

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0156

Reversed & Remanded

PROCEDURAL HISTORY: On December 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for a disqualifying act (decision # 133131). Claimant filed a timely request for hearing. On January 10, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for January 25, 2017 at 10:45 a.m., at which the employer failed to appear. On January 25, 2017, ALJ Wyatt conducted a hearing, and on January 27, 2017 issued Hearing Decision 17-UI-75573, concluding claimant's discharge was not for a disqualifying act. On February 1, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-75573 should be reversed and this matter remanded for additional proceedings.

With its application for review, the employer requested to be allowed to present evidence about claimant's work separation. The employer's request for relief is construed as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. In support of its request, the employer stated,

Due to inclement weather in the Portland area the receipt of [*sic*] the Notice of Hearing was not received until the afternoon of the date of the hearing. All postal routes, UPS and other delivers [*sic*] were delayed for several business days due to the weather. All businesses and residential customers were affected by this inclement weather.

The employer's statement suggests that factors or circumstances beyond the employer's reasonable control might have prevented the employer from attending the hearing. However, the U.S. Postal Service typically delivers 1st class mail within three days of the date it was deposited in the mail,¹ and the employer is claiming that inclement weather delayed the notice of hearing by a total of fifteen days,

¹ <http://faq.usps.com/>

which is implausible absent additional facts about the circumstances under which the notice was delayed. Because additional facts are necessary before a determination can be reached about the employer's entitlement to present evidence about the work separation, the record might not be complete and this matter must be reversed and remanded to OAH for collection of additional information.

The threshold issue on remand is whether, having failed to attend the hearing, the employer may still be allowed to present information about claimant's work separation. The employer must establish that factors or circumstances beyond its reasonable control prevented it from appearing at the January 25, 2017 hearing. To that effect, the ALJ should ask the employer when the period of inclement weather at issue began and ended, how long it took the employer to receive its other 1st class mail through the U.S. Postal Service, whether the employer's business was opened and staffed during the period of inclement weather, whether and how the employer handled its mail during the period of inclement weather, whether the employer's delay in receiving notice of the January 25, 2017 hearing was the result of mail delays or due to the employer's failure to process its mail during any inclement weather business closures, and, if it was the latter, to explain how the employer's failure to process its mail amounted to a circumstance beyond its reasonable control. The ALJ should follow up with the employer on any other relevant lines of inquiry, and, if he has relevant information, allow claimant the opportunity to respond to the employer's evidence.

Only if the ALJ determines that the employer proved that, more likely than not, factors or circumstances beyond its reasonable control prevented the employer from appearing during the January 25th hearing to provide evidence about the work separation would the employer then be allowed another opportunity to do so.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-75573 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 17-UI-75573 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: February 10, 2017

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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