

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1520

Reversed
Request to Reopen Allowed

PROCEDURAL HISTORY: On October 9, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80552). Claimant filed a timely request for hearing. On October 21, 2015, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for November 4, 2015, at which claimant failed to appear. On November 4, 2015, ALJ R. Frank issued Hearing Decision 15-UI-47148, dismissing claimant's hearing request for failure to appear. On November 4, 2015, claimant filed a request to reopen. On November 12, 2015, OAH mailed notice of a hearing scheduled for November 25, 2015. On November 25, 2015, ALJ R. Frank conducted a hearing, and on December 3, 2015, issued Hearing Decision 15-UI-48779, denying claimant's request to reopen. On December 23, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her 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.

FINDINGS OF FACT: (1) On November 4, 2015, claimant and her advocate were at Self Enhancement Inc. prepared to participate in the 10:45 a.m. hearing on decision # 80552.

(2) At 10:43 a.m., claimant dialed the phone number for the hearing conference bridge line. For several minutes, she was taken through a series of automated prompts, after which her call was disconnected. Claimant re-dialed the phone number for the hearing. She connected to the hearing at 10:55:00 AM; the ALJ disconnected from the hearing, and dismissed claimant's request for hearing, at 10:55:10 AM.¹ Claimant was then disconnected from the hearing conference bridge line.

¹ Exhibit 3.

(3) Claimant called OAH at the back-up number listed on the notice of hearing. Claimant spoke with an OAH employee named Marcia about her difficulty connecting with the hearing. Marcia placed claimant on hold, then returned to the phone and asked if she could call claimant back. Claimant agreed, and provided Marcia with her call-back number.

(4) Claimant realized after hanging up with Marcia that she had not provided Marcia with the number for her phone extension at her call-back number, and called OAH again. Claimant spoke with a different employee about her difficulty connecting with the hearing. The second employee called the ALJ, then called claimant to explain that the ALJ had disconnected the hearing at 10:55 a.m.

(5) OAH records show notes, created by OAH employees, reflecting two calls by claimant to OAH on November 4, 2015. The first note stated, in pertinent part, "Claimant called at 11:00 a.m. stating having trouble getting into hearing, explained to claimant that I had called ALJ and hearing had been dismissed due to all parties not at hearing, explained to claimant about reopening of hearing . . .," and the second note, written two minutes after the first, stated, in pertinent part, "Claimant called at 10:54 indicating that she was unable to connect to the hearing as the host has disconnected. Claimant verified that she called from 503-285-0493. I pulled the phone records showing that claimant called at 10:55 a.m., explained that she was late calling in . . ."2

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude claimant's request to reopen should be allowed, and a hearing on the merits of decision # 80552 should be scheduled.

ORS 657.270(5) provides that a hearing may be reopened upon request of any party that failed to appear at the hearing may request reopening within 20 days after issuance of the hearing decision if the party shows good cause for failing to appear. OAR 471-040-0040(2) provides that "good cause" means an excusable mistake or factors beyond the party's reasonable control.

The ALJ concluded that claimant did not show good cause for the hearing, concluding, "It is simply more likely than not that claimant simply called late for her hearing. It stands to reason that if claimant only made two unsuccessful appearance attempts, the first occurring at 10:43 AM, she would have had ample time to contact the OAH prior to disconnection by the host at 10:55 AM."³ The ALJ further concluded that claimant's account of her actions between 10:43 a.m. and 11:00 a.m. on November 4th "contradicts OAH evidence almost in its entirety," because OAH records show "a successful appearance attempt by claimant ten minutes after the appointed time" and "two subsequent calls to the OAH beginning at 11:00 AM."⁴ We disagree.

There is inadequate evidence in the record to support resolution of any dispute between claimant's evidence and OAH phone records in favor of the phone records. The ALJ read a note indicating that claimant's call occurred at 11:00 a.m. and referred to it as "the first note," and concluded that claimant's first call to OAH occurred at 11:00 a.m. However, the second note the ALJ read, although entered two

² Audio recording at 31:35-32:33.

