

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0232

Reversed
Eligible Weeks 24-09 through 35-10

PROCEDURAL HISTORY: On November 24, 2008, claimant filed an initial claim for benefits. On December 15, 2008, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause. ALJ Hoppe conducted a hearing on January 23, 2009, and on January 28, 2009 issued Hearing Decision 09-UIB-02223, affirming the Department's decision. On January 30, 2009, claimant filed an application for review with the Employment Appeals Board (EAB). On March 12, 2009, EAB issued Appeals Board Decision 09-AB-0423, affirming Hearing Decision 09-UIB-02223. On or about March 14, 2009, claimant filed a petition for judicial review of Appeals Board Decision 09-AB-0423 with the Oregon Court of Appeals. On May 22, 2009, claimant filed a request for reconsideration of decision 09-AB-0423. On May 26, 2009, EAB issued Appeals Board Decision 09-AB-1660, dismissing claimant's request for reconsideration.

On September 29, 2010, the Oregon Court of Appeals issued *J. A. W. v. Employment Department and Tillamook County Creamery Association*, 27 Or App 520, 240 P3d 86 (2010) (*J. A. W. I*), reversing Appeals Board Decision 09-AB-0423 and remanding the case to EAB. On December 16, 2010, the Oregon Court of Appeals issued the appellate judgment. *See* ORAP 14.05(2)(b). On December 23, 2010, EAB issued Appeals Board Decision 10-AB-3943, reversing Hearing Decision 09-UIB-02223 on reconsideration.

On January 31, 2011, the Oregon Employment Department (the Department) served notices of the following administrative decisions: decision # 83844 denied claimant's late claim for benefits for week 24-09 (June 14, 2009 through June 20, 2009) and decision # 83853 denied claimant's request to backdate her claim for the period June 21, 2009 through September 4, 2010 (weeks 25-09 through 35-10). The effect of these decisions was to deny claimant benefits under the federal Extended Unemployment Compensation (EUC) program for the weeks at issue. Claimant filed timely requests for hearing. ALJ Upite conducted a consolidated hearing on March 2, 2011, and on March 4, 2011, issued Hearing Decisions 11-UIB-06331 and 11-UIB-06333, affirming the Department's decisions. On March 8, 2011, claimant filed applications for review of both hearing decisions with EAB. On April 6, 2011

EAB issued Appeals Board Decisions 11-AB-0988 and 11-AB-0989, affirming the hearing decisions under review.

On April 12, 2011, claimant filed petitions for judicial review of Appeals Board Decisions 11-AB-0988 and 11-AB-0989 with the Oregon Court of Appeals. On August 3, 2011, EAB filed with the Court of Appeals a notice of withdrawal of Appeals Board Decisions 11-AB-0988 and 11-AB-0989 pursuant to ORS 183.482(6). On August 26, 2011, EAB issued Appeals Board Decisions 11-AB-2522 and 11-AB-2523, denying claimant's late claim for benefits and backdating request. On September 22, 2011, claimant filed petitions for judicial review of Appeals Board Decisions 11-AB-2522 and 11-AB-2523; the court assigned appellate case numbers A149597 and A149518.

On September 30, 2015, the Oregon Court of Appeals issued *J. A. W. v. Employment Department*, 274 Or App 81, __ P3d __ (2015) (*J. A. W. II*), reversing and remanding Appeals Board Decisions 11-AB-2522 and 11-AB-2523 to the Department. The court remanded these cases so that a Department representative could determine in the first instance “whether applying the claims filing requirements for a regular benefits claim – either statutes or the department’s own rules – to petitioner’s claim for EUC benefits would bring about a result inconsistent with the extended benefits statutes, as provided in ORS 657.323.”¹ In making such a determination, the court instructed the Department to consider “whether [claimant] should be penalized for the period involving the department’s erroneous disqualification of her from both regular and EUC benefits and for the period following the remand in *J. A. W. [I]*, when [claimant] did not know of any time limitation on the filing of claims for EUC benefits.” *J. A. W. II* at 93.² On December 22, 2015, the Oregon Court of Appeals issued the appellate judgment. *See* ORAP 14.05(2)(b).

