

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0423**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On August 31, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 122544). On September 11, 2017, claimant filed a timely request for hearing. On September 21, 2017, the Office of Administrative Hearings (OAH) served, by mail to claimant's address in Salem, Oregon, notice of a hearing scheduled for October 3, 2017. On October 3, 2017, claimant failed to appear at the hearing, and on October 4, 2017, ALJ Amesbury issued Order No. 17-UI-93788, dismissing claimant's request for hearing due to his failure to appear. On October 24, 2017, Order No. 17-UI-93788 became final without claimant having filed a request to reopen the hearing. On April 4, 2018, claimant filed a late request to reopen the hearing. ALJ Kangas reviewed claimant's request, and on April 11, 2018 issued Order no. 18-UI-107088, dismissing the request. On April 19, 2018, claimant filed a timely application for review of Order no. 18-UI-107088 with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Order no. 18-UI-107088 is reversed, and this matter remanded for a hearing on whether claimant's late request to reopen the October 3, 2017 hearing on decision # 122544 should be allowed and granted, and, if so, whether claimant should be disqualified from receiving benefits based on a work separation from the employer.

ORS 657.270(5) and OAR 471-040-0040(2) (February 10, 2012) provide that any party that failed to appear at a hearing may request to reopen the hearing, and the request will be granted if it was filed within 20 days of the date the ALJ's order was issued and mailed, and the party shows good cause for failing to appear at the hearing. The period within which a party may request reopening may be extended if the party has good cause for failing to request reopening within the time allowed and acts within a reasonable time. OAR 471-040-0041(1) (February 10, 2012). "Good cause" exists when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control. OAR 471-040-0040(2), OAR 471-040-0041(2). "A reasonable time," is seven days after the circumstances that prevented a timely filing ceased to exist. OAR 471-040-0041(3).

In his April 4, 2018 late request to reopen the October 3, 2017 hearing on decision # 122544, claimant stated that he failed to appear at the hearing because he was arrested and incarcerated in Washington

County, Oregon from September 20, 2017 until he was released on March 24, 2018. Claimant therefore appears to have been arrested and incarcerated one day before the September 21, 2017 notice of hearing was mailed, and filed his request to reopen the hearing 11 days after he was released from incarceration. In Order No. 18-UI-107088, the ALJ dismissed claimant's late request to reopen the hearing, asserting that claimant "may not have been able to file a reopen request while he was incarcerated; however, the circumstances that may have prevented [claimant] from filing a reopen request ended on March 24, 2018, when he released."<sup>1</sup> The ALJ reasoned that because claimant did not provide any information about why he waited 11 days after being released to file his reopen request, he failed to establish that he filed his request within a reasonable time.<sup>2</sup>

We agree with the ALJ that claimant's request to reopen shows that he may have had good cause for failing to appear at the October 3, 2017 hearing. However, we disagree with the ALJ's assertion that the circumstances that may have prevented claimant from filing a timely reopen request ended when he was released from incarceration on March 24, 2017. The circumstances ended sometime *after* claimant was released from incarceration, the date he first learned that a hearing order had been issued dismissing his request for hearing on decision # 122544 due to his failure to appear at a hearing scheduled for October 3, 2017. Absent a full inquiry into the date claimant first learned that such an order had been issued, we cannot determine whether he filed his late request to reopen within a reasonable period of time, or therefore whether his request should be allowed and granted.

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's late request to reopen the hearing should be allowed and granted, Order No. 18-UI-107088 is reversed, and this matter is remanded for development of the record on that issue and, if the ALJ grants claimant's late request to reopen the hearing, whether claimant should be disqualified from receiving benefits based on a work separation from the employer.

**DECISION:** Order No. 18-UI-107088 is set aside, and this matter remanded for further proceedings consistent with this order.<sup>3</sup>

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

**DATE of Service: May 2, 2018**

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<sup>1</sup> Order No. 18-UI-107088 at 3.

<sup>2</sup> *Id.*

<sup>3</sup> The failure of any party to appear at the hearing on remand will not reinstate Order no. 18-UI-107088 or return this matter to EAB. Only a timely application for review of the subsequent hearing order will cause this matter to return to EAB.