

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0851

*Hearing Decisions 17-UI-86628, 17-UI-86630, 17-UI-86631 and 17-UI-86633
Reversed & Remanded*

PROCEDURAL HISTORY: On March 21, 2017, the Oregon Employment Department (the Department) served two notices of administrative decision, the first concluding claimant did not actively seek work during the weeks of December 25, 2016 through January 7, 2017 (decision # 123203) and the second concluding claimant did not actively seek work during the weeks of January 15, 2017 through February 18, 2017 (decision # 123559). Both decisions stated that, to be timely, requests for hearing needed to be filed on or before April 10, 2017. Based on decisions # 123203 and # 123559, on April 26, 2017, the Department served notice of an administrative decision assessing an overpayment of \$492 (decision # 140515) and on April 27, 2017 served notice of an administrative decision assessing an overpayment of \$3,279 (decision # 93200). On May 1, 2017, claimant filed untimely requests for hearing on decisions # 123203 and # 123559 and timely requests for hearing on decisions # 140515 and # 93200. On May 25, 2017, ALJ M. Davis convened a hearing at 1: 30 p.m. on decisions # 123203 and # 123559, at which claimant did not appear, and convened a hearing at 2:30 p.m. on decisions # 93200 and # 140515, at which claimant also did not appear. On May 26, 2017 ALJ Davis issued four hearing decisions dismissing all of claimant's requests for hearing due to claimant's failure to appear as follows, on decision # 123203 (Hearing Decision 17-UI-84321), on decision # 123559 (Hearing Decision 17-UI-84322), on decision # 93200 (Hearing Decision 17-UI-84323) and on decision # 140515 (Hearing Decision 17-UI-84324). On June 12, 2017, claimant filed requests to reopen all the hearings at which he failed to appear. On June 26, 2017, ALJ Kangas issued four decisions denying each of claimant's requests to reopen due to his failure to show good cause as follows, on decision # 123203 (Hearing Decision 17-UI-86630), on decision # 123559 (Hearing Decision 17-UI-86628), on decision # 93200 (Hearing Decision 17-UI-86631) and on decision # 140515 (Hearing Decision 17-UI-86633). On July 14, 2017, claimant filed applications for review of all hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-86628, 17-UI-86630, 17-UI-86631 and 17-UI-86633. For case-tracking purposes, this decision is

being issued in quadruplicate (EAB Decisions 17-EAB-0850, 17-EAB-0851, 17-EAB-0852 and 17-EAB-0853]).

Claimant submitted a written argument to EAB that contained new information in apparent response to facts of which the ALJ took judicial notice in Hearing Decisions 17-UI-86628, 17-UI-86630, 17-UI-86631 and 17-UI-86633 about the recorded information and instructions usually stated as an introduction on the hearing conference phone line for the Office of Administrative Hearings (OAH) when parties call in for a hearing. OAR 471-041-0090(2) (October 29, 2006) allows EAB to consider new information if the party offering it shows it is relevant and material to the issues before EAB and the party shows that it prevented by factors or circumstances beyond its reasonable control from offering that new information during proceedings before the ALJ. Since the new information that claimant sought to present to EAB is relevant and material to the issues on which EAB has remanded these matters, whether claimant had good cause for failing to appear at the hearings on May 25, 2017, and it was not within claimant's reasonable control to have foreseen the facts of which the ALJ took judicial notice in Hearing Decisions 17-UI-86628, 17-UI-86630, 17-UI-86631 and 17-UI-86633, claimant's request to present new information is allowed. Claimant's written argument has been marked as EAB Exhibit 1 and copy of EAB Exhibit 1 is included with this decision. Any party that objects to the admission into evidence of EAB Exhibit 1 must submit its objection in writing to EAB within 10 days of the date on which this decision is mailed. If no objection is received and sustained, EAB Exhibit 1 will remain in the record.

CONCLUSIONS AND REASONS: Hearing Decisions 17-UI-86628, 17-UI-06630, 17-UI-86631 and 17-UI-86633 are reversed and these matters are remanded for further development of the record.

Claimant did not appear at the May 25, 2017 hearings giving rise to Hearing Decisions 17-UI-84321, 17-UI-84322, 17-UI-84323 and 17-UI-84324 and, as a result, was not able to offer evidence on his own behalf. On June 12, 2017, claimant filed a request to reopen all the hearings at which he did not appear, stating that, although he tried multiple times to call in for the hearings on May 25, 2017 at the scheduled times, "each time [I] could not get past the electronic portion asking for a PIN number [and] I was never given a PIN number to use at this hearing."

ORS 657.270(5)(a)-(c) provides that a party who fails to appear at a hearing may reopen the hearing to allow the party to present evidence if the party files a request to reopen within 20 days after the issuance of the written decision arising from the hearing and shows the cause of the party's failure to appear was beyond the its control. OAR 471-040-0040(1) (February 10, 2012) provides that "good cause" to reopen the hearing exists if the action, delay or failure to act that caused the party to fail to appear arises from an excusable mistake or factors beyond the party's reasonable control." In Hearing Decisions 17-UI-86628, 17-UI-06630, 17-UI-86631 and 17-UI-86633, the ALJ concluded claimant did not show good cause to reopen the hearings underlying Hearing Decisions 17-UI-84321, 17-UI-84322, 17-UI-84323 and 17-UI-84324. The ALJ reasoned that, since the usual introductory instructions on the hearing conference phone line advised callers who were ALJs to enter #1, and only after entering #1 were they required to enter their assigned PIN and advised all other callers to enter #2, after which those other callers were not required to enter any PIN, it was within claimant's reasonable control to have listened carefully while on the hearing conference phone line and to have correctly followed the instructions on the line. The ALJ further concluded that since claimant also did not provide information on why he did not call OAH, as instructed in the Notice of Hearing and at the alternate number appearing on the Notice

