

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0622

Affirmed
Request to Reopen Denied

PROCEDURAL HISTORY: On April 17, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 81450). The employer filed a timely request for hearing. On May 16, 2018, the Office of Administrative Hearings (OAH) served notice of a telephone hearing scheduled for May 29, 2018 at 9:30 a.m. On May 29, 2018, ALJ Frank convened the hearing and issued Order No. 18-UI-110232, dismissing the employer's request for hearing based on a determination that the employer failed to appear for the hearing. On June 4, 2018, the employer filed a timely request to reopen the hearing. ALJ Kangas reviewed the request, and on June 7, 2018 issued Order No. 18-UI-110881, denying the request. On June 19, 2018, the employer filed a timely application for review of Order No. 18-UI-110881 with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument.

FINDINGS OF FACT: (1) On May 29, 2018, the employer, through its representative, ADP Unemployment Group/UC Express (ADP), appeared for the hearing on decision # 81450. The employer's representative informed the ALJ that she was appearing to ask the ALJ to postpone the hearing and that if the request was denied, she would disconnect in order to preserve the right to request that the hearing be reopened.

(2) In support of her request for a postponement, the employer's representative asserted the following: Upon receiving the May 16, 2018 notice of hearing, she repeatedly attempted to inform the employer's human resources employee, who was responsible for preparing for the hearing, that it had been scheduled for May 29, 2018 at 9:30 a.m. On May 29th at 9:00 a.m., however, the employer informed its representative that the employee was on a medical leave of absence, and that the employer therefore was not prepared to offer any information into evidence at the hearing.

(3) The ALJ denied the request for a postponement, but told the employer's representative that he would consider the employer to have failed to appear at the hearing, and that the employer could request that

the hearing be reopened. Claimant had not yet appeared for the hearing when the ALJ and the employer disconnected.

(4) In its request to reopen, the employer, through its representative, asserted the following: Its representative made several attempts to reach the employer's contact person prior to the start of the hearing. It was discovered approximately 30 minutes before the hearing that the contact person was on a medical leave of absence, and the employer had just then become aware of the hearing. The employer made efforts to secure a witness but was unable to do so within the limited time period, and was unable to confirm if the witness would in fact have first-hand knowledge.

CONCLUSIONS AND REASONS: We agree with ALJ Kangas and deny the employer's request to reopen the May 29, 2018 hearing.

An ALJ may dismiss a request for hearing if the requesting party fails to appear at the hearing. ORS 657.270(7); OAR 471-040-0035(3)(c) (August 1, 2004). Any party may file a request to reopen the hearing, and the ALJ may grant the request if the party requesting the reopening failed to appear at the hearing, the party files the request within 20 days after the ALJ's decision was issued and mailed, and the party shows good cause for failing to appear. ORS 657.270(7); OAR 471-040-0040(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).

In the present case, the record shows that the employer, through its representative, appeared at the May 29th hearing. We therefore agree with ALJ Kangas that the employer's request for hearing must be denied. ALJ Frank erred in concluding that the employer failed to appear at the hearing, and dismissing its request for hearing. However, even if the employer had not appeared at the hearing, its request for a reopening still would be denied. The employer's failure to be prepared for the hearing appears to have been due to poor communication between the employer and its representative, and not due to factors beyond the employer's reasonable control. And although the employer's failure to be prepared apparently was due to a mistake, it was not an excusable mistake because it did not, for example, raise a due process issue, and was not the result of inadequate notice, reasonable reliance on another, or the inability to follow directions despite substantial efforts to comply. The employer therefore failed to establish good cause for failing to appear at the May 29th hearing.

Instead of disconnecting from the hearing, ALJ Frank should have waited for claimant to appear and, if he did, taken his testimony and allowed the employer's representative an opportunity to cross-examine him. However, ALJ Frank's failure to do so did not substantially prejudice the employer's rights, regardless of whether claimant appeared, given that decision # 81450 concluded the employer discharged claimant, not for misconduct, the employer had the burden to establish misconduct by a preponderance of evidence,¹ and the employer was not prepared to offer any information into evidence at the hearing.² Thus, although ALJ Frank erred in disconnecting from the hearing prematurely, it was not reversible error.

¹ *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

² *See Accord*, OAR 471-040-0025(5) (August 1, 2004) (erroneous rulings on evidence shall not preclude the ALJ from entering a decision unless shown to have substantially prejudiced the rights of a party).

However, ALJ Frank did not err in denying the employer's request for a postponement. An ALJ may grant a party's request that a hearing be postponed if the request is promptly made after the party becomes aware of the need for postponement, and the party has good cause, as stated in the request, for not attending the hearing at the time and date set. OAR 471-040-0021(1) and (2) (August 1, 2004). 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. OAR 471-040-0021(3). Here, the circumstance causing the employer's request for a postponement was poor communication between the employer and its representative, which was within the employer's reasonable control. The employer therefore failed to establish good cause for not attending the hearing at the time and date set.

DECISION: Order No. 18-UI-110881 is affirmed.

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

DATE of Service: July 13, 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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