On January 27, 2016, the Department referred the cases the Court of Appeals had remanded to the Office of Administrative Hearings (OAH) to conduct a hearing. On February 17, 2016, ALJ Holmes-Swanson conducted a consolidated hearing, and on February 25, 2016, issued the following hearing decisions: Hearing Decision 16-UI-53832, concluding that claimant was not entitled to backdate her claim for the weeks of 25-09 through 35-10, and Hearing Decision 16-UI-53829, concluding that claimant did not file a timely claim for benefits for the week of 24-09. On February 29, 2016, claimant filed applications for review of Hearing Decisions 16-UI-53832 and 16-UI-53829 with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-53832 and 16-UI-53829. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0231 and 2016-EAB-0232).

¹ ORS 657.323 states that “[t]he provisions of this chapter related to the payment of regular benefits shall apply to claims for and the payment of extended benefits except when the result would be inconsistent with the provisions of ORS 657.321.” (ORS 657.321 defines the terms used in the statutes defining and implementing the state of Oregon’s extended benefits program). We note, however, that the court appears to have used the term “extended benefits,” which refers to a state program, interchangeably with the term “EUC benefits,” which are benefits provided by a federal program and which were the benefits the Department denied claimant during the weeks at issue.

² The court dismissed claimant’s appeal of EAB’s April 6, 2011 decisions (11-AB-0988 and 11-AB-0989) as moot. *J. A. W. II* at 83.

EAB considered claimant's written argument.

EVIDENTIARY MATTER: At the February 17, 2016 hearing, the ALJ admitted into evidence documents submitted by the Department as Exhibits 10 through 15. On this record, however, the exhibits admitted were not marked. Accordingly, we have marked Exhibits 10 through 15 based on the ALJ's descriptions. These exhibits are: Exhibit 10 – claimant's claim record marked as "ED-1"; Exhibit 11 – documents submitted by OED marked as "ED- 2"; Exhibit 12 – documents previously submitted to claimant marked as "ED-3"; Exhibit 13 – a copy of *J. A. W. I* marked as "ED-4"; Exhibit 14 – a copy of the decision in *J. A. W. II* marked as "ED-5"; and Exhibit 15 – a transcript of the March 2, 2011 hearing marked as "ED-6."

FINDINGS OF FACT: (1) On November 24, 2008, claimant filed an initial claim for benefits. She filed weekly claims for benefits through the Department's online system from that date through the week ending June 18, 2009 (week 23-09).

(2) On June 30, 2009, claimant attempted to claim benefits online for week 24-09 (June 14 through 20, 2009). 2/17/16 Hearing Transcript at 5-6. The Department's system recognized claimant's claim as one for week 25-09 (June 21 through 27, 2009) and indicated that claimant needed to restart her claim.³ The system then requested information about claimant's employment during the week she was claiming. When claimant, who had not worked during the week she was claiming, attempted to circumvent this message and continue filing her claim, she received a message stating that Department records showed she had been disqualified from benefits due to an administrative decision and to contact the Department to determine if she had satisfied the disqualification to start receiving benefits. 2/17/16 Hearing Transcript at 89-90.

(3) After her June 30, 2009 attempt to claim benefits, claimant did not contact the Department, believing it would be futile to do so. She knew that her disqualification could only be ended if the Court of Appeals reversed EAB Decision 09-AB-0423 which had affirmed the hearing decision that found she had voluntarily left work without good cause. Based on the messages she received through the Department's online system, she concluded that she would be unable to restart her claim unless the court overturned her disqualification or she had worked a sufficient number of hours and had enough earnings to start a new claim. Since she had not met either of these conditions, she believed she could not restart her claim. 2/17/16 Hearing Transcript at 43 and 46-47. Claimant also consulted the attorney who was representing her on the appeal of EAB Decision 09-AB-0423. The attorney did not advise claimant to continue claiming for benefits; the attorney told claimant that she needed to wait until the disqualification was ended before anything could be done about claimant's benefits. 2/17/17 Hearing Transcript at 53-54; Exhibit 15 – 3/2/11 Hearing Transcript at 24.

