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BYE: 201907

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0674

Reversed
Request to Reopen Allowed

PROCEDURAL HISTORY: On March 8, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 133200). The employer filed a timely request for hearing. On April 10, 2018, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for April 23, 2018. On April 23, 2018, ALJ Scott conducted a hearing, at which claimant did not appear, and on April 25, 2018 issued Order No. 18-UI-108070, concluding that the employer discharged claimant for misconduct. On May 17, 2018, OAH received a request to reopen filed by claimant. On May 24, 2018, OAH mailed notice of a hearing scheduled for June 7, 2018. On June 7, 2018, ALJ Shoemake conducted a hearing, and on June 14, 2018 issued Order No. 18-UI-111360 concluding claimant's request to reopen was filed late, and even if it had been filed timely was without good cause. On July 3, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) On April 23, 2018, ALJ Scott convened a hearing on the employer's request for hearing on decision # 133200. The employer's witness appeared promptly, and the ALJ began the preliminary portion of the hearing during which she explained the hearing procedures and stated that "apparently" claimant is not joining the hearing. Audio recording at ~ 5:04.

(2) Immediately thereafter, claimant called into the hearing, and the following occurred:

> (A chime noise sounded indicating someone [claimant] had called into the OAH conference bridge line.)
>
> ALJ: Oh, there she is. This is Administrative Law Judge Scott, who has just joined the conference line?

(Pause, no audible response.)

ALJ: Hello?

(Pause, no audible response.)

ALJ: [Employer's witness], are you there?

EW: Yes, ma'am.

ALJ: Okay, I just got a tone that somebody joined the line and I, I . . . (unintelligible, ALJ and EW speaking over each other).

(Pause.)

ALJ: Okay.

(Pause.)

ALJ: Is [claimant], are you on the line?

(Pause, no audible response on the hearing recording.)

ALJ: Okay, I'm gonna go ahead. Um, since this has come to me as a discharge case, even if the – uh – claimant were participating I would take the employer's witness's testimony first and then the claimant's. Each party may present additional testimony . . .

Audio recording at ~ 5:06-5:51. Claimant had replied to the ALJ during the four second pause between when the ALJ asked if she was on the line and when the ALJ stated, "Okay, I'm gonna go ahead." Claimant did not know the ALJ had not heard her response or that the response was not audible.

(3) The ALJ then proceeded to question the employer's witness without knowing that claimant was on the conference line. Once the ALJ finished questioning the employer's witness, the following occurred:

ALJ: I think I've got the picture here, and, um – it's difficult when there's a – it's a one party hearing, when the other party doesn't show up to tell me their side of the story, because, as I told you at the beginning, the only evidence that we're allowed to go on in these hearings is what's presented us at the hearing. So I have nothing to give me what her side of the story is, so I have to completely base my decision on what you've told me here. So, um, but that's her choice not to partic –

(A chime noise sounded indicating when claimant exited the OAH conference bridge line.)

ALJ: –ipate, you know she was sent . . . uh . . .

(Pause.)

ALJ: This is Administrative Law Judge Scott. Did someone join the line?

(Pause.)

ALJ: This is very strange.

(Pause.)

ALJ: Are you there [employer's witness]?

EW: I'm here, yes ma'am.

ALJ: Okay. Um. So evidently she chose not to participate and if she did that may have been her eavesdropping, I have no way of knowing if she wasn't gonna to speak up. But I have only the evidence you gave me to go on. * * *

Audio record at ~ 23:05-23:56. The ALJ then closed the hearing, and, on April 25, 2018 issued an order denying claimant benefits.

(4) On May 13, 2018, claimant wrote a letter requesting that the April 23rd hearing be reopened. Claimant placed her letter in an envelope, placed six first-class mail stamps on the envelope, and deposited the envelope in the U.S. mail. On May 17, 2018, the envelope was delivered to OAH and stamped as "received." Domestic first class mail sent through the U.S. Postal Service generally takes 1-3 days to be delivered.[1]

CONCLUSIONS AND REASONS: We disagree with the ALJ. Claimant's request to reopen was filed timely and she established good cause to reopen the hearing.

ORS 657.270(5)(a) provides that any party may request to reopen the hearing, and that the request for hearing may be allowed if the party requesting reopening failed to appear at the hearing, filed within 20 days after the ALJ's written decision was issued, and shows good cause for failing to appear. To be timely, in this case, claimant's request to reopen had to be filed on or before May 15, 2018. Generally speaking, the filing date of a document filed by mail is the postmark date affixed by the U.S. Postal Service, or, if such date is absent, "the most probable date of mailing." *See e.g.* OAR 471-040-0005(4)(a) (filing dates for requests for hearing); OAR 471-010-0040(2) (filing timely notices, requests, appeals, applications, etc. to any office of the Employment Department in Oregon); ORS 183.605(1) (establishing OAH as an office within the Employment Department).

[1] We take notice of this generally cognizable fact, which is found at https://www.usps.com/ship/first-class-mail.htm. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

The ALJ found as fact that "[c]laimant requested reopening on May 17, 2018." Order No. 18-UI-111360 at 2. The ALJ reasoned that although she "testified that she completed the request on May 13, 2018 and mailed it on May 15, 2018," "the request was date stamped received by the Employment Department on May 17, 2018." *Id.* at 3. Without explaining how a document received via U.S. Postal Service mail and date stamped on May 17th was likely "filed" the same day, the ALJ concluded that claimant's request was filed late. We disagree.

