

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0231

Reversed & Remanded

PROCEDURAL HISTORY: On December 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not able to work from November 6, 2016 to November 12, 2016 (decision # 93217). Claimant filed a timely request for hearing. On January 17, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for January 30, 2017 at 8:15 a.m., at which claimant failed to appear. On January 30, 2017, ALJ A. Mann issued Hearing Decision 17-UI-75719, dismissing claimant's request for hearing for failure to appear. On February 6, 2017, claimant filed with the Department an application for review form and request to reopen the January 30th hearing. On February 13, 2017, claimant filed a written statement with OAH that was construed as a request to reopen the January 30th hearing. On February 21, 2017, ALJ Kangas considered claimant's February 13th filing and issued Hearing Decision 17-UI-77500, denying claimant's request to reopen. On February 24, 2017, the Employment Appeals Board (EAB) received claimant's application for review.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-77500 must be set aside, and this matter remanded.

In Hearing Decision 17-UI-77500, the ALJ found that claimant "did not provide any information why he failed to appear at the previously scheduled hearing," and that in the absence of such information claimant had not shown good cause for failing to appear at the hearing. Hearing Decision 17-UI-77500 at 2. We disagree. The record shows that at the time the ALJ decided the case claimant had, in fact, filed a written statement explaining why he missed the hearing; due to an administrative delay or error that is not attributable to claimant, however, the written statement was not provided to the ALJ. Due process requires that claimant receive a reasonable opportunity for fair proceedings, which necessarily requires that the ALJ have, review and consider a fully developed record as to the facts at issue before deciding the case. *See e.g. ORS 657.270(3); see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because it seems the record the ALJ reviewed failed to include claimant's written statement, the record was incomplete, and Hearing Decision 17-UI-77500 is reversed as unsupported by a complete record.

ORS 657.270(5)(c)(C) provides that an ALJ may allow a party's request to reopen if the party requesting reopening "shows good cause for failing to appear." OAR 471-040-0040(2) defines "good cause" to include "an excusable mistake or . . . factors beyond an applicant's reasonable control." Claimant's written statement suggests that he might be able to show good cause for failing to appear, since he missed the hearing because he was working as a log truck driver at the time of the hearing and would have had to stop on the side of the road in an area with poor cell phone reception against his supervisor's wishes in order to participate, at the risk of both dropping the conference line to the hearing and losing his job. In order to determine if he had good cause, however, the record must be further developed to include: what date claimant received the notice of hearing; whether he planned to participate in the hearing when he received the notice of hearing; what date he found out that his work schedule conflicted with the scheduled date and time of the hearing; whether he asked his employer for time off work to participate in the hearing and, if not, why not; whether he contacted OAH to ask that the hearing be rescheduled and, if not, why not; what, if any, attempt claimant made to attend the hearing despite his work schedule; and any other information the ALJ deems necessary to development of a complete record about whether claimant's failure to appear at the hearing was the result of an "excusable mistake" or "factors beyond [his] reasonable control." Because the record suggests claimant might be able to establish "good cause" but requires further development, this matter is remanded for a hearing.

Please note that the primary issue at the remand hearing will be whether or not claimant had good cause for missing the January 30th hearing. If and only if claimant can establish good cause would the ALJ then have the jurisdiction to conduct a hearing on the merits of decision # 93217, that is, whether or not claimant was able to work between November 6, 2016 and November 12, 2016.

DECISION: Hearing Decision 17-UI-77500 is set aside, and this matter remanded for further proceedings consistent with this order.¹

Susan Rossiter, J. S. Cromwell and D. P. Hettle.

DATE of Service: February 28, 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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¹ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-77500 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.