

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0236**

*Reversed*  
*Request to Reopen Allowed*

**PROCEDURAL HISTORY:** On November 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150539). Claimant filed a timely request for hearing. On December 6, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for December 20, 2017. On December 20, 2017, ALJ Wyatt conducted a hearing, at which both parties appeared, and continued to the hearing to January 9, 2018. On December 21, 2017, OAH mailed notice of the continued hearing scheduled for January 9, 2018. On January 9, 2018, ALJ Wyatt conducted a hearing, at which the employer failed to appear, and on January 11, 2018 issued Hearing Decision 18-UI-100788, concluding that claimant's discharge was not for misconduct. On January 25, 2018, the employer filed a timely request to reopen the January 9<sup>th</sup> hearing. On February 9, 2018, OAH mailed notice of a hearing scheduled for February 21, 2018. On February 21, 2018, ALJ Wyatt conducted a hearing, at which both parties appeared, and issued Hearing Decision 18-UI-103932, denying the employer's request to reopen the hearing. On March 6, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) During the December 20, 2017 hearing, the ALJ continued the hearing to another date to correct deficiencies in the notice of hearing. On approximately eight occasions at the end of the December 20<sup>th</sup> hearing, the ALJ stated that he was continuing the hearing to 10:45 a.m., January 9<sup>th</sup>, or January 9<sup>th</sup> at 10:45 a.m.

(2) In an exchange that lasted five seconds, claimant asked the ALJ if they should use the same number to call into the January 9<sup>th</sup> hearing, and the ALJ said "yes." See December 20, 2017 hearing, Audio recording at 26:15-26:20. The ALJ continued, "but we'll also send out" a new notice of hearing, and emphasized two other times that OAH would be mailing the parties a new notice of hearing with additional sets of rules. *Id.* at 26:20. The ALJ told the parties that the new notice of hearing would have

instructions about how to participate on January 9<sup>th</sup> “so you won’t have to [] remember from this hearing.” *Id.* at 26:38.

(3) After the hearing, the employer waited to receive the new notice of hearing and frequently checked his mail for it. He did not receive the notice. Claimant noticed during one week that he received less mail than he normally received, the following week he did not receive any mail, and his parents’ mailbox showed signs of tampering. Claimant asked his mail carrier if she had delivered mail to his mailbox. She confirmed that she had delivered more mail to claimant than he had actually received.

(4) The employer was concerned about not having received a new notice of hearing. He remembered that the ALJ had set a date and time and knew that he needed the new notice of hearing. On two occasions during the week of January 1, 2018, claimant called OAH to ask about the notice. He was told on both occasions that the notice of hearing would be mailed to him and was told that “unless you get something in the mail” the hearing was not scheduled. February 21, 2018 hearing, Audio recording at 33:45. The employer never received notice of the hearing, and failed to attend it.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that the employer’s request to reopen the January 9<sup>th</sup> hearing should be allowed, and the employer is entitled to a continued hearing on the merits of decision # 150539.

ORS 657.270(5) provides that any party who failed to appear at a hearing may request that the hearing be opened, and that the request may be granted if the party filed the request within 20 days of the ALJ’s decision and shows good cause for failing to appear. “Good cause” is defined, in pertinent part, as “an excusable mistake” or “factors beyond an applicant’s reasonable control.” OAR 471-040-0040(2) (February 10, 2012).

