

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0711

Reversed & Remanded

PROCEDURAL HISTORY: On March 1, 2017, the Oregon Employment Department (the Department) served notice of the following three administrative decisions: decision # 92005, concluding that claimant did not actively seek work during the weeks including December 18, 2016 through January 7, 2017; decision # 94829, concluding that claimant did not actively seek work during the weeks including January 15, 2017 through January 28, 2017; and decision #95332 concluding that claimant did not actively seek work during the weeks including February 5, 2017 through February 25, 2017.

On March 21, 2017, decisions # 92005, 94829 and 95332 became final without claimant having requested hearings. On April 12, 2017, claimant filed late telephone requests for hearing for all three administrative decisions. On April 20, 2017, ALJ Kangas issued the following hearing decisions, all of which dismissed claimant's late requests for hearing on the administrative decisions subject to claimant's right to renew the hearing requests by responding to appellant questionnaires no later than May 4, 2017: Hearing Decision 17-UI-81497 dismissed claimant's request for hearing on decision # 92005; Hearing Decision 17-UI-81496 dismissed claimant's request for hearing on decision # 94829; and Hearing Decision 17-UI-81494 dismissed claimant's request for hearing on decision # 95332.

On April 26, 2017, the Office of Administrative Hearings (OAH) received claimant's response to the appellant questionnaires. On May 2, 2017, ALJ Kangas issued three letters to claimant stating that Hearing Decisions 17-UI-81497, 17-UI-81496 and 17-UI-81494 had been vacated and that a hearing would be scheduled to address the timeliness of claimant's original hearing requests and, if appropriate, the merits of the underlying administrative decision on appeal.

On May 9, 2017, the Office of Administrative Hearings (OAH) served notice of a consolidated hearing on all three administrative decisions scheduled for May 26, 2017. On May 26, 2017, ALJ Shoemaker conducted a consolidated interpreted hearing, and on June 1, 2017, issued Hearing Decision 17-UI-84680, re-dismissing claimant's late request for hearing on administrative decision # 92005, Hearing Decision 17-UI-84626, re-dismissing claimant's late request for hearing on administrative decision # 94829 and Hearing Decision 17-UI-84642, re-dismissing claimant's late request for hearing on

administrative decision # 95332. On June 8, 2017, claimant filed applications for review of Hearing Decisions 17-UI-84680, 17-UI-84626 and 17-UI-84642 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-84680, 17-UI-84626 and 17-UI-84642. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2017-EAB-0713, 2017-EAB-0712 and 2017-EAB-0711, respectively).

EVIDENTIARY MATTER: With claimant's applications for review of Hearing Decisions 17-UI-81497, 17-UI-81496 and 17-UI-81494 on May 24, 2017, claimant included a copy of her response to the appellant questionnaire in which she explained why she filed her untimely hearing requests. Under OAR 471-041-0090(1)(October 29, 2016), information offered, but not received into the hearing record, may be received into evidence as necessary to complete the record. Claimant's response to the appellant questionnaire is necessary to complete the record, and EAB therefore considered her response when reaching this decision. Claimant's response to the appellant questionnaire has been marked as EAB Exhibit 1, and 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 objection in writing to EAB within 10 days of the date on which this decision was mailed. If no objection is received, or an objection is received and overruled, EAB Exhibit 1 will remain part of the record.

CONCLUSIONS AND REASONS: Hearing Decisions 17-UI-84680, 17-UI-84626 and 17-UI-84642 should be reversed and these matters remanded for development of the record.

This matter is before EAB on claimant's applications for review of Hearing Decisions 17-UI-84680, 17-UI-84626 and 17-UI-84642, all of which re-dismissed claimant's April 12, 2017 late requests for hearing on decisions the Department issued on March 1, 2017 as untimely, based upon the ALJ's conclusion that claimant failed to show at hearing that an excusable mistake or factors beyond her reasonable control caused the late filings. Hearing Decisions 17-UI-84680, 17-UI-84626 and 17-UI-84642 at 3.

However, the state of the record leads us to conclude that these matters need to be remanded for further development of the record for two reasons. First, the interpretive services provided in this matter substantially contributed to the lack of a clear and sufficient record of claimant's responses to the questions asked on which to base a decision. Second, based on claimant's questionnaire responses, the ALJ needs to inquire about the circumstances surrounding claimant's assertion that she did not receive the Department's notice of the administrative decision in question until April 18, 2017.

