

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0447

Reversed
Request to Reopen Granted

PROCEDURAL HISTORY: On December 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 123146). Claimant filed a timely request for hearing. On January 4, 2017, the Office of Administrative Hearings (OAH) scheduled a hearing for January 18, 2017. Claimant requested that the hearing be postponed, and OAH granted the request. On January 19, 2017, OAH rescheduled the hearing for February 2, 2017. Claimant again requested a postponement, and OAH again granted the request. On January 26, 2017, OAH rescheduled the hearing for February 10, 2017 at 9:30 a.m. On February 10, 2017, claimant failed to appear at the hearing, and on February 13, 2017 ALJ Monroe issued Hearing Decision 17-UI-76784, dismissing claimant's request for hearing due to her failure to appear. On February 27, 2017, claimant filed a timely request to reopen the hearing. On March 24, 2017, ALJ Lohr conducted a hearing, and on March 27, 2017 issued Hearing Decision 17-UI-79661, denying claimant's request to reopen. On April 17, 2017, claimant filed a timely application for review of Hearing Decision 17-UI-79661 with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. Claimant submitted written argument with her application for review. However, claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We therefore did not consider claimant's written argument or new information when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Claimant received the January 26, 2017 notice of the February 10, 2017 hearing a few days after it was mailed. Claimant was a single mother and planned to attend the 9:30 a.m. hearing after dropping her young daughter off at school.

(2) Between 8:00 and 8:30 a.m. on February 10, 2017, claimant started driving her daughter to school and expected to drop her off about an hour before the hearing. However, claimant's daughter became extremely nauseated, and claimant stopped her vehicle several times to allow her daughter to breathe

some fresh air. Claimant's daughter continued to feel extremely nauseated, and claimant ultimately drove her to a grocery store, where she vomited in the restroom. Claimant cleaned her daughter up and purchased her a snack and beverage to settle her stomach. Claimant's daughter began feeling better after consuming the snack and beverage, and claimant drove her to school.

(3) Claimant and her daughter arrived at school at approximately 9:15 a.m. However, claimant's daughter initially refused to enter her classroom. Claimant was able to escort her daughter into the classroom, but her daughter insisted that claimant stay with her. Claimant's daughter ran out of the classroom several times, requiring claimant to convince her to return and escort her back in. After claimant's daughter finally settled down, claimant left the school at approximately 9:45 a.m., realized she was 15 minutes late for the hearing, immediately attempted to call in, but had missed the hearing.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant established good cause for failing to appear at the February 10, 2017 hearing. Claimant's request to reopen the hearing therefore is allowed. Hearing Decision 17-UI-79661 is reversed, and this matter remanded for a hearing on whether claimant is disqualified from receiving benefits based on a work separation from the employer.

ORS 657.270(5) provides that any party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and shows good cause for failing to appear. "Good cause" exists when the requesting party's failure to appear at the hearing arose from an excusable mistake or factors or circumstances beyond the party's reasonable control. OAR 471-040-0040(2) (February 10, 2012).

In Hearing Decision 17-UI-79661, the ALJ found as fact that claimant telephoned OAH at 10:00 a.m. on February 10, 2017 and stated that she missed the hearing because her daughter vomited and claimant had to bring her home from school.¹ In support of that finding, that ALJ asserted she was taking official notice of that fact, which was taken from Department records.² Based on that finding, the ALJ noted that although claimant's testimony that she missed the hearing because she "lost track of time" while tending to her daughter as she drove her to school differed only slightly from her written statement in her request for a reopening, they both differed significantly from her prior statement to OAH.³ The ALJ then determined that the inconsistencies undermined claimant's contention that the circumstances were beyond her reasonable control.⁴ However, the ALJ ultimately concluded that claimant failed to establish good cause for a reopening because even her testimony showed it was within her reasonable control to contact OAH prior to the hearing to request a postponement if necessary, and "losing track of time" was not an excusable mistake or circumstance beyond claimant's reasonable control.⁵

¹ Hearing Decision 17-UI-79661 at 2.

² *Id.*, fn. 1.

³ *Id.* at 4.

⁴ *Id.*

⁵ *Id.*

We first disagree with the ALJ's assertion that the inconsistencies between claimant's testimony and what Department records show she stated to OAH undermine her contention that the circumstances were beyond her reasonable control. Absent another basis for concluding that claimant was not a credible witness, we find that her sworn testimony under oath, materially corroborated by the written statement in her request for a reopening, outweighs Department records to which she had no opportunity to respond, and which could easily reflect a miscommunication between her and a representative of OAH. We therefore found facts in accordance with claimant's testimony.

We also disagree with the ALJ's determination that claimant's testimony failed to establish good cause for failing to appear at the hearing. Claimant's testimony showed she did not know, and did not have reason to know, she would be unable to attend the hearing until after she attempted to drop her daughter off at school at 9:15 a.m., and her daughter refused to enter her classroom, insisted that claimant stay with her and repeatedly ran out of the classroom, requiring claimant to convince her to return and escort her back in. Claimant's daughter's behavior was a circumstance beyond claimant's reasonable control that prevented her from appearing at the hearing, regardless of whether claimant lost track of the time while attending to her daughter's needs. And even if we concluded that it was within claimant's control to call in and request a postponement, and inferred that her third request with virtually no notice would have been granted, we nevertheless would conclude that her failure to do so under the circumstances was an excusable mistake, again regardless of whether she lost track of the time while attending to her daughter's needs.

Claimant therefore established good cause for failing to appear at the February 10, 2017 hearing. Her request to reopen the hearing is allowed. Hearing Decision 17-UI-79661 is reversed, and this matter remanded for a hearing on whether claimant is disqualified from receiving benefits based on a work separation from the employer.

DECISION: Hearing Decision 17-UI-79661 is set aside, as outlined above.

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

DATE of Service: April 20, 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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