

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0990**

*Reversed*  
*Request for Hearing Allowed*

**PROCEDURAL HISTORY:** On April 22, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision #82957). On May 12, 2015, decision #82957 became final without a request for hearing having been filed. On June 3, 2015, the employer filed a request for hearing. On June 11, 2015, ALJ Kangas issued Hearing Decision 15-UI-39931, dismissing the employer's request for hearing, subject to the employer's right to renew the request by responding to an appellant questionnaire within 14 days of the date of the decision. The employer timely responded to the appellant questionnaire. By letter dated July 6, 2015, the Office of Administrative Hearings (OAH) cancelled Hearing Decision 15-UI-39931. On July 21, 2015, ALJ L. Lee conducted a hearing, and on August 3, 2015, issued Hearing Decision 15-UI-42480, dismissing the employer's hearing request as untimely. On August 19, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) The employer received administrative decision #82957 a few days after it was mailed on April 22, 2015.

(2) On April 27, 2015, the employer's business manager faxed a request for hearing on decision #82957 to the OAH office in Salem. The machine that the business manager used does not provide confirmation that a fax has been successfully transmitted; it only rejects faxes that are not successfully transmitted. Audio Record at 20:36. The fax machine did not reject the business manager's fax to the Salem OAH office. The Salem OAH office has no record of receiving the employer's hearing request.

(3) On April 22, 2015, the Department issued administrative decision #91730, concluding that claimant was not available for work. Claimant filed a timely hearing request. On May 19, 2015, ALJ Buckley conducted a hearing in which the employer participated, and on May 22, 2015, issued Hearing Decision 15-UI-38934, affirming decision #91730. After participating in this hearing and receiving Hearing Decision 15-UI-38934, the employer realized it had received no response to its request for a hearing on decision #82957. On June 3, 2015, the employer's business manager contacted the Department,

discovered there was no record of the April 27 hearing request on decision #82957, and again submitted a request for hearing on this decision. Also on June 3, 2015, the business manager attempted to procure a fax log that would show that the April 27 hearing request had been submitted to the OAH. She was unable to do so, however, because the fax machine only retained log information for a 50 day period. Audio Record at 20:30.

**CONCLUSION AND REASONS:** We disagree with the ALJ and conclude that the employer timely requested a hearing on decision #82957.

Under ORS 657.269, a request for hearing must be filed within 20 days of the date on which the administrative decision was mailed to the last known address of the appellant. A hearing request may be filed by mail or fax the OAH. OAR 471-040-0005(2)(c) (July 7, 2011). The administrative decision at issue was mailed to the parties on April 22, 2015. The appellant employer's business manager testified that she timely filed the employer's hearing request by faxing it to the OAH office in Salem on April 27, 2015. The ALJ, however, concluded that the employer failed to prove by a preponderance of evidence that the hearing request was timely filed. The ALJ held that "there is no evidence to independently corroborate the employer's testimony that one was actually faxed on April 27, 2015. The employer had the means to obtain such corroboration (a fax confirmation sheet), but did not do so." Hearing Decision 15-UI-48480 at 5. The ALJ also determined that the employer "did not take reasonable steps," such as contacting OAH, to confirm that it received the hearing request and "did not mail a hard copy of it hearing request as a backup filing, in case the fax filing had not gone through." *Id.* We disagree with these conclusions of the ALJ.

In regard to obtaining confirmation of the April 27 hearing request, the employer's business manager testified that the fax machine she used rejected any fax that was not successfully transmitted, but did not provide confirmation of a successful fax transmission. Because the fax was not rejected, the business manager reasonably concluded that the hearing request had been successfully transmitted. Based on this conclusion, the business manager would then have no reason to think that it was necessary for her to contact the OAH. The ALJ's determination – that the employer should have sent a "hard copy" of his hearing request to the OAH – was unreasonable. Given the widespread use of electronic technology in the workplace and the general reliability of this technology, we find, unlike the ALJ, that standard business practice does not require that an individual or business confirm that a time-sensitive fax was received by sending the fax recipient a "hard copy" of the material faxed. We also note that as soon as the business manager learned there was no record that her April 27 fax had been received, she attempted to obtain a fax log which would show the fax transmission had been made. She was unable to do so, however, because the fax machine she used had not retained log information for April 27.

Contrary to the ALJ's conclusions, then, we find that the business manager provided plausible reasons why had no additional evidence to corroborate her fax transmission of the April 27 hearing request. We also note that the business manager's failure to provide this evidence does not, in and of itself, lead to a conclusion that she did *not* send the fax on April 27. At the hearing, the business manager's testimony about submitting the hearing request was detailed, specific and consistent with statements she made to a Department representative when she filed the June 3 hearing request. Absent any reason to doubt the business manager's credibility (and we find none in this record), we find it more likely than not that the employer filed a timely request for hearing on April 27, 2015.

We conclude that the employer filed a timely hearing request. Hearing Decision 15-UI-42480 is therefore reversed, and the matter returned to OAH for a hearing on the merits of decision #82957.

**DECISION:** Hearing Decision 15-UI-42480 is set aside, as outlined above.

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

**DATE of Service:** August 28, 2015

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-42480 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.

**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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