

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1328**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On September 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 112605). Claimant filed a timely request for hearing. On October 27, 2015, ALJ Shoemake issued Hearing Decision 15-UI-46589, concluding that claimant withdrew his request for a hearing and dismissing his hearing request. On November 6, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 15-UI-46589 is reversed as unsupported by the record, and this matter remanded.

ORS 657.270(7)(a)(A) and OAR 471-040-0035 allow an ALJ to dismiss a request for hearing when the request is withdrawn by the requesting party. When a party files an application for review of an ALJ's decision, EAB is required by statute to "perform de novo review on the record." ORS 657.275. The standard of review in unemployment insurance matters is the preponderance standard; for EAB to affirm an ALJ's decision to allow a request for withdrawal, the record on review must therefore show that, more likely than not, the requesting party withdrew his or her request for hearing.

With his application for review, claimant provided a letter in which he asked for a "second chance" for a hearing. In support of his request, claimant stated: "I am sorry I missed my hearing and had to withdrawal [sic]. I was unable to get to a telephone or use a cell phone at the scheduled time."<sup>1</sup> The

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<sup>1</sup> The letter claimant provided with his application for review constitutes new information which was not part of the record. Under OAR 471-041-0090 (October 26, 2009), EAB may consider new information if the party presenting the information demonstrates that circumstances beyond its reasonable control prevented the party from presenting the information at the hearing, and the information is material and relevant to EAB's determination. Here, the ALJ's erroneous decision to dismiss claimant's hearing request – a circumstance beyond his reasonable control – prevented him from presenting the information in his letter at a hearing. In addition, the information is clearly material to EAB's determination. We will, therefore, mark this letter as EAB Exhibit 1 and admit it into the record. A copy of EAB Exhibit 1 is included with this decision. Any party that objects to the admission of EAB Exhibit 1 must submit its objections in writing within 10 days of the date on which this decision is mailed. Unless such an objection is received, EAB Exhibit 1 will remain part of the record.

only indication in this case that claimant might have knowingly and voluntarily withdrawn his request for hearing on the administrative decision at issue is a document dated October 26, 2015 and entitled "Memo To File / Telephone Record"; the document states "From: Jason E. Moore, CLM" and "Message: clmt withdrawal." This "Memo To File" was not marked as an OAH business record or authenticated as such, and was not admitted into the record as an exhibit. The document does not indicate what telephone number claimant supposedly called, what he said when he called, what the person with whom he spoke told him, and the context in which the "clmt withdrawal" occurred.

The letter claimant submitted to EAB demonstrates that he may have believed he was requesting a postponement of the hearing during his October 26, 2015 telephone call, or may have believed that he "had" to withdraw his hearing request if he was going to be unable to attend the hearing. Because it appears that claimant may not have intended to withdraw his hearing request, and because of a lack of evidence concerning the way in which claimant's purported withdrawal occurred, the record fails to demonstrate that more likely than not, claimant withdrew his hearing request. Because the preponderance of the evidence fails to show that claimant withdrew his request for hearing, this matter must be remanded to the ALJ to develop a record of claimant's withdrawal. If the record does not show that claimant knowingly or intentionally withdrew his request for a hearing, the ALJ should conduct a hearing on the merits of the administrative decision under review.

**DECISION:** Hearing Decision 15-UI-46589 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell

**DATE of Service: November 16, 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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