to self-correct after entering an incorrect access code was the result of an excusable mistake, and we conclude that it was. Claimant and her representative made a mistake by entering the incorrect access code. Once the wrong code was entered, claimant and her representative had no way of immediately discovering that they had entered the wrong code. Rather, the conference system accepted the faulty code and began playing music. Given those circumstances, claimant's failure to recognize that she had entered the incorrect access code or self-correct were excusable.

The record, as supplemented before EAB, also fails to show that claimant waited too long before contacting OAH staff after entering the wrong access code. The detailed information claimant's representative provided on review shows that she placed her call to OAH staff five minutes after her initial attempt to access the hearing, as the notice of hearing instructed. The fact that she then waited six or seven additional minutes on hold, until after the hearing was dismissed, was beyond claimant's reasonable control.

the objection in writing, within ten days of our mailing this decision. Unless such objection is received and sustained, the noticed fact will remain in the record at EAB Exhibit 1.

² DR Exhibit 5, claimant's reopen request, page 1.

³ EAB Exhibit 1.

⁴ Hearing Decision 15-UI-36906 at 2.

For those reasons, we conclude that claimant showed good cause to reopen the hearing. Her request to reopen is, therefore, allowed, and this matter is returned to OAH to schedule a new hearing on the merits of decision # 74023.

DECISION: Hearing Decision 15-UI-36906 is set aside, as outlined above.

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

DATE of Service: May 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. 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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