Oregon law requires that, "to secure the constitutional rights and other rights of persons who are unable to readily understand or communicate in the English language because of a non-English-speaking cultural background . . . , and who as a result cannot be fully protected in administrative proceedings . . . unless qualified interpreters are available to provide assistance," such persons "shall" be provided with an interpreter. *See* ORS 45.273, ORS 45.275(1)(a); OAR 471-040-0007.

Although the ALJ appointed a Vietnamese interpreter to interpret the proceedings in this case, it appears from the record that the interpreter lacked the skills and/or experience to effectively do so. Rather than translating exactly what the witnesses or ALJ actually stated, the interpreter appeared to rephrase or

ignore many of claimant's responses. *See e.g.* Transcript at 9, 10, 13. At one point, the ALJ admonished the interpreter to interpret exactly what claimant had testified to:

ALJ SHOEMAKE: No. It is what I explained at the start of the hearing. It is regarding the timeliness of your appeals in all three of these cases. That's why I'm asking if there's anything further that you want to add about the timeliness of these appeals. I didn't hear an interpretation, [addresses interpreter]....

[INTERPRETER]: Oh, she didn't say anything that I hear.

ALJ SHOEMAKE: I heard her say something twice

[INTERPRETER]: I'm sorry.

See Transcript at 15-16. On this record, the interpreter did not interpret, or promptly interpret, portions of the hearing. It appears to us that the interpretive services provided in this matter contributed to the lack of a clear and sufficient record. Due process and state law require that this matter be remanded for another hearing, with a different interpreter who understands his or her role in the hearing and is willing and capable of performing an exact interpretation of the entire proceeding – including all of claimant's testimony, even when claimant states multiple sentences at a time.

ORS 657.269(2) provides that parties have 20 days after an administrative decision was mailed to request a hearing on that decision. ORS 657.875 provides that the deadline may be extended "a reasonable time" upon a showing of "good cause." OAR 471-040-0010(1) defines good cause, in pertinent part, as an excusable mistake or factors or circumstances beyond claimant's reasonable control. OAR 471-040-0010(3) defines "a reasonable time" as "seven days after the circumstances that prevented a timely filing ceased to exist.

In EAB Exhibit 1, claimant explained that she first learned of the administrative decision in question "by phone" on April 12, 2017 and received the decision "by mail" on or around April 18, 2017. She added, "We could not file the hearing request because we did not receive the administrative decision by phone & by mail until very late after the deadline. If mails were sent before the deadline, we never received them until 04/18, which we think were re-issued following the phone call." EAB Exhibit 1.¹

Claimant's questionnaire responses suggest that she might have had good cause for the late filings, but there is insufficient evidence in the record upon which to base a conclusion and additional inquiry is

¹ Department records concerning claimant's claim contain the following entry: "04/18/17 RESEND DECS TO IMAGING PER REQUEST. NOT SURE WHY – IT SHOULD HAVE GONE THE FIRST TIME." This entry may give some credence to claimant's assertion regarding her non-receipt of the March 1 administrative decisions in question. We take official notice of the entry in question, as it is contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

necessary. ORS 657.270 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). On remand, the ALJ should inquire with claimant and any other party with relevant information as to the circumstances surrounding her receipt of the three administrative decisions issued on March 1, 2017 and her failures to file timely requests for hearing by March 21, 2017. For example, the ALJ should ask claimant how and where she received her mail, and how often she checked her mail. Did she rely on another person to help her get her mail, and if yes, in what manner? How did she communicate with that person? Did she have difficulty arranging to pick up her mail, and if yes, why? When was the last time she checked her mail before April 12, 2017? Does claimant have any impediments (*e.g.* financial problems, transportation issues or disabilities, language problems) that affected her ability to receive or understand her mail and how did she compensate for that? The ALJ should also inquire about whether claimant's April 12, 2017 late telephone requests for hearing were filed within seven days of the date whatever circumstances prevented a timely filing ceased to exist, and ask any follow-up questions the ALJ deems necessary to develop a complete record on claimant's late requests for hearing. If, and only if, claimant establishes good cause for any of the late filings would the parties then be allowed to present evidence about the substantive issue(s) covered in the corresponding administrative decision(s).

NOTE: The failure of any party to appear at the hearings on remand will not reinstate the hearing decisions or return these matters to EAB. Only timely applications for review of the subsequent hearing decisions will cause these matters to return to EAB.

DECISION: Hearing Decisions 17-UI-84680, 17-UI-84626 and 17-UI-84642 are set aside, and these matters remanded for further proceedings consistent with these orders.

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

DATE of Service: July 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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