³ Hearing Decision 15-UI-48779 at 3-4.

⁴ *Id.* at 3.

minutes later, stated that claimant called at 10:54 a.m., making it unclear on this record when claimant placed that call. Also, claimant indicated that her first call to OAH was answered by Marcia, and the second to another unknown female, but the ALJ did not read into the record which employee(s) made each note to allow the content of each note to be compared to claimant's evidence about each call, nor were the notes themselves placed into evidence. Because we lack a complete record of the notes, and the circumstances under which they were made, and because the notes are not part of the record, there is insufficient evidence upon which to resolve any discrepancies in favor of the contents of the notes.

We also disagree with the ALJ that claimant's evidence and the OAH notes are entirely contradictory. Both show that claimant called OAH twice, and the first note the ALJ read into the record is consistent with claimant's description of her second call to OAH staff. The material discrepancy is as to the time of claimant's calls, as compared to the time of the scheduled hearing. The notes indicate only that claimant's calls occurred at 11:00 a.m. and somewhere between 10:54 a.m. or 11:02 a.m., none of which is determinative of whether claimant had good cause to reopen the November 4th hearing or whether her testimony was inconsistent with OAH records.

There is no record evidence disputing that claimant and her advocate were prepared for and intended to participate in the November 4th hearing at its scheduled time, or disputing that they initially attempted to call the hearing conference number at 11:43 a.m. and were abruptly disconnected after an unknown number of minutes following prompts an attempting to join the hearing. That the OAH conference bridge records do not include record of that attempt is not dispositive of whether or not claimant attempted that call as she claimed, or that her attempt began at 11:43 a.m., given that all indications show that claimant experienced some type of malfunction when she attempted to call.

Notably, the evidence in this record proves that claimant called to participate in the November 4th hearing the very same minute that the ALJ disconnected from the conference bridge and dismissed her hearing. A closer view of OAH records shows that claimant actually connected to the call at 10:55:00 AM, a full ten seconds *before* the ALJ disconnected from the call and dismissed her hearing request for failure to appear. Thus, the record shows that claimant did not fail to appear at the hearing before the ALJ dismissed it, making it more likely than not that the ALJ dismissed claimant's request for hearing in error, which was a circumstance beyond claimant's reasonable control that prevented her from participating in the November 4th hearing, thus justifying reopening.

Even if claimant had failed to appear at the hearing, our decision would remain the same. To the extent claimant's delay in reaching the hearing was caused by her first failed attempt to call, it appears the phone system malfunctioned and dropped her call without connecting her to the hearing, so her failure to appear at the hearing was the result of factors beyond her reasonable control. To the extent that her delay in reaching the hearing was also caused by her decision to make a second, and successful, attempt at calling into the hearing rather than calling OAH staff for assistance sooner, we conclude that her conduct was, probably, the result of a mistake.⁵ Given claimant's description of her efforts, however, including the fact that she was prepared for the hearing, placing the call with advocate's assistance, the lack of specificity in this and OAH records about the timing of each of claimant's call, the fact that

⁵ We conclude that calling the conference line a second time instead of calling OAH staff was probably a mistake because the notice of hearing instructed parties unable to reach an ALJ within five minutes of the scheduled start time of the hearing, or experiencing difficulty calling in for the hearing, to call within five minutes. *See* October 21, 2015 Notice of Hearing.

claimant ultimately connected to the hearing within the same minute it was dismissed, and then promptly called OAH to resolve her difficulties, we conclude that claimant's mistake should be considered excusable.

DECISION: Hearing Decision 15-UI-48779 is set aside, as outlined above.⁶

Susan Rossiter and J. S. Cromwell

DATE of Service: December 28, 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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⁶ **NOTE:** The failure of any party to appear at the hearing ordered by this decision will not reinstate Hearing Decision 15-UI-48779 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.