

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0687

Hearing Decision 15-UI-40581 Reversed & Remanded
Hearing Decision 15-UI-39321 Affirmed - Overpayment and Penalties¹

PROCEDURAL HISTORY: On August 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with Express Employment Professionals (decision # 94230). On September 15, 2014, decision # 94230 became final without a request for hearing having been filed. On February 4, 2015, the Department served notice of an administrative decision assessing a \$3,878 overpayment, \$775.60 monetary penalty and 34 penalty weeks based on decision # 94230 and claimant's failure to report work or earnings (decision # 200111). On February 24, 2015, decision # 200111 became final without a request for hearing having been filed.

On April 16, 2015, claimant filed late requests for hearing on decisions # 94230 and 200111 by telephone. On April 23, 2015, ALJ Kangas issued Hearing Decision 15-UI-37428 dismissing claimant's late request for hearing on decision # 94230, and Hearing Decision 15-UI-37433 dismissing claimant's late request for hearing on decision # 200111, both subject to claimant's right to renew the request by answering an appellant questionnaire by May 7, 2015. On May 1, 2015, the Office of Administrative Hearings (OAH) received claimant's responses. On May 5, 2015, OAH mailed claimant letters canceling Hearing Decisions 15-UI-37428 and 15-UI-37433 and two notices of two hearings, one scheduled for May 26, 2015 at 9:30 a.m. and the other scheduled for the same day at 10:45 a.m.

¹ If, on remand, the ALJ allows claimant's request to reopen, allows claimant's late request for hearing on decision # 94230, and reverses decision # 94230 by determining that claimant is not disqualified from receiving benefits based on a work separation Express Employment Professionals, the Department must then reassess the amount of claimant's overpayment and any penalties based on the overpayment amount.

On May 26, 2015, claimant failed to appear for the 9:30 a.m. hearing, and ALJ Monroe issued Hearing Decision 15-UI-39034, dismissing claimant's hearing request on decision # 94230 for failure to appear. On May 26, 2015, ALJ Monroe held the 10:45 a.m. hearing, which claimant attended, and on June 1, 2015 issued Hearing Decision 15-UI-39321, allowing claimant's late request for hearing on decision # 200111, and affirming the Department's assessment of an overpayment and penalties.

On June 1, 2015, claimant filed a request to reopen the May 26th 9:30 a.m. hearing on decision # 94230. On June 8, 2015, claimant filed a timely application for review of Hearing Decision 15-UI-39321 with the Employment Appeals Board (EAB). On June 9, 2015, OAH mailed notice of a hearing on claimant's reopen request scheduled for June 23, 2015. On June 23, 2015, ALJ Murdock conducted a hearing. Claimant participated during a portion of the hearing, but, mid-way through, and before testifying, claimant disconnected from the hearing line and did not reconnect. On June 24, 2015, ALJ Murdock issued Hearing Decision 15-UI-40581, denying claimant's request to reopen. On June 24, 2015, claimant filed an application for review of Hearing Decision 15-UI-40581 with EAB.

No adversely affected party requested review of the portion of Hearing Decision 15-UI-39321 concluding that claimant's late request for hearing on decision # 200111 should be allowed. We therefore confined our review in that matter to the overpayment and penalty issues.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-39321 and 15-UI-40581. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-0687 and 2015-EAB-0787).

FINDINGS OF FACT AND CONCLUSIONS AND REASONS: Hearing Decision 15-UI-39321 is affirmed. Hearing Decision 15-UI-40581 is reversed, and remanded for additional proceedings.

Hearing Decision 15-UI-39321. EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted**.

Hearing Decision 15-UI-40581. In Hearing Decision 15-UI-40581, the ALJ denied claimant's request to reopen, reasoning that claimant did not have good cause to reopen the hearing based on his written statement alleging non-receipt of the notice of hearing scheduling the May 26th 9:30 a.m. hearing, and did not offer additional evidence about the reason he failed to appear because he disconnected from the June 23 hearing without testifying. Claimant asked EAB for another hearing, stating that he disconnected from the hearing because he "lost my phone signal due to my position." We construe claimant's request as a request for EAB to consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing of the party offering the information shows that circumstances beyond its reasonable control prevented it from presenting the information at the hearing. Claimant's sudden and apparently unexpected loss of phone service during the hearing appears to have been a circumstance beyond his reasonable control. Accordingly, we conclude that claimant is entitled to present new evidence regarding his reopen request, and remand this matter to OAH for additional proceedings to obtain additional evidence in the matter.²

² Only if claimant proves that he had good cause to reopen the hearing would he then be allowed to present evidence about the circumstances that caused him to file a late request for hearing on the Department's August 25, 2014 decision (# 94320). Only if claimant proves that he had good cause for filing a late request for hearing on decision # 94320, and filed his request within a reasonable time, would claimant then be allowed to present evidence about the work separation at issue in decision #

DECISION: Hearing Decision 15-UI-39321 is affirmed. Hearing Decision 15-UI-40581 is set aside, and this matter remanded for further proceedings consistent with this order.³

J. S. Cromwell and D. P. Hettle, *pro tempore*;
Susan Rossiter, not participating.

DATE of Service: July 24, 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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94320. If, on remand, the ALJ allows claimant's request to reopen, allows claimant's request for hearing on decision # 94320, and reverses the Department's decision deeming claimant disqualified from receiving benefits because of the work separation at issue in decision # 94320, the Department must then recalculate the amount of the overpayment and any penalties based on the amount of the overpayment. If the ALJ denies claimant's reopen request, the late request for hearing, or affirms decision # 94320, the overpayment decision would remain entirely undisturbed.

³ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-40581 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.