

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0394

*Late Application for Review Allowed
Reversed & Remanded*

PROCEDURAL HISTORY: On September 10, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 83102). On September 11, 2015, the Department served notice of an administrative decision (# 194040) that assessed a \$1,920 overpayment, a \$288 monetary penalty and 18 penalty weeks based pm decision # 83102. Claimant filed timely requests for hearing on both decisions; in each hearing request, claimant indicated that he wanted an interpreter in the Somali language. On October 7, 2015, the Office of Administrative Hearings issued notice of hearings scheduled for October 21, 2015. On October 22, 2015, ALJ Frank issued the following hearing decisions, dismissing claimant's hearing requests for claimant's failure to appear at the October 21 hearings: Hearing Decision 16-UI-46334 dismissed claimant's request for hearing on decision # 194040, and Hearing Decision 15-UI-46335 dismissed claimant's request for hearing on decision # 83102. On November 12, 2015, both hearing decisions became final without applications for review or requests to reopen having been filed.

On January 6, 2015, claimant filed untimely requests to reopen both hearing decisions. On January 20, 2016, ALJ Kangas issued the following hearing decisions, dismissing claimant's requests concluding that, dismissing claimant's requests to reopen as untimely: Hearing Decision 16-UI-51360 dismissed claimant's request to reopen the hearing on decision # 194040, and Hearing Decision 16-UI-51361 dismissed claimant's request to reopen the hearing on decision # 83102. On January 25, 2016, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB). On January 28, 2016, EAB issued the following two decisions: 2016-EAB-0087, which reversed and remanded Hearing Decision 16-UI-51360, and 2016-EAB-0088, which reversed and remanded Hearing Decision 16-UI-51361.

On February 17, 2016, ALJ Frank conducted hearings, and on February 25, 2016, issued the following two hearing decisions: Hearing Decision 16-UI-53783 dismissed claimant's request to reopen the hearing on decision # 194040 and Hearing Decision 16-UI-53784 dismissed claimant's request to reopen the hearing on decision # 83102. On March 16, 2016, both hearing decisions became final

without an application for review having been filed with EAB. On April 4, 2016, claimant filed untimely applications for review of Hearing Decisions 16-UI-53783 and 16-UI-53784 with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-53783 and 16-UI-53784. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0383 and 2016-EAB-0384).

LATE APPLICATIONS FOR REVIEW: OAR 657.270(6) and (7) required that claimant's applications for review be filed on or before March 16, 2016; claimant filed his applications on April 4, 2016. Under OAR 471-041-0070(2) (March 20, 2012), the period for filing an application for review may be extended a reasonable time upon a showing of "good cause." "Good cause" exists if an applicant demonstrates that "factors or circumstances beyond the applicant's reasonable control prevented timely filing." OAR 471-041-0070(2)(a). In the written argument submitted with his application for review, claimant stated "I live in 240 SE 188th Ave Apt 180 Portland, OR 97233. and [sic] I do not received [sic] anything from administration of Hearing department."

The record shows that in the January 7, 2016 request to reopen that claimant submitted to the Office of Administrative Hearings (OAH), claimant listed his address as: 240 SE 188th Ave, Portland OR. The OAH mailed the February 17, 2016 hearing decisions to 685 SE 182nd Ave, Portland OR 97233, an address where claimant had previously lived and to which the administrative decisions and October 22, 2015 hearing decisions were mailed. The failure of the OAH to mail Hearing Decisions 16-UI-53783 and 16-UI-53784 to claimant's correct and current address was a circumstance beyond claimant's reasonable control that prevented timely filing of the applications for review. The late applications for review are therefore allowed.

CONCLUSION AND REASONS: Hearing Decisions 16-UI-53783 and 16-53784 are reversed, and these matters remanded for further development of the record.

In EAB Decisions 2016-EAB-0087 and 2016-EAB-0088, EAB determined that a full and fair inquiry into the relevant facts could only be possible if claimant was provided with the services of an interpreter in the Somali language. EAB therefore remanded the cases, directing the ALJ to conduct interpreted hearings on claimant's late requests to reopen.

At the first remanded hearing on claimant's request to reopen the hearing on decision # 83102, conducted on February 7, 2016, a Somali language interpreter had not appeared at the start of the hearing, and claimant consented to proceed with the hearing in English. Audio Recording, Case No. 2015-UI-39766, at 4:25. The interpreter subsequently appeared, and the ALJ explained that he would continue conducting the hearing in English, but would have the interpreter "stand by" in case she was needed. Audio Recording, Case No. 2015-UI-39766 at 5:14. During the hearing, as claimant was attempting to respond to a question by the ALJ, he stated "I need help with interpreter." The ALJ responded: "Your English is just fine. I understand absolutely everything you're saying." Audio Recording, Case No. 2015-UI-39766 at 17:17 through 17:21. The point, however, is not whether the ALJ understood the claimant, but whether *claimant* understood the ALJ. It is not up to the ALJ to determine whether claimant's English proficiency is sufficiently advanced that no interpreter is needed –

it is a determination that must be made by claimant.¹ As we explained in our earlier decisions, the ALJ's obligation to give all parties a reasonable opportunity for a fair hearing requires that the ALJ conduct a full and fair inquiry into the facts. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d (1986). Such an inquiry is only possible if a claimant is able to fully understand the proceedings. Once claimant indicated he needed the help of an interpreter, the ALJ was obligated to provide him with one.² Because the ALJ erred in denying claimant's request for an interpreter, these matters are remanded again for an interpreted hearing to determine whether claimant had good cause for filing late requests to reopen. Given the linguistic difficulties claimant has experienced, we direct that a Somali interpreter be used for the entire hearing. If the ALJ determines that claimant has shown good cause for these late requests, the ALJ must then conduct hearings to determine if claimant had good cause for reopening his hearings. If the ALJ concludes that claimant has demonstrated good cause for reopening, the ALJ will then conduct hearings on the merits of claimant's hearing requests.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decisions 16-UI-51360 and 16-UI-51361 or return these matters to EAB. Only timely applications for review of the subsequent hearing decisions will cause these matters to return to EAB.

DECISION: Hearing Decision 16-UI-53783 is set aside, and this matter remanded for further proceedings consistent with this order.

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

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.

¹ We note that at one point during the second hearing this ALJ conducted on February 7, 2016, the hearing on claimant's request for hearing on decision # 194040, an unidentified voice is heard on the record, speaking in a language other than English. This interruption occurred after the ALJ asked a question and before claimant responded. Audio Recording, Cases No. 15-UI-39765 at 10:27. It is probable that this interjection was made by someone on the line who was attempting to translate the ALJ's question into Somali for claimant.

² OAR 471-040-0007(7)(a) (March 5, 2006) states: "If, at any time of or during the contested case proceedings, it becomes apparent that an interpreter is necessary for a full and fair inquiry, the administrative law judge *shall* arrange for an interpreter and may postpone the proceedings if necessary." Emphasis added; *see also Leung v. Employment Department*, 266 Or App 795, 804, 340 P3d 62 (2014) (states have an obligation to provide meaningful access to their unemployment insurance programs to individuals with limited English proficiency).

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.