(4) On or after June 30, 2009, claimant consulted the Department's website for information regarding her benefits. Based on the information she found on this website, she concluded that even if she ended the disqualification, her regular benefits would have been exhausted in June 2009. She also concluded that she was ineligible for any extended benefits, because these benefits were available only to individuals

³ Because the system recognized claimant's claim as a claim for week 25-09 and not for 24-09, it considered that she had missed claiming a week and was required to file a reopened claim. OAR 471-030-0040 (December 30, 2003).

who had exhausted their regular benefits. Claimant knew that, because of the disqualification, her benefits had not yet been exhausted.

(5) On December 22, 2010, the Oregon Court of Appeals issued the appellate judgment in *J. A. W. I.* The Department paid claimant benefits for the weeks she had been denied due to the disqualification which was ended by *J. A. W. I.*, and claimant received these benefits on or about December 23, 2010. Payment of these claims exhausted claimant's regular claim balance.

(6) By letter dated December 23, 2010, the Department informed claimant that:

You have claimed and received unemployment benefits for the week ending 06/06/09. This payment reduced your REG claim balance to zero (0). Please contact your UI center to determine your eligibility for additional benefits.

Exhibit 4. The letter provided information regarding eligibility for the Emergency Unemployment Compensation (EUC) and Extended Benefit (EB) benefit extension programs, told claimant to apply for benefits by "calling your Unemployment Insurance [UI] Center within seven days of the date of this letter," and gave claimant the telephone numbers for these UI Centers. Exhibit 4.

(7) After receiving the Department's letter regarding benefit extension programs, claimant contacted the Department. She was told that she needed to speak to a particular representative who was on vacation through the holidays.⁴ On January 7, 2015, claimant contacted the representative, who had returned from vacation, and filed late claims for extended benefits for the period from June 14, 2009 through September 4, 2010 (weeks 24-09 through 35-10). 2/17/2016 Hearing Transcript at 6 and 11.

(8) On January 10, 2011, the Department issued a "Wage and Potential Benefit Report" to claimant, which indicated that claimant "may receive" a benefit of \$482 per week, to a maximum of \$9,640 under the EUC program. Exhibit 5.

(9) On January 12, 2011, the Department issued notices of its decisions denying claimant's weekly claims for benefits for the period from June 14, 2009 through September 4, 2010 (weeks 24-09 through 35-10). Exhibit 6.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that claimant had good cause for failing to timely file continuing claims for unemployment benefits throughout all of the weeks at issue, and that she filed those claims within seven days of the date on which the circumstances which prevented a timely filing ceased to exist. Because we decide the case on other grounds, we find it unnecessary to address any possible inconsistency between filing requirements for regular claims and EUC claims or to consider whether the Department penalized claimant for any period.

⁴ We take official notice that Friday, December 24, 2010 and Friday, December 31, 2010 were holidays for employees of the state of Oregon, and that state offices were closed on those dates. We also take notice that the first regular workday following the end of the New Year holiday was Monday, January 3, 2011. Any party that objects to these noticed facts must submit its objections to this office in writing, setting forth the basis of the objection, within ten days of the date on which these decisions are mailed. Unless such an objection is received, the noticed facts will remain part of the record.

ORS 657.155(1)(b) provides that an unemployed individual shall be eligible to receive benefits with respect to any week “only if the Director of the Employment Department finds that...[t]he individual has made a claim for benefits with respect to such week in accordance with ORS 657.260.” ORS 657.260 provides that “[e]very person making a claim shall certify that the person has not, during the week...claimed, received or earned wages or compensation for any employment.”