The ALJ concluded that the employer did not have good cause for failing to appear at the January 9<sup>th</sup> hearing because, although the employer alleged that he did not receive a mailed copy of the notice of hearing, “the employer had *actual knowledge* of the new hearing date and time.” Hearing Decision 18-UI-103932 at 4. In reaching that conclusion, the ALJ reasoned that the employer’s “bare assertion of non-receipt is insufficient to overcome the presumption” that “documents sent through the U.S. Postal Service are presumed to have been received by the addressee, subject to evidence to the contrary.” *Id.*

We disagree. This record does not show that the employer made a “bare assertion of non-receipt.” The employer testified that after two weeks of irregular mail service and signs of tampering around his parents’ mailbox he asked the mail carrier if she had delivered more mail than he had received, and she answered in the affirmative. The question of who tampered with the mail, and the employer’s ill-founded speculation that it might have been claimant, is a red herring and immaterial to the question of whether or not the employer received the mailed copy of the notice of hearing scheduling the January 9<sup>th</sup> hearing. This record has credible evidence showing that although OAH mailed that notice of hearing to the employer at its address of record, it is more likely than not that the employer did not receive it.

The next issue is whether or not the employer’s non-receipt of the notice of hearing was a factor beyond the employer’s reasonable control that prevented the employer from appearing at the January 9<sup>th</sup> hearing. In the ALJ’s decision, he emphasized several times that, regardless whether the employer received the mailed copy of the notice of hearing, he had repeatedly told the parties on December 20<sup>th</sup> of the new

date and time for the hearing, and that the employer's witness "specifically approved of" the date and time. *Id.* We agree with the ALJ. The ALJ told the parties the date, time, or date and time of the new hearing eight times. The employer did have actual knowledge of the hearing date and time, the ALJ stated on one brief occasion that the parties would be calling into the January 9<sup>th</sup> hearing using the same phone number they had used to call into the December 20<sup>th</sup> hearing, and the employer therefore failed to show that it was beyond his reasonable control to participate in the January 9<sup>th</sup> hearing.

The inquiry does not stop there, however, as parties may still show good cause to reopen a hearing if they can prove that their failure to appear at the hearing was due to an excusable mistake. The term "excusable mistake" is not defined by rule. However, we customarily consider a mistake excusable if the mistake raises a due process issue or was the result of inadequate notice, reasonable reliance on another, or the inability to follow direction despite substantial efforts to comply.

It is apparent in this case that the employer made mistakes when he failed to keep track of the date and time the ALJ set for the new hearing, and failed to call in when he failed to receive a new notice of hearing, and that those mistakes caused him to miss the hearing. However, the ALJ specifically told the parties during the hearing that he was continuing the hearing because the original notice of hearing was deficient, suggesting to the parties that receipt of the new notice of hearing document was important. The ALJ repeatedly told the parties that OAH would mail new documents to them, and specifically said that the new notice of hearing would have instructions on it "*so you won't have to [] remember from this hearing.*" (Emphasis added.) The employer vigilantly checked his mail for the new notice for approximately two weeks and, when he did not receive it, called OAH two times to ask about the hearing and was not given the date or time of the new hearing, nor told to call into the hearing even if he did not receive the new notice of hearing. Although the ALJ said during the hearing that "anyone at my office would [] very quickly be able to find the hearing date" if the employer asked for it, and we have no doubt that is true, there is no evidence in this record suggesting that they did, in fact, find the hearing date or communicate it to the employer. February 21, 2018 hearing, Audio recording at 34:35.

Considering the totality of the circumstances present at the time of the events – being repeatedly told by the ALJ that a new notice would be sent, the importance of the new notice of hearing, being told by the ALJ that he "won't have to remember" the date and time, and, when he twice contacted OAH about the missing notice of hearing was just told that he would get it in the mail – it appears more likely than not that the employer's mistakes, both failing to keep track of the date and time when it was told to him at the December 20<sup>th</sup> hearing and in failing to call into the January 9<sup>th</sup> hearing regardless of not having received the notice of hearing, were the result of inadequate notice or the inability to follow direction despite substantial efforts to comply. The mistakes were, therefore, excusable, and the employer is entitled to reopen the January 9<sup>th</sup> hearing.

The employer's request to reopen is allowed. OAH shall schedule a new continued hearing on the merits of decision # 150539.

**DECISION:** Hearing Decision 18-UI-103932 is set aside, as outlined above.

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

**DATE of Service: April 4, 2018**

**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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