

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1025

Reversed & Remanded

PROCEDURAL HISTORY: On April 20, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 100716). Claimant filed a timely request for hearing. On July 27, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for August 9, 2017. On August 4, 2017, the employer requested that the hearing be postponed due to the unavailability of its first hand witness on the scheduled hearing date. On August 9, 2017, ALJ Amesbury conducted a hearing at which the employer failed to appear, and on August 11, 2017, issued Hearing Decision 17-UI-90211, concluding claimant voluntarily left work with good cause. On August 25, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT¹: (1) The employer received the July 27, 2017 notice of hearing that the hearing in this matter was scheduled for August 9, 2017 and planned to participate in it. However, after receiving the notice, the employer's representative determined that its first hand witness would be unable to participate in the hearing due to complications concerning child care and, on August 4, 2017, filed a written request for postponement of the hearing for that reason with OAH. Record Document, Employer Request for Postponement.

(2) On August 9, 2017, the hearing was conducted without the employer's participation.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-90211 is reversed and this matter remanded for a new hearing.

In its application for review, the employer's representative requested that the August 9, 2017 hearing be reopened, asserting that the employer's first hand witness was unable to participate in the hearing due to child care issues, and requesting an opportunity to present that witness's testimony on the underlying

¹ The findings of fact in this decision are based upon the employer's request for postponement, which the ALJ included in the record of this case.

issue concerning claimant's voluntary leaving. Application for Review at 1. The employer's statement is construed as a request for EAB to consider new information regarding claimant's work separation under OAR 471-041-0090(2) (October 29, 2006), which allows EAB to consider new information not offered into evidence at the hearing if the party presenting the information shows that the information is relevant and material and that circumstances beyond the party's reasonable control prevented the party from offering the information at the hearing.

At hearing, the ALJ noted the employer requested a postponement, stated only that it was "administratively denied" without stating the reason for the denial, and included the August 4, 2017 request in the record of this case. Audio Record ~ 4:30 to 5:15. However, the "administrative denial" is not in the record and there is no evidence concerning the reason that it was reportedly denied or that it was even looked at or ruled upon, making the denial of the request under those circumstances an abuse of discretion.

OAR 471-040-0021(2) and (3) (August 1, 2004) provides that OAH may grant postponement of a hearing if the "request is promptly made after the party becomes aware of the need for postponement" and "[t]he party has good cause, as stated in the request, for not attending the hearing at the time and date set." "Good cause" exists when "the circumstances causing the request are beyond the reasonable control of the requesting party [and] failure to grant the postponement would result in undue hardship to the requesting party." Here, the notice of hearing was mailed on July 27, 2017 and the employer's representative requested postponement on August 4, 2017, five days prior to the scheduled hearing, which we conclude was "promptly made" given the probable transmittal and communication time between OAH, the employer and the employer's representative. That the employer's witness was unavailable due to lack of child care, more likely than not, was a circumstance beyond the employer's control, and being unable to participate at the hearing due to the absence of a necessary first hand witness, in the absence of the requested postponement, constituted an "undue hardship."

Because OAH's erroneous denial of the employer's postponement request was a circumstance beyond the employer's reasonable control, the employer's request to present relevant and material new information regarding claimant's work separation is granted. Because due process requires that claimant have an opportunity to respond to the employer's new information, Hearing Decision 17-UI-90211 is reversed, and this matter remanded pursuant to ORS 657.275(1) for new hearing and hearing decision based upon the record of the proceeding before the ALJ.

DECISION: Hearing Decision 17-UI-90211 is set aside, and this matter remanded for further proceedings consistent with this order.²

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 21, 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

² **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-90211 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.

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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