Under the rules in effect from 2009 through 2011, an initial, additional, or reopened claim for benefits had to be filed before or during the first week or series of weeks for which benefits were claimed. A claimant who did not claim benefits for one or more weeks could file an additional or reopened claim, but had to certify that there was no employment during the skipped weeks or that the employment had ended. OAR 471-030-0040(1). A Department representative could backdate an initial, additional, or reopened claim after a break in reporting, but could backdate “no later than seven (7) calendar days from the end of the week to which backdating was requested.” OAR 471-030-0040(3) (December 30, 2003).⁵ A continued claim for benefits, which was defined as a claim that followed the first week of an initial or reopened claim and without a break in reporting, had to be filed no later than 24 days from the end of the week for which benefits were claimed. The 24-day period could be extended if the Department Director found that a claimant had good cause for failing to file a timely continued claim. OAR 471-030-0045(4). “Good cause” for failing to file a timely continued claim existed if satisfactory evidence established that “factors or circumstances beyond the reasonable control of the claimant” prevented a timely filing; the continued claim had to be filed “no later than seven days following the date determined by the Director to be the date such factors or circumstances” ceased to exist. OAR 471-030-0045(6).

In Hearing Decisions 16-UI-53829 and 16-UI-53832, the ALJ found that on January 11, 2011, claimant filed a late claim for benefits for week 24-09, and requested that her claim be backdated to weeks 25-09 through 35-10. The ALJ concluded that she was not entitled to backdate her claim under OAR 471-030-0040(3) because “backdating can only go back to the week before the reopened claim was filed.” Hearing Decision 16-UI-53829 at 4. In Hearing Decision 16-UI-53832, the ALJ reviewed the circumstances that prevented claimant from timely filing continued claims for benefits for weeks 24-09 and concluded that they failed to demonstrate good cause for filing late claims under OAR 471-030-0045(5). We disagree with the ALJ’s conclusions regarding the factors that prevented claimant from filing timely claims for benefits.

The Department’s representative testified that on June 30, 2009, claimant attempted to claim benefits online for week 24-09 (June 14 through 20, 2009). 2/17/16 Hearing Transcript at 5. Because this was a continued claim – one which followed claimant’s claim for benefits for week 23-09 – claimant had 24 days from the end of week 24-09 – until July 14, 2009 – to claim benefits for that week. OAR 471-030-0045(4). The system did not permit claimant to claim for week 24-09, however. The system recognized the claim as a claim for week 25-09 (June 21 through 27, 2009) and instructed claimant that she was required to restart her claim.⁶ 2/17/16 Hearing Transcript at 6. (The system indicated a restarted claim was needed because it had no record that claimant had claimed week 24-09.) When claimant attempted to navigate her way through the system to restart her claim, she received a message that she was

⁵ Unless otherwise noted, all further citations are to the administrative rules that were effective on December 30, 2003, the rules in effect from 2009 through 2011.

⁶ The Department often used the terms “restart” and “reopen” interchangeably. 2/17/16 Hearing Transcript at 57.

disqualified from benefits and needed to contact the Department to determine if the disqualification had ended. 2/17/16 Hearing Transcript at 89-90. Claimant did not contact the Department about restarting her claim and filed no more weekly claims for benefits until January 7, 2011. On that date, when the court had overturned her disqualification in *J. A. W. I* and the Department notified her of her eligibility for extended benefit programs, claimant filed claims for benefits for weeks 24-09 through 35-10, claims which the Department denied as untimely since each was filed considerably more than 24 days from the end of the week claimed as required by OAR 471-030-0045(4).

Claimant's late claims for benefits for weeks 24-09 through 35-10 will be allowed if she demonstrates "good cause" for failing to timely file her claims. *Id.* "Good cause" exists if the evidence shows that "factors or circumstances beyond the reasonable control of the claimant caused the late filing." OAR 471-030-0045(6). Neither the applicable statutes nor Department administrative rules define the meaning of the phrase "reasonable control." It is therefore appropriate to look to the dictionary to determine the ordinary meaning of these words. *State v. Murray*, 340 Or 599, 604, 136 P3d 10 (2006). "Reasonable" means, as relevant, "being sensible, rational, sane or logical." *See* www.webster-dictionary.org. "Control" means "power to direct or determine." *Id.* Based on our interpretation of the phrase "reasonable control" we conclude that claimant demonstrated good cause for filing untimely continued claims for benefits for weeks 24-09 through 35-10 for the reasons that follow.

