

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0050

Reversed & Remanded

PROCEDURAL HISTORY: On September 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 121120). On September 21, 2015, the employer filed a timely request for hearing.¹ On December 1, 2015, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for December 10, 2015. On December 9, 2015, the employer requested that the hearing be postponed on the grounds that the employer had inadequate notice of the hearing. OAH denied the employer's request. On December 10, 2015, ALJ M. Davis convened a hearing and issued Hearing Decision 15-UI-49163, dismissing the employer's request for hearing for failure to appear. On December 18, 2015, the employer filed a timely request to reopen. On January 5, 2016, ALJ Kangas reviewed the employer's request and issued Hearing Decision 16-UI-50439, denying the employer's request to reopen. On January 13, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its 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.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-50439 should be reversed, and this matter remanded.

ORS 657.270(5) provides that an ALJ may reopen the hearing upon the request of any party who missed a hearing to request, provided the party shows good cause for failing to appear. OAR 471-040-0040(2) defines good cause as "when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control." Although OAR 471-040-0040(3) requires that a party

¹ In Hearing Decision 16-UI-50439, the ALJ stated the employer filed its request for hearing on September 28, 2015. However, it appears that the request was received by fax to the Department on September 21, 2015, making that the actual and timely date the request for hearing was filed.

requesting reopening set forth the basis of the request in writing to OAH, OAR 471-040-0040(7) allows the ALJ the discretion to schedule a hearing if necessary.

The ALJ concluded the employer did not have good cause for failing to appear at the hearing, reasoning that since the employer “knew at least by September 28, 2015, the day it filed its hearing request, that it intended to proceed to hearing regarding the administrative decision,” and therefore had “more than ten weeks” to prepare for the hearing, the employer did not establish that it had inadequate time to prepare for the hearing based on its failure to receive notice of the hearing until the day before it was scheduled to occur. Hearing Decision 16-UI-50439 at 2. We disagree with the ALJ, and conclude that additional evidence is necessary for a determination of whether or not the employer had good cause to reopen the hearing.

Although the employer could reasonably be expected to perform some preparatory activities after requesting a hearing and before notice of the date and time of the hearing are received, it is unreasonable to expect the employer’s representative to effectively secure the participation of its witnesses, who are, logically, employees of a different company whose work schedules have to be arranged to coincide with the date and time of the hearing, without knowledge of the date and time of the hearing. Therefore, we must conclude that the employer did not have “more than ten weeks” to prepare for the hearing, it had one day to prepare.

In order to determine whether the employer had good cause to reopen the hearing it missed because it had only one day of notice, additional evidence about whether the delay was attributable to the employer or factors outside its control is required. The employer should be allowed the opportunity to provide details about its receipt of the notice of hearing, including, for example, why it took eight days for the notice of hearing to arrive at its Dallas, Texas address and how the employer processes its mail, specifically, what date did the notice of hearing arrive in the employer’s facility, how long did it take for the notice to be processed, and what date did the notice arrive in an employee’s work queue. The employer should also be allowed to explain how long, if more than one day, it needed to prepare its witnesses for the hearing, what, if any, attempt the employer’s representative made to contact the employer about participating in the hearing before or after the employer’s representative’s postponement request was denied, and what, if any, response he received from the employer or its witnesses about participating in the hearing as scheduled. The employer should be allowed the opportunity to explain why the representative did not appear at the hearing on the employer’s behalf to renew its request to postpone the hearing and explain the circumstances to the ALJ assigned to the hearing. Finally, to the extent he has any pertinent information, claimant should be allowed to respond to the employer’s request.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether or not the employer had good cause to reopen the hearing, Hearing Decision 16-UI-50439 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 16-UI-50439 is set aside, and this matter remanded for further proceedings consistent with this order.²

Susan Rossiter and J. S. Cromwell

DATE of Service: January 14, 2016

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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² **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-50439 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.