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State of Oregon  
**Employment Appeals Board**  
875 Union St. N.E.  
Salem, OR 97311

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**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1188**

*Reversed*  
*Late Request for Hearing Allowed*

**PROCEDURAL HISTORY:** On August 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with Simos Insourcing Solutions (Simos) without good cause and was, therefore, disqualified from receiving unemployment insurance benefits (decision # 120850). On August 26, 2016, the Department served notice of another administrative decision, based on decision # 120850, concluding claimant was overpaid \$1,727 and was liable for a monetary penalty of \$345.40 and 17 penalty weeks for making a material misrepresentation when claiming the overpaid benefits (decision # 193028). On August 31, 2016, Simos filed a timely request for hearing on decision # 193028. On September 1, 2016, claimant filed a timely request for hearing on decision # 120850.

On September 13, 2016, the Office of Administrative Hearings (OAH) mailed notice of a hearing on decision # 193028 scheduled for September 27, 2016. On September 27, 2016, ALJ Triana convened a hearing at which time Simos withdrew its August 31, 2016 hearing request. On September 28, 2016, ALJ Triana issued Hearing Decision 16-UI-68203, dismissing Simos's request for hearing on decision # 193028. Also on September 28, 2016, OAH issued two notices of two hearings scheduled for October 13, 2016, one based on claimant's request for hearing on decision # 120850 and one based on claimant's late request for hearing on decision # 193028.

On October 13, 2016, ALJ Triana conducted hearings on decision # 120850 and on claimant's late request for a hearing on decision # 193028. On October 14, 2016, the ALJ issued Hearing Decision 16-UI-69252, setting aside decision # 120850 and concluding claimant was not disqualified for benefits because of a work separation from Simos. On October 14, 2016, the ALJ also issued Hearing Decision 16-UI-69260, dismissing claimant's late request for hearing on decision # 193028.

On October 18, 2016, Hearing Decision 16-UI-68203, dismissing Simos's request for hearing on decision # 193028, became final without any party having filed an application for review of that decision. On October 24, 2016, claimant filed a timely application for review of Hearing Decision 16-UI-69260, dismissing claimant's request for hearing on decision # 193028, with the Employment Appeals Board (EAB). On November 3, 2016, Hearing Decision 16-UI-69252, concluding claimant did not have a disqualifying work separation from Simos, became final without any adversely affected party having requested review. This matter is before EAB solely on claimant's application for review of Hearing Decision 16-UI-68260.

**EVIDENTIARY MATTER:** EAB admitted Exhibit EAB 1 into the record when reaching a decision in this matter. Exhibit EAB 1 consists of the audio recording of the September 27, 2016 hearing on decision # 193028, during which the ALJ dismissed the employer's request for hearing on decision # 193028 and accepted claimant's oral statements during the hearing as his late request for hearing on decision # 193028. The evidence is relevant and material to EAB's determination and necessary to complete the record in this matter. Any party that objects to our admitting Exhibit EAB 1 into evidence 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 exhibit will remain in the record.<sup>1</sup>

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that claimant's request for hearing on decision # 193028 should be allowed.

Under ORS 657.269, claimant had 20 days after decision # 193028 was issued to request a hearing. ORS 657.875 provides, however, that the time period for requesting a hearing may be extended "a reasonable time" upon a showing of "good cause." "Good cause" is "when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control." OAR 471-040-0010(1). A "reasonable time" is "seven days after the circumstances that prevented a timely filing ceased to exist." OAR 471-040-0010(3).

During the September 27<sup>th</sup> and October 13<sup>th</sup> hearings on decision # 193028, claimant made inconsistent statements about his receipt of decision # 193028. In the September 27<sup>th</sup> hearing, claimant stated that he received decision # 193028 and filed a timely request for hearing; in the October 13<sup>th</sup> hearing, claimant denied having received decision # 193028. The ALJ concluded in Hearing Decision 16-UI-69260 that claimant's testimony about his request for hearing was not reliable, and, therefore, although claimant alleged he did not receive notice of decision # 193028, the record fails to support the claim, it was more likely true than not that he did receive notice of the decision when it was mailed to him, and he failed to establish good cause to extend the filing period. Although we agree with the ALJ that claimant's claim that he did not receive a copy of decision # 193028 was not reliable, we disagree with the ALJ's decision to dismiss claimant's late request for hearing.

Decision # 193028, mailed August 26<sup>th</sup>, concluded that claimant was overpaid benefits, disqualified for future benefits, had a monetary penalty, and willfully made a misrepresentation to obtain benefits. On

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<sup>1</sup> An electronic copy of the audio recording is available to parties upon request.

September 13, 2016, before the appeal period for decision # 193028 expired, OAH mailed notice that a hearing on decision # 193028 had been scheduled:

The hearing is regarding the Administrative Decision(s) dated August 26, 2016. In addition to the jurisdictional issues . . . the issue(s) to be considered are: **Whether claimant willfully made a false statement or misrepresentation or willfully failed to report a material fact to obtain benefits; whether claimant should be liable for a penalty in addition to a disqualification . . . Was remuneration payable to claimant during the period in issue which would reduce the weekly benefit amount? . . . Whether claimant was paid benefits to which claimant was not entitled and is liable to repay such amount or is liable to have such amount deducted from benefits payable. \* \* \*** This hearing has been scheduled for **September 27, 2016** and will begin at **10:45 AM Pacific Time . . .**

(Emphasis in original.) We infer from claimant's appearance at the September 27<sup>th</sup> hearing that he received the September 13<sup>th</sup> notice of hearing, likely shortly after it was mailed, and likely within the 20-day appeal period for decision # 193028.<sup>2</sup> Whatever claimant's reason(s) were for not requesting a hearing before September 13<sup>th</sup>, after having been informed that he was to have a hearing on decision # 193028, and having no reason to suspect that he needed to take any action with respect to requesting a hearing on decision # 193028 until he was told to do so, we conclude that claimant had "good cause" to extend the filing period a "reasonable time." The circumstances that prevented claimant from filing a timely request for hearing on decision # 193028 ceased to exist on September 27, 2016 when he was told that he had not filed a request for hearing and needed to do so. Claimant effectively filed his request the same day. His late request for hearing was, therefore, filed within the seven-day "reasonable time" period after the circumstances that prevented a timely filing ceased to exist.

Claimant's late request for hearing is allowed for the foregoing reasons.<sup>3</sup> Claimant is entitled to a hearing on the merits of decision # 193028.<sup>4</sup>

**DECISION:** Hearing Decision 16-UI-69260 is set aside, as outlined above.

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

**DATE of Service: November 1, 2016**

<sup>2</sup> Mail through the U.S. Postal Service is generally delivered 1-3 days after mailing, making it likely that claimant received notice of the hearing within the 20-day appeal period. <https://www.usps.com/ship/mail-shipping-services.htm>

<sup>3</sup> See accord Appeals Board Decision 10-AB-3047 (October 25, 2010) (the ALJ abused his discretion in refusing to conduct a hearing over the objection of the employer, which had reasonably and justifiably relied upon OAH's notice that a hearing was to take place); Appeals Board Decision 10-AB-3269 (October 29, 2010) (the ALJ erred in dismissing claimant's request for hearing over the employer's objections because the employer did not also request a hearing after receiving notice that a hearing was to take place).

<sup>4</sup> Hearing Decision 16-UI-69252 reversed the Department's decision that claimant had a disqualifying work separation from Simos. As a result, the existence and amount of any overpayment and penalties based on the disqualifying work separation are subject to recalculation.

**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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