

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1339

Reversed & Remanded

PROCEDURAL HISTORY: On October 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 112702). Claimant filed a timely request for hearing. On November 9, 2016, ALJ Vincent conducted a hearing, at which the employer did not appear, and on November 16, 2016 issued Hearing Decision 16-UI-71229, concluding claimant's discharge was not for misconduct. On November 28, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-71229 should be reversed, and this matter remanded for additional information.

In a written argument to EAB, the employer requested to reopen the November 9, 2016 hearing on the grounds that its representative planned to attend the hearing despite needing to handle a family emergency that day but was unable to do so because the emergency was more severe than she had initially understood, causing her to forget about the hearing. The employer's request for relief is construed as a request to have EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. We need not reach a determination as to whether the employer is entitled to a new hearing to submit its additional information in this matter, however, because we have determined that remand is required on other grounds.

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). As noted, the employer did not attend the November 9th hearing in this matter. During the less than three minutes of testimony in this matter, the ALJ asked claimant if he knew why the employer discharged him, and, when claimant responded that he did not know and had not been told by the employer why he had been discharged, the ALJ ended the hearing without further inquiring into the circumstances that ended his

employment. Audio recording at ~ 6:30. Notably, however, administrative decision # 112702, one of the record documents in this case, stated that claimant was “fired because you chose not to call in or show up to your scheduled shift on August 17, 2016.” Although the findings in the administrative decision are not evidence, the finding suggested a reason for claimant’s discharge in a record that contained no reasons for the discharge. Given that claimant professed that he did not know and was not told of a reason, and the ALJ’s obligation to inquire and develop a full record regardless whether the employer was in attendance at the hearing, we conclude that the ALJ was obligated to ask claimant if he had knowledge of such an incident, and either follow up or end the hearing at that point based on claimant’s response.

Because the ALJ did not develop the record necessary for a determination of whether claimant’s discharge was for misconduct, Hearing Decision 16-UI-71229 is reversed, and this matter is remanded for development of the record. If the employer chooses to appear at the hearing, the ALJ should take testimony from its witness(es) and allow the parties to respond to each other’s evidence.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-71229 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.

DECISION: Hearing Decision 16-UI-71229 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: December 1, 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.

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