

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0576

Affirmed
No Disqualification
Employer's Request to Present Additional Evidence Denied

PROCEDURAL HISTORY: On April 10, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 102503). The employer filed a timely request for hearing. On May 23, 2018, ALJ Murdock conducted a hearing and issued Order No. 18-UI-110013, affirming the Department's decision. On June 4, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer filed a request to reopen the hearing because, although the employer's representative appeared at the hearing on the employer's behalf, the employer's fact witness failed to call in to provide testimony at the hearing. No administrative regulation directly authorizes EAB to reopen a hearing and, even if one did, EAB likely would not reopen the hearing because the employer appeared by its representative at the time of the hearing. Audio at ~00:53; *see generally* OAR 471-040-0040(1)(a) (February 10, 2012). For this reason, EAB considers the employer's request to reopen as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information when the party offering it shows that it was prevented by circumstances beyond its reasonable control from presenting that information at the hearing.

The employer's request to present additional information stated that the employer's representative made several calls attempting to reach the fact witness before the ALJ commenced taking hearing testimony, but she was unable to do so because the number she called connected her only to an "automated messaging system" and "voicemail" and she did not discover that the witness was working at an "alternate location" until after she had disconnected from the hearing phone line. However, this explanation does not establish why the *witness* did not call in at the time of the hearing as the representative appeared to expect, or that it was beyond the witness's reasonable control to have called in. Although in the absence of more detail, EAB infers that poor planning, miscommunication or a failure to notify the witness of the scheduled hearing may have been the cause of the witness's failure to

call in to the hearing, human error of that sort is generally considered to be within a party's reasonable control to avoid. To the extent that the witness's failure to call may have been the result of other factors, the employer presented no basis for EAB to conclude that it was caused by circumstances beyond the employer's reasonable control. For these reasons, the employer's request to have EAB consider new information under OAR 471-041-0090 is denied.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the Order under review, Order No. 18-UI-110013 is **adopted**.

DECISION: Order No. 18-UI-110013 is affirmed.

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

DATE of Service: July 3, 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. 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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