of Hearing, when he was unable to connect to the hearing on the hearing conference phone line, there also was no showing that an excusable mistake caused him to miss the hearing or that factors or circumstances beyond his reasonable control prevented him from appearing at the hearing. Hearing Decisions 17-UI-86628 at 2-3, 17-UI-06630 at 2-3, 17-UI-86631 at 2-3 and 17-UI-86633 at 2-3. The record, as it exists and in light of the new information that claimant submitted to EAB, is not sufficient to support the ALJ's conclusions in Hearing Decisions 17-UI-86628, 17-UI-06630, 17-UI-86631, 17-UI-16633.

At the outset, the ALJ should consider the new information that claimant presented in EAB Exhibit 1. The ALJ should question claimant about that new information in light of the information of which she took judicial notice in Hearing Decisions 17-UI-86628, 17-UI-06630, 17-UI-86631, 17-UI-86633 about the recorded introduction on the phone conference hearing line. Specifically, the ALJ should ask claimant if he agrees or disagrees that the content of the recorded introduction to the phone conference line was as the ALJ found it to be in the hearing decisions, that it provided distinct and separate instructions for callers who were ALJs and for callers who were not ALJs, what those instructions stated as best he recalls and, if different from the instructions the ALJ cited in Hearing Decisions 17-UI-86628, 17-UI-06630, 17-UI-86631, 17-UI-86633, how they differed. The ALJ should also inquire of claimant if he entered #1 or #2 immediately after calling in on the hearing conference phone line and, if he entered #1, why he did so. The ALJ should further explore what, if anything, the recording instructed claimant to do after entering #1, whether the recording informed claimant that by entering #1 he was on a line reserved for the exclusive use of ALJs or whether the recording simply asked for the entry of a PIN without explanation, as well as develop the evidence, as appropriate, about any factors that might have confused claimant as to the purpose of the line he accessed after entering #1 or that should have alerted him that he had accessed a wrong phone line and needed to try again. If claimant entered option #2 after reaching the hearing conference phone line, the ALJ should ask claimant if, different from the instructions that she cited in Hearing Decisions 17-UI-86628, 17-UI-06630, 17-UI-86631, 17-UI-86633, the recording then instructed him to enter a PIN. The ALJ should further ask claimant, whether he testifies he entered #1 or #2, what happened when he did not enter the PIN that was requested and if he received any additional recorded instructions or advisements about options to further proceed. With respect to the operation of hearing conference phone line that claimant accessed on May 25, 2017, the ALJ should attempt to develop the evidence sufficiently to determine if the OAH hearing conference phone line malfunctioned that day and, if so, how and to what extent. The ALJ also should develop the evidence as to any factors that might have confused claimant about how to proceed when he was trying, but unable to access the conference phone line intended for parties to a hearing.

The ALJ should also ask claimant to estimate the number of times he tried unsuccessfully to call in for the hearings on May 25, 2017 and whether each call proceeded in the same fashion up to the point when he was asked to enter a PIN. While the additional information that claimant submitted to EAB suggests that he did not call any other phone numbers for OAH on May 25, 2017 because he did not have the Notice of Hearing paperwork with him when he made the calls from work and he had stored only the number for the hearing conference phone line in his phone, the ALJ should confirm that this was the reason claimant did not try to reach OAH or to access the hearing by calling alternate number(s). The ALJ should further inquire of claimant the reason that he did not bring the paperwork, which had alternate phone numbers for him to call if he was not successful in accessing the hearing conference phone line, and to describe any inconvenience he would have experienced by bringing the paperwork to work with him. The ALJ should, in addition, ask claimant if he took any steps on May 25,

2017 other than unsuccessfully calling the hearing conference line at the number listed on the Notice of Hearing to reach OAH or to participate in the hearing, what he did in addition, including if he searched for alternate numbers for OAH on the internet or did anything else or, if he took no additional steps, why he did not. The ALJ should also ask claimant if he tried to reach OAH after May 25, 2017 and before he received copies of Hearing Decisions 17-UI-86628, 17-UI-06630, 17-UI-86631, 17-UI-86633 and, if he did, the approximate dates and substance of that contact. Absent further development of the evidence on the matters set out above, EAB cannot determine if an excusable mistake or factors beyond claimant's control, such as a malfunction of the OAH hearing conference phone line prevented claimant from appearing at the hearings on May 25, 2017.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily 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). Because the ALJ failed to develop the record necessary for a determination of whether claimant had good cause for failing to appear at the hearings schedule for May 25, 2017, Hearing Decisions 17-UI-86628, 17-UI-86630, 17-UI-86631 and 17-UI-86633 are reversed, and this matter remanded for further development of the record. On remand, if the ALJ determines that claimant showed good cause for failing to appear at the hearings on May 25, 2017, she should then proceed to address the timeliness of claimant's requests for hearing on administrative decisions # 123203 and # 123559 and, if appropriate, the merits underlying those decisions. If good cause is shown, the ALJ should also proceed to address the merits of administrative decisions #140515 and # 93200.

DECISION: Hearing Decisions 17-UI-86628, 17-UI-86630, 17-UI-86631 and 17-UI-86633 are set aside, and these matters remanded for further proceedings consistent with this order.

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

DATE of Service: August 14, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decisions 17-UI-86628, 17-UI-86630, 17-UI-86631 and 17-UI-86633 or return these matters to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

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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