

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0838**

*Affirmed*  
*Late Request For Hearing Dismissed*

**PROCEDURAL HISTORY:** On July 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision assessing an overpayment of \$338 (decision # 193834). The administrative decision stated that, to be timely, a request for hearing needed to be filed on or before August 2, 2016. On May 26, 2017, claimant filed an untimely request for hearing. On June 1, 2017, ALJ Kangas issued Hearing Decision 17-UI-84654, dismissing claimant's request for hearing as untimely, subject to reconsideration if claimant completed and filed the Appellant Questionnaire enclosed with that decision within 14 days of the date it was mailed. On June 9, 2017, claimant filed a completed Appellant Questionnaire with the Office of Administrative Hearings (OAH). On June 15, 2017, OAH issued a letter order vacating Hearing Decision 17-UI-84654 and returning this matter to the docket for the scheduling of a hearing on claimant's request for hearing and, if appropriate, the merits of decision # 193834. On July 5, 2015, ALJ Monroe conducted a hearing at which the employer did not appear, and on July 7, 2017 issued Hearing Decision 17-UI-87524, dismissing claimant's request for hearing as untimely. On July 11, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) On May 24, 2016, the Department mailed to claimant a notice of audit letter stating that he had potentially been overpaid \$165 in benefits due to his failure to correctly report earnings while receiving benefits. On June 20, 2016, claimant called the Department about the results of its audit. Claimant told a representative that he questioned some of the earnings his employer had reported to the Department during the audit and was concerned that the employer had included mileage reimbursements in his earnings. As a result, the Department requested additional information from claimant's employer about claimant's earnings.

(2) On July 13, 2016, the Department mailed a copy of administrative decision # 193834 to claimant at his correct address of record. The decision stated that claimant had been overpaid \$338 in benefits due to his failure to accurately report earnings. The first page of the decision stated, "To be timely, any appeal from this decision must be filed on or before AUGUST 2, 2016" (emphasis in original). Claimant received decision # 193834 shortly after July 13, 2016.

(3) On July 18, 2016, claimant telephoned the Department in response to administrative decision # 193834 and spoke to a representative about it. Claimant did not dispute that he might have misreported some of his earnings, or that he was overpaid \$338 in benefits. Claimant's primary concern was that some of the overpayment amount might have been based on mileage reimbursements that the employer had erroneously reported as amounts that claimant earned. The representative told claimant that the amount of his overpayment was greater than stated in the notice of audit letter because the Department had discovered additional wages and tips, and that amounts he received as mileage reimbursements were not included in his earnings or in the overpayment calculation. Claimant did not tell the Department representative that he disagreed with any part of decision # 193834 or that he wanted to request a hearing on the decision. Because claimant understood the representative to have told him that any amounts he was overpaid would be deducted from any future benefit payments to which he was entitled, he was not overly concerned about the assessment of an overpayment.

(4) Sometime in approximately early February 2017, claimant received a collections notice from the Department for the \$338 assessed in decision # 193834. Before this time, claimant assumed the overpayment would be withheld from benefits owed to him and he would not need to affirmatively make any payments to the Department. On February 6, 2017, claimant called the Department to obtain more detailed information about how the amount of overpayment was determined.

(5) Sometime in early to mid-May 2017, claimant received another collections notice from the Department. At around that time, claimant requested information from his employer about the earnings figures it had reported to the Department and which formed the basis for administrative decision # 193834. After claimant received and reviewed the information from the employer, claimant came to believe that part of the overpayment assessed in administrative decision # 193834 was based on mileage reimbursements that his employer incorrectly reported to the Department as earnings paid to him. On May 26, 2017, claimant filed a request for hearing on administrative decision # 193834.

**CONCLUSIONS AND REASONS:** Claimant did not show good cause filing a late request for hearing. Claimant's request for hearing is dismissed as untimely.