The evidence the parties presented is conclusive that claimant wrote her request to reopen letter on May 13th and that the Office of Administrative Hearings received it on May 17th.[2] Claimant testified that she did not mail her request to reopen to OAH until May 15th, suggesting that it was likely not filed on May 13th or May 14th. It is unlikely that a letter mailed through the U.S. Postal Service on May 17th would reach OAH the same day, suggesting that the request to reopen was not mailed on May 17th. The most likely dates that the request to reopen could have been mailed were therefore May 15th and May 16th.

The U.S. Postal Service delivery standards suggest that most first-class mail takes between one and three days after mailing to reach its destination, which, averaged, means that most first-class mail takes an average of two days to reach its destination.[3] Two days prior to May 17th is May 15th, making May 15th the most likely date claimant's request to reopen was mailed. A request to reopen mailed on May 15th is also most likely "filed" on May 15th, and a request to reopen filed on May 15th in this case was filed within the time allowed. Claimant's request to reopen was, therefore, timely filed.

An individual's timely-filed request to reopen may only be allowed if the party establishes "good cause" for failing to appear at the hearing. OAR 471-040-0040(2) (February 10, 2012) defines good cause to include "when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control."

The ALJ concluded that claimant failed to show good cause for missing the April 23rd hearing, finding as fact that claimant "knew the Administrative Law Judge could not hear her because she was not acknowledged when she tried to respond." Order No. 18-UI-111360 at 2. The ALJ concluded that because she "knew that she could not be heard in the hearing and chose to stay on the telephone conference without participating in the entire proceeding rather than contact the hearings office as instructed on the notice of hearing." Order No. 18-UI-111360 at 3. The record fails to support the ALJ's findings and conclusion.

There is little in the record to suggest that claimant knew that the ALJ could not hear her. Although the ALJ's initial comments after hearing the chime indicating someone had joined the hearing bridge

[2] The ALJ wrote that the "Employment Department" received the request to reopen, but the May 17th date stamp states that OAH received it; OAH is an office within the Employment Department under ORS 183.605.

[3] In so stating we note that EAB's office has observed many recent occasions upon which mail directed to EAB took over a week to be delivered, suggesting that the 1-3 day delivery window may underestimate the actual amount of time mail takes to be delivered to government offices such as EAB or OAH. We take notice of this fact, which is within EAB's specialized knowledge. *See e.g.* Employment Appeals Board Decision 2018-EAB-0606 (July 9, 2018). Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

suggest that the ALJ was making it clear that she could not hear whomever called into the hearing bridge at minute 5:06, what followed included the ALJ stating, "Is [claimant], are you on the line?" then pausing for four seconds before stating, "Okay, I'm gonna go ahead" and continuing the hearing. The four second pause was long enough for claimant to state that she was present on the line, and, assuming she did so, the ALJ's response was, "Okay, I'm gonna go ahead." The ALJ did not state on the record that she had not heard claimant's response to her question, did not state that she was unable to hear claimant, and did not state that anyone on the line who had not been recognized by name should hang up and try again or contact OAH for assistance connecting to the bridge line. In sum, it does not appear that the circumstance or the ALJ adequately apprised claimant that although she had called into the hearing attempting to participate, she was not, in fact, appearing at the hearing by doing so. Between minute 5:06 and minute 23:10, while the ALJ finished explaining the hearing procedures and questioned the employer's witness, there were no appropriate opportunities for claimant to participate in the hearing or have reason to suspect that although she had called into the hearing she was not actually participating in it. On this record, it appears more likely than not that claimant did not understand she had not appeared at the hearing until minute 23:10-23:25 when the ALJ stated on the record that claimant did not "show up" for the hearing and that the ALJ would be basing her decision entirely on the employer's evidence; 7 seconds later, claimant disconnected from the hearing and contacted OAH.

The April 23rd hearing recording establishes that it is more likely than not that claimant attempted to participate in the hearing and was unable to do so despite having called in, likely due to some technical problem related to her call. Claimant's failure to appear at the hearing was therefore caused by a factor beyond her reasonable control, and amounted to good cause to reopen the hearing.

In so deciding, we note that at minute 5:43 of the hearing, shortly after the ALJ asked claimant to verify her presence and then proceeding with the hearing, the ALJ mentioned in her explanation of hearing procedures "even if the – uh – claimant were participating . . ." To any extent claimant heard the ALJ's statement, and should have understood it to mean that the ALJ had not heard claimant's attempts to identify herself as participating in the hearing, claimant's failure to do so and take steps to actively participate in the hearing was an excusable mistake. It is quite possible under the circumstances that claimant might have missed hearing the ALJ's passing statement, or that she heard the statement but failed to understand its significance, and does not change the fact that claimant's failure to appear at the hearing occurred despite her substantial efforts to participate, and does not change our conclusion that she had good cause for failing to appear and is entitled to reopen the April 23rd hearing.[4]

DECISION: Order No. 18-UI-111360 is set aside, as outlined above.[5]

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

[4] We also note that the ALJ characterized claimant's behavior during the April 23rd hearing as "eavesdropping." Audio recording at ~ 23:51. The word "eavesdropping" means to "[s]ecretly listen to a conversation," and common synonyms for that term include to "spy," "intrude," and "snoop." https://en.oxforddictionaries.com/definition/eavesdrop. It is a pejorative term, which, considering the totality of the circumstances in this case, in which claimant appears to have made an earnest and open attempt to actively participate in the hearing but was unable to do so due to factors beyond her control and unaware that her efforts to participate were ineffective, use of the term to describe claimant's behavior is inappropriate.

[5] **NOTE:** The failure of any party to appear at the merits hearing will not reinstate Order No. 18-UI-111360 or return this matter to EAB. Only a timely application for review of a subsequent Order will cause this matter to return to EAB.

DATE of Service: July 19, 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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