

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1220

Reversed & Remanded

PROCEDURAL HISTORY: On August 5, 2016, the Oregon Employment Department (the Department) mailed claimant a wage and potential benefit (WPBR) report showing that claimant had worked 64 hours for Horizon Air during the second quarter of 2016 and earned \$2,264.95. On August 26, 2016, claimant requested a hearing on the August 5 WPBR. On September 6, 2016, ALJ Kangas issued Hearing Decision 16-UI-66908, dismissing claimant's request for hearing as untimely, subject to claimant's right to renew the request by responding to an appellant questionnaire within 14 days. Claimant timely responded to the appellant questionnaire. By letter dated September 28, 2016, the Office of Administrative Hearings (OAH) cancelled Hearing Decision 16-UI-66908. On October 21, 2016, ALJ M. Davis conducted a hearing in which no Department representative participated, and on October 24, 2016, issued Hearing Decision 16-UI-69737, dismissing claimant's hearing request as untimely. On November 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On July 3, 2016, claimant filed a claim for unemployment benefits.

(2) On July 9, 2016, claimant received a WPBR showing no work for or earnings from Horizon Air. By letter to the Department dated July 10, 2016, claimant stated that she disagreed with this determination and that Horizon Air had not correctly reported her earnings for April and May 2016. Exhibit 2, Claimant's 9/14/16 letter.

(3) On August 5, 2016, the Department mailed claimant a WPBR indicating that she had earned \$2,264.95 working for Horizon Air during the second quarter (April – June) of 2016. The WPBR stated that "[t]his report becomes final unless you request redetermination of the report or request a hearing within 10 days." Exhibit 2.

(4) On August 8, 2016, claimant called the Department because she had received no response to her July 10 letter. Claimant spoke to two Department representatives, one of whom told claimant that he would "look into the matter" of claimant's earnings from Horizon Air. Exhibit 2, Claimant's 9/14/16 letter. Although claimant had not yet received the August 5 WPBR when she spoke to the Department

representative on August 8, neither of the Department representatives with whom claimant spoke told her about the August 5 WPBR. Audio Recording at 22:00.

(5) On August 13 or 15, claimant received the August 5 WPBR. Audio Recording at 19:29. Claimant, who believed that this WPBR did not correctly reflect her earnings, attempted to contact the Department, but was unable to do so until August 26, 2016. On that date, she spoke to the representative with whom she had spoken on August 8 and who had told her that he would “look into the matter” of her earnings from Horizon Air. This representative referred claimant to another representative, who asked claimant if she wanted to request a hearing on the August 5 WPBR; claimant responded that she did. This representative transferred claimant to a third Department representative, who told claimant that he would investigate the matter of claimant’s wages. Exhibit 2, Claimant’s 9/14/16 letter.

(6) In a decision issued on September 6, 2016, the Department informed claimant that it had completed its investigation in response to her request for adjustment of a claim determination based on earnings from Horizon Air and that “[a]n additional 104 hours worked was added to quarter 2/16 making the total 168.” The letter also informed claimant that the “decision is final unless you specifically ask for a hearing within 10 days of the mailing date of this letter,” instructed claimant to submit her hearing request to the Office of Administrative Hearings, and gave her the address of OAH in Salem, Oregon to which her hearing request should be directed. Exhibit 2.

(7) By letter dated September 14, 2016, sent to OAH at the Salem address she had been given, claimant requested a hearing on the Department’s September 6 decision. Exhibit 1.

(8) By letter sent in an envelope postmarked October 26, 2016 to the Department, OAH and EAB, claimant requested a hearing on a WPBR the Department issued on October 20, 2016. EAB Exhibit 1.¹

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that claimant timely responded to all WPBRs she received, and is entitled to a hearing on the most recent decision.