OORS 657.269 provides that unless a request for hearing is filed within 20 days after an administrative decision is mailed to claimant's last known address, the decision shall become final and matters shall be determined in accordance with its terms. ORS 657.875 provides that the 20 day period in which a request for hearing may be filed may be extended, upon a showing of good cause, for a reasonable time under the circumstances of the particular case. OAR 471-040-0010(1) (February 12, 2012) provides that "good cause" exists for extending a filing period if the action, delay or failure to act that resulted in the late filing arises from an excusable mistake or from factors beyond an applicant's reasonable control. OAR 471-040-0010(1)(b)(B) provides that "good cause" does not include failing to understand the implications of a decision or notice when it is received. OAR 471-040-0010(3) provides that a "reasonable time" for purposes extending a filing deadline is seven days after the circumstance that prevented a timely filing ceased to exist.

It is undisputed that claimant did not file a request for hearing in the usual form until May 26, 2017, which was almost a year late. While OAR 471-040-0005(1) (July 4, 2011) states that a request for hearing may be filed on forms provided by the Department, it also states that the use of a form is not required provided the party specifically requests a hearing or otherwise expresses a present intent to

appeal. The issue is whether claimant's contact with the Department on July 18, 2016, which was within the 20 day period in which a request for hearing would have been timely filed, can be construed as specifically requesting hearing or expressing a present intent to appeal.

Claimant did not suggest that he specifically requested a hearing during his July 18, 2016 conversation with the Department representative. While claimant stated he made the call on July 18, 2016 due to his concern that mileage reimbursements had been incorrectly reported to the Department as amounts he had earned, and therefore incorrectly used by the Department in determining the amount of benefits he was overpaid, claimant candidly testified he did not dispute decision # 193834 at that time, thought he could have incorrectly reported his earnings to the Department that resulted in the assessment of a \$338 overpayment, and did not further consider the matter since he thought the amount of the overpayment would be deducted from his future benefits, and it was a relatively small amount. Audio at ~36:18, ~37:47, ~38:30, ~38:58, ~41:03. Given the testimony of claimant and the Department's witness about the July 18, 2016 conversation, the record does not show that claimant said anything on July 18, 2016 that could reasonably have been construed as requesting a hearing on decision # 193834 or expressing a present intent to appeal that decision. Because the content of claimant's conversation with Department representative on February 6, 2017 appears to have been similar to that on July 18, 2016, and claimant did not suggest that he requested a hearing on decision # 193834 or expressed a present intent to appeal that decision in any contacts with the Department prior May 26, 2017, the record does not support that any of those conversations should be considered a request for hearing under OAR 471-040-0005(1).

In assessing whether claimant had good cause for filing a late request for hearing on May 26, 2017, the content of claimant's call to the Department only five days after administrative decision #193834 was issued and mailed shows that he had read it and understood that the Department had assessed an overpayment. While claimant testified that he did not think he needed to file a request for hearing on decision #193834 at that time, he did not cite any grounds for this belief or suggest that he relied on any representations from any one in reaching this conclusion. Audio at ~38:30, ~41:03, ~44:52, ~56:20. It appears, most likely, that claimant did not consider requesting a hearing on administrative decision # 193834 until he was informed that the amount of the overpayment would not be offset against future benefit payments but he would need to pay it out of pocket. Given that the language of administrative decision #193834 clearly, conspicuously and in simple language sets out the deadline for filing a request for hearing if claimant disagreed with its conclusions, it was within claimant's reasonable control to understand its implications and to comprehend and abide by its instructions. *See* OAR 471-040-0010(1)(b)(B). In addition, while claimant may have made mistake in failing to request a hearing on administrative decision # 193834 within 20 days of the date it was mailed, it was not an "excusable mistake" for purposes of establishing good cause for his late request for hearing because that mistake did not raise due process issues and was not the result of inadequate notice, reasonable reliance on another person or he inability to follow directions despite substantial efforts to comply. *See Appeals Board Decision 2016-EAB-1435* (December 28, 2016). Claimant has failed to show good cause, and his late request for hearing is dismissed.

**DECISION:** Hearing Decision 17-UI-87524 is affirmed.

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

**DATE of Service: August 8, 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](http://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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