When claimant attempted to claim benefits online on June 30th, the Department's automated claim filing system would not allow her to complete her weekly claim. The system very probably suggested to claimant that she make a phone call to the Department to restart her claim. At and around that time, however, several competing factors convinced her that it would be futile to do so. She had been disqualified from receiving unemployment insurance benefits since November 28, 2008 because the Department, OAH and EAB had all erroneously concluded that she had a disqualifying work separation from Tillamook County Creamery Association, and her appeal of EAB's decision was pending at the Oregon Court of Appeals. She had tried to use the Department's online system to file a claim for weekly benefits, as she had been doing for almost six months, and was unable to complete her claim. She received instructions that indicated she had to restart her claim. In order to restart her claim, however, she needed to provide information about a recent employer, when she had not been employed, and information indicating she was "now eligible for benefits," when she knew she ineligible and would not be eligible unless she won her appeal or had employment sufficient to end the disqualification based on her work separation from Tillamook County Creamery Association. In addition, she needed to correctly answer a series of questions, none of which were applicable to her situation.⁷ Although claimant had made numerous calls to the Department while her case was pending at the court, she eventually received a voicemail message from a Department employee indicating that the Department could not talk with her about her case while it was pending at the Court of Appeals, and informing her that if she had any questions she was to call the Department of Justice.⁸ She attempted to call the Department of Justice but

⁷ Notably, the Department does not have record of how claimant answered those questions, or what screens or messages the online claim system displayed to her on June 30, 2009. *See e.g.* Exhibit 11, Item ED-2 at page 15 (displaying a screenshot of a "test" system from 2005; stating that the Department does not know how claimant answered the questions and speculating about what message she might have seen).

⁸ The specific details of the message claimant received during the time period in question are no longer available due to the passage of time. However, claimant testified that the information she received in that message was substantially similar to the message admitted into evidence as Exhibit 1, during which a Department employee notified claimant as follows:

was unable to speak with anyone about her case. 2/17/16 Hearing Transcript at 53. She had received information that her benefits (should the disqualifying work separation decision be overturned) were exhausted so there was no need for her to continue filing weekly claims for benefits. She also understood, however, that she would not be qualified to claim extended benefits until after the actual (not prospective) exhaustion occurred and that she had not and could not exhaust her regular claim unless the Court of Appeals overturned her disqualification. Finally, claimant had asked her attorney and state Senator about how to proceed, and both told claimant that the Department was correct that nothing could be done until the disqualification ended, so "[w]e've got to wait." *Id.*

Despite those events, the ALJ and the Department contended that claimant did have "power to direct or determine" her claims for unemployment benefits in June 2009. They argued that claimant had the logical ability to contact the Department after the online system directed her to restart her claim on June 30, 2009. Had she done so, they asserted, a representative would have readily assisted her to file timely claims for weeks 24-09 and 25-09. We do not doubt that, had claimant called a Department claims specialist at the time of these events to either restart her claim or to timely claim weeks 24-09 and 25-09 a Department employee might well have processed claimant's claims without incident, thus allowing claimant to continue filing online weekly claims for benefits throughout the weeks at issue throughout the weeks her case was pending at the Oregon Court of Appeals. However, that is not the proper analysis. To determine whether claimant had "good cause" to extend the filing deadline, the proper focus is not a hindsight determination of what would – or might – have happened had claimant called, or even what the Department had intended to communicate to claimant through its online messages, phone message and any other communications between them that occurred during the relevant period. Instead, the proper focus is whether the totality of circumstances that existed in June 2009 demonstrated that filing timely claims or restarting a claim was within claimant's reasonable control. To answer this question, it is necessary to determine what claimant rationally or logically believed she had the power to direct or determine at that time. As explained above, we conclude that she did not believe that she had the power to file or restart her claim for benefits, and that her belief was logical and rational. When asked why she did not call the Department after her June 30, 2009 attempt to file continued claims for benefits failed, claimant testified that "it made sense to me . . . that . . . first I had to win the disqualification"; "it was logical that they were telling me I couldn't [claim]"; "I was gonna have to beat the disqualification before we could deal with this and that's what my attorney thought"; "it didn't make any sense for me to call and ask them to restart me if I hadn't worked enough hours to qualify for a restart"; "[i]t was made perfectly clear that until my disqualification was turned over or until I'd worked a certain amount of hours there was nothing they could do"; and "I mean how many times do you guys