ORS 657.266(1) requires that the Department promptly examine each new claim for unemployment benefits, determine the wages paid to claimant during the applicable base year, determine if those wages are sufficient to qualify claimant for benefits, and, if so, determine the weekly benefit amount payable to claimant. A party who disagrees with an initial or amended claimant determination, *i.e.*, WPBR, must file a request for hearing within 10 days of the date on which the WPBR is mailed; if no hearing request is filed, the WPBR becomes final. ORS 657.266(5). Upon a showing of good cause, the deadline for filing a hearing request may be extended for a reasonable time. ORS 657.875. “Good cause” exists when circumstances beyond a party’s reasonable control or an excusable mistake prevent a timely filing. OAR 471-040-0010(1) (February 10, 2010). “A ‘reasonable time’ is seven days after the circumstances that prevented a timely filing cease to exist.” OAR 471-040-0010(3).

¹ Claimant’s October 26 letter is marked as EAB Exhibit 1. A copy of EAB Exhibit 1 is included with this decision. Any party that objects to the admission of EAB Exhibit 1 must submit its objections to this office in writing, setting forth the basis of the objection, within ten days of the date on which this decision is mailed. Unless such an objection is received, EAB Exhibit 1 will remain part of the record.

In Hearing Decision 16-UI-69737, the ALJ found that claimant received the Department's August 5, 2016 WPBR on August 13 or 15, but failed to contact the Department to request a hearing until August 26. The ALJ concluded that claimant demonstrated good cause to extend the deadline by which she was required to request a hearing, but failed to do so within seven days of the date she received the decision. The ALJ therefore dismissed claimant's request on the August 5 WPBR as untimely. We disagree, and find that the ALJ ignored evidence in the record that demonstrated claimant's persistent attempts to timely contest the Department's determination regarding her work for and earnings from Horizon Air.

The record shows that on July 9, 2016, claimant received an initial WPBR that reported that she had no earnings from Horizon Air during the second quarter of 2016 and was therefore ineligible for unemployment benefits. By letter dated July 10, claimant timely expressed her disagreement with this decision, a disagreement that the Department ignored until claimant contacted the Department on August 8. On that date, she spoke with two representatives about the Department determination of her work for and earnings from Horizon Air. One of the Department representatives agreed to "look into the matter." Finding of Fact 4. Although the record contains no evidence about any specific discussion of the August 5 WPBR, claimant made the purpose of her August 8 call perfectly clear – she wanted the Department to correct the error it made in determining wages she had earned from Horizon Air. Claimant did not specifically mention the August 5 WPBR during her August 8 call to the Department because she was unaware it had been issued – she had not yet received it and the Department representatives did not tell her about it. Findings of Fact 4 and 5. A valid hearing request may be filed by telephone call to the Department if the party "specifically requests a hearing or otherwise expresses a present intent to appeal." OAR 471-040-0005(1) and (2) (July 14, 2011). During her August 8 phone call to the Department, claimant clearly indicated her disagreement with the Department's calculations regarding her earnings. Claimant's ignorance of the Department's August 5 decision, which resulted from the Department representatives' failure to tell her about it, does not diminish "the present intent to appeal" the Department's determination of her wages that she expressed during her August 8 phone call. We therefore conclude that claimant timely requested a hearing on the August 5, 2016 WPBR and the ALJ erred by dismissing her hearing request as untimely.

Even if we were to dismiss as untimely claimant's request for hearing on the Department's August 5 WPBR, we would still conclude that claimant is entitled to a hearing on the merits of the Department's determinations concerning her work for and earnings from Horizon Air. The Department's August WPBR was subsequently superseded by an amended WPBR, issued on September 6, 2016. Claimant timely requested a hearing on that WPBR in her September 14, 2016 letter to OAH. Although the ALJ admitted the letter as Exhibit 1 at the October 21 hearing, neither she nor any other OAH representative acknowledged this as a hearing request. Matters became perhaps even more confusing and vexing for claimant when her request for hearing on the September WPBR continued to be ignored and the Department issued another amended WPBR on October 20, 2016. Claimant responded to that WPBR by timely filing a request for hearing on October 26, 2016.² EAB Exhibit 1. We therefore reverse Hearing Decision 16-UI-69737 and remand this matter for a hearing on merits of the most recent WPBR issued by the Department.

² Under OAR 471-040-005(4)(b), the filing date of a hearing request filed by mail is "the postmarked date affixed by the United States Postal Service..." Here, that date is October 26, 2016. Finding of Fact 8.

DECISION: Hearing Decision 16-UI-69737 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: November 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.

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.