

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0864

Reversed & Remanded

PROCEDURAL HISTORY: On April 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 142207). Claimant filed a timely request for hearing. The Office of Administrative Hearings (OAH) scheduled a hearing for May 10, 2016. On May 10, 2016, ALJ Seideman issued Hearing Decision 16-UI-59290, dismissing claimant's request for hearing for failure to appear. On May 31, 2016, Hearing Decision 16-UI-59290 became final without a request to reopen the hearing having been filed by claimant.

On June 15, 2016, claimant telephoned the Department, and the Department interpreted his call as another request for hearing on administrative decision # 142207. On June 21, 2016, ALJ Kangas issued Hearing Decision 16-UI-62163, dismissing the request for hearing as untimely, subject to claimant's right to renew the request by responding to an attached appellant questionnaire by July 5, 2016. On June 28, 2016, claimant filed a timely response to the appellant questionnaire. On July 11, 2016, ALJ Kangas mailed claimant a letter vacating Hearing Decision 16-UI-62163 on the basis that, because Hearing Decision 16-UI-59290 was final, OAH did not have authority to consider a second request for hearing on decision # 142207, and therefore erred in issuing Hearing Decision 16-UI-62163.¹

On July 12, 2016, ALJ Kangas issued Hearing Decision 16-UI-63612, treating claimant's June 28, 2016 response to the appellant questionnaire attached to Hearing Decision 16-UI-62163 as a late request to reopen the May 10, 2016 hearing on administrative decision # 142207, and denying the request. On July 22, 2016, claimant filed an application for review of Hearing Decision 16-UI-63612 with the Employment Appeals Board (EAB). EAB considered the entire hearing record and claimant's written argument to the extent it was based on information in the hearing record.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-63612 is reversed, and this matter remanded to OAH for a hearing on whether claimant's late request to reopen the May 10, 2016 hearing

¹ We take notice of these facts, which are contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed facts will remain

on administrative decision # 142207 should be allowed and granted, and, if so, whether claimant is disqualified from receiving benefits based on his work separation from the employer.

ORS 657.270(5) and OAR 471-040-0040(1) (February 12, 2012) provide that an ALJ may reopen a hearing if the party that is requesting the reopening failed to appear at the hearing, files the request within 20 days after the issuance of the written decision by the ALJ, and shows good cause for failing to appear. The period within which a party may request reopening may be extended if the party requesting reopening has good cause for failing to request reopening within the time allowed and acts within a reasonable time. OAR 471-040-0041(1). "Good cause" exists when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control. OAR 471-040-0040(2); OAR 471-040-0041(2). "A reasonable time," is seven days after the circumstances that prevented a timely filing ceased to exist. OAR 471-040-0041(3).

The party filing a late request to reopen shall set forth the reason(s) for filing the request late and missing the hearing in a written statement, which OAH shall consider in determining whether good cause exists for the late filing and the party acted within a reasonable time, and whether good cause exists for failing to appear at the hearing. OAR 471-040-0040(3); OAR 471-040-0041(4). However, nothing in OAR 471-040-0040(3) or OAR 471-040-0041(4) prevents OAH from scheduling a hearing if it determines that testimony is required. OAR 471-040-0040(7); OAR 471-040-0041(6). 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).

In Hearing Decision 16-UI-63612, the ALJ treated claimant's June 28, 2016 response to the appellant questionnaire attached to Hearing Decision 16-UI-62163 as a late request to reopen the May 10, 2016 hearing on administrative decision # 142207, asserting that the information claimant provided in the response addressed why he missed the hearing.² However, the ALJ denied claimant's request to reopen the hearing as untimely without good cause, noting that the response included no explanation of why claimant did not file the request to reopen within the 20 days allowed, and therefore concluding that claimant failed to show that an excusable mistake or factors beyond his reasonable control caused him to fail to request a reopening within the time allowed.³

We agree with the ALJ's treatment of claimant's response to the appellant questionnaire as a late request for a reopening, given that claimant indicated in the response that he failed to appear at hearing because he never received notice of the hearing. Exhibit 5. We also agree with the ALJ that the response failed to explain why claimant did not file a request to reopen the hearing within the 20 days allowed. *See* Exhibit 5. However, the ALJ overlooks that the appellant questionnaire informed claimant that he needed to provide information regarding an administrative decision mailed to him on April 12, 2016, for which a hearing request was due on May 2, 2016, but filed by claimant on June 15, 2016. Exhibit 5. The questionnaire asked claimant when he received the administrative decision, the date he filed his hearing request, how he filed it, why he did not file it before the deadline stated in the administrative

² Hearing Decision 16-UI-63612 at 1, fn. 1.

³ *Id.* at 2.

decision, and what prompted him to file it on the day it was filed. Exhibit 5. Thus, the questionnaire, which resulted from OAH's admitted error in issuing Hearing Decision 16-UI-62163, focused entirely on a late request for hearing claimant allegedly filed on June 15, 2016, and therefore did not afford claimant a reasonable opportunity to explain why he did not file a request for a reopening until June 28, 2016.

Hearing Decision 16-UI-63612 therefore is reversed, and this matter remanded for a hearing on whether claimant's late request for a reopening should be allowed and granted, and if so, whether claimant is disqualified from receiving benefits based on his work separation from the employer. On remand, the ALJ should first conduct a full inquiry into the facts necessary for a determination of whether claimant had good cause for failing to request a reopening within the time allowed and acted within a reasonable time, including the date on which he received notice of Hearing Decision 16-UI-59290, factors or circumstances, if any, that delayed his receipt of the decision, or other factors or circumstances, if any, that delayed his request for a reopening. The ALJ then should conduct a full inquiry into the facts necessary for consideration of whether good cause exists for claimant's failure to appear at the hearing, including his alleged failure to receive notice of the May 10, 2016 hearing. If it is determined that claimant's request for a reopening should be allowed and granted, the ALJ should conduct a full inquiry into whether claimant should be disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 16-UI-63612 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: August 4, 2016

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-63612 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.

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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