

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0868**

*Affirmed*  
*Request to Reopen Denied*

**PROCEDURAL HISTORY:** On March 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83003). Claimant filed a timely request for hearing. On April 6, 2016, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for April 20, 2016. On April 21, 2016, ALJ R. Frank issued Hearing Decision 16-UI-57794, dismissing claimant's hearing request for failure to appear. On April 28, 2016, claimant filed a request to reopen the April 20, 2016 hearing.<sup>1</sup> On June 30, 2016, claimant filed a second request to reopen the April 20, 2016 hearing. On July 6, 2016, ALJ Kangas reviewed claimant's request and issued Hearing Decision 16-UI-63173, denying claimant's request to reopen. On July 26, 2016, claimant filed an application for review of Hearing Decision 16-UI-63173 with the Employment Appeals Board (EAB).

With his application for review, claimant submitted a written argument to EAB that included new information. EAB may only consider a party's new information if the party establishes that factors or circumstances beyond his reasonable control prevented him from offering it into the record before the ALJ. ORS 657.275; OAR 471-041-0090(2). Claimant stated that he did not offer the information before because he was not aware that an "in depth explanation regarding my failure to show for the hearing" was necessary. Claimant requested reopening using the application for review form attached to the Hearing Decision 16-UI-63173; we therefore infer that claimant received Hearing Decision 16-UI-63173 and, more likely than not, the enclosure titled "Rights of Review of a Hearing Decision," which OAH customarily mails to parties with its hearing decisions.<sup>2</sup> Hearing Decision 16-UI-63173 stated, in pertinent part:

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<sup>1</sup> The ALJ concluded in Hearing Decision 16-UI-63173 that claimant filed a timely request to reopen with the Employment Appeals Board on April 28, 2016 but EAB failed to forward it to OAH. We note that EAB has reviewed its records and has no record of having received claimant's April 28, 2016 fax, nor does the record on review include documentation supporting the ALJ's conclusion that the April 28, 2016 attempt to file the documents with EAB was successful. *See* OAR 471-010-0040(3) (defining filing dates for faxed documents to include encoded date, fax receipt date, or most probable date of faxing). Regardless, no adverse party has requested review of the ALJ's conclusion that claimant's request to reopen was timely filed on April 28, 2016, and, consequently, we will not review or disturb the ALJ's finding on that issue.

If you did not appear at the hearing, you may request to reopen the hearing. \* \* \* Your request to reopen the hearing must: 1) be in writing; 2) *show that factors or circumstances beyond your reasonable control caused you to miss the hearing* \* \* \*<sup>3</sup>

The "Rights of Review of a Hearing Decision" stated, in bold font, that to request that a hearing be reopened:

You must include a statement explaining why you failed to appear or your request will be dismissed. *Unless your statement shows that circumstances beyond your reasonable control prevented you from appearing at the hearing, your request will be denied.*<sup>4</sup>

Because claimant was advised in two documents that his written statement requesting reopening had to show that appearing at the hearing was beyond his reasonable control, we conclude that claimant's failure to include an "in depth explanation" about the circumstances that caused him to miss the hearing with his reopen request was not due to factors or circumstances beyond his reasonable control. Therefore, EAB may not consider claimant's new information when reaching this decision.<sup>5</sup>

Even if EAB had been able to consider the information claimant provided in his argument, the outcome of this decision would remain the same. In order to allow claimant's request to reopen, EAB would have to conclude that claimant missed the hearing with "good cause" due to an excusable mistake or factors beyond his reasonable control. While "unanticipated, and not reasonably foreseeable, loss of telephone service" amounts to "good cause" under OAR 471-040-0040(2)(a)(B), that is not what prevented claimant from attending the hearing in this matter. OAH mailed notice of the April 20th hearing two weeks prior to the hearing date, and claimant's argument indicated that he knew when the hearing was going to occur, knew that he had telephone access issues, and knew in advance that his work schedule would prevent him from attending the hearing at the scheduled time. The Notice of Hearing OAH mailed to claimant instructed him to call OAH "[i]f you have questions prior to your hearing," and advised him that "[i]f you requested the hearing and you do not call \*\*\* at the time set for your hearing, the hearing will be dismissed." The materials included or noticed in this record include information about how to contact OAH by mail, fax and telephone. The OAH public website "Contact Us" link,

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<sup>2</sup> We take notice of the fact that the "Rights of Review of a Hearing Decision" document is customarily included by OAH with the copies of the hearing decisions OAH mails to parties, which is a fact within EAB's specialized knowledge. 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 fact will remain in the record.

<sup>3</sup> Hearing Decision 16-UI-63173 at 4 (emphasis added).

<sup>4</sup> Rights of Review Of A Hearing Decision, page 1 (emphasis added).

<sup>5</sup> We note that EAB is also barred from considering claimant's argument under OAR 471-041-0080 because claimant did not certify he served a copy of his argument to the employer, an instruction written both on page two of the Rights of Review document and page two of the "Notice of Receipt of Application for Review" letter EAB mailed to claimant on July 27, 2016.

located in the upper left corner of the website's homepage, includes an email contact option that allows individuals to send emails to OAH.<sup>6</sup>

Given those factors, and although it is undisputed that claimant had some barriers to participating in the hearing as scheduled or making phone contact with OAH, the absence of evidence that he made any attempt, even an unsuccessful one, to notify OAH by mail, fax or email that he was going to be unable to attend the scheduled hearing or ask that his hearing be postponed or rescheduled to a more convenient time, all of which appear to have been within his control, we would not have concluded that claimant had good cause to reopen the April 20th hearing. Therefore, had we considered claimant's new information, we would still have affirmed the ALJ's decision denying claimant's reopen request.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted**.

**DECISION:** Hearing Decision 16-UI-63173 is affirmed.

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

**DATE of Service:** July 27, 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](http://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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<sup>6</sup> We take notice of this generally cognizable fact. 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 information will remain in evidence.