...we here at the Employment Department cannot talk to you about your case. That is the bottom line. Umm ... if you call me back I can't talk to you about your case, all I can do is ask you to call the Department of Justice, who is our representative, as long as there is no decision issued by the Court. Umm, if you have any questions, call the Department of Justice.

See 2/17/16 Hearing Transcript at 53; Exhibit 1. The Department did not dispute that claimant received a message from a Department employee during the period in question, nor did the Department rebut claimant's testimony as to the content of the message. Although the Department explained the message meant only that Department employees could not speak with claimant about her appellate *case*, but that they could still discuss claimant's *claim* with her, the distinction between a "case" and a "claim" is not readily apparent to a layperson, nor could a layperson such as claimant reasonably be expected to make that distinction and understand that she was still welcome to call the Department with questions about her claim despite receiving a message such as the one in evidence.

have to tell me no before I'm finally going to like believe you." 3/2/11 Hearing Transcript at 20, 24; 2/17/16 Hearing Transcript at 45, 48, 65.

It is more likely than not that, had claimant merely been confused about any aspect of her attempt to claim benefits in June 2009, she could and would have tried to contact the Department. But the foregoing testimony shows that claimant was not at all confused by the message she received on the Department's online system on June 30 and verified through other sources: claimant understood that that she could not restart her claim unless her disqualification had ended or she had work and earnings sufficient to start a new claim. Claimant rationally and logically concluded there was no point in contacting a Department representative because the Department's position was unambiguous: she would only obtain benefits and qualify to claim extended benefits if and when her disqualification was ended when the court issued its decision on her appeal. Claimant's conclusions about her claims, although flawed, were nevertheless rational and logical based on the totality of circumstances she faced. We therefore conclude that claimant was prevented from filing timely continued claims for benefits from week 24-09 through 35-10 by factors or circumstances beyond her reasonable control, and demonstrated "good cause" for the late filing.

We next determine whether claimant filed her continued claim "no later than seven days following the date determined by the Director to be the date such factors or circumstances" ceased to exist as was required by OAR 471-030-0045(6). By letter dated December 23, 2015, the Department notified claimant that she was eligible to file a claim for benefits under the EUC or EB benefit programs for weeks 23-09 *et seq.* because payment of her benefits as required by *J. A. W. I* had exhausted her regular claim balance as of the week ending June 6, 2009 (week 22-09). The letter also notified claimant that she needed to contact the Department within seven days to file for these benefits. When claimant received this letter on December 24, 2010, she promptly called the Department. She was told that the only representative who could assist her was on vacation during the holidays; as a result, she was unable to file her claims for benefits until January 7, 2011. 2/17/16 Hearing Transcript at 50. The circumstances which caused claimant's late filing of her continued claim ended only when the Department allowed her to file these claims on January 7, 2011. On this record, it is reasonable to infer that it is probable that the Department representative who was able to assist claimant returned on or after the Monday, January 3, 2011. Claimant's January 7, 2011 continued claims for benefits for weeks 24-09 through 35-10 were therefore filed within seven days of the date on which the factors that prevented her timely filing ceased to exist.

Claimant demonstrated good cause for filing late claims for benefits for weeks 24-09 through 35-10, and timely filed benefits when the circumstances that caused her late filing ended. She is eligible to receive benefits for these weeks.

DECISION: Hearing Decisions 16-UI-53832 and Hearing Decision 16-UI-53829 are set aside, as outlined above.

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

DATE of Service: April 8, 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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