

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0816**

*Reversed ~ Revocada*  
*Request to Reopen Allowed ~ Petición Atrasada para Reabrir es Permitida*

**PROCEDURAL HISTORY:** On June 22, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73535). Claimant filed a timely request for hearing. On July 2, 2018, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for July 16, 2018 at 2:30 p.m. On July 16, 2018, claimant did not appear for the hearing, and ALJ Seideman issued Order No. 18-UI-113200, dismissing claimant's request for hearing for failure to appear. On July 19, 2018, claimant filed a timely request to reopen. On July 25, 2018, OAH mailed notice of a hearing scheduled for August 8, 2018 at 3:30 p.m. On August 8, 2018, ALJ Murdock conducted a hearing, at which claimant appeared, and issued Order No. 18-UI-114793, denying claimant's request to reopen. On August 24, 2018, claimant filed an application for review of Order No. 18-UI-114793 with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Claimant received notice of the July 16, 2018 hearing. He did not read English or Spanish well enough to understand the notice, and asked a friend to help him.

(2) Claimant's friend "read the papers to" claimant by looking at them quietly and then telling claimant the date and time of the hearing; claimant's friend also told claimant that he would receive a call at the time of the hearing.<sup>1</sup> Claimant understood from his friend that "the Court is going to call me, not that I was going to call the Court."<sup>2</sup>

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<sup>1</sup> Transcript at 5, 6.

<sup>2</sup> Transcript at 5.

(3) Claimant did not ask his friend to read the notice of hearing to him aloud or verbatim. The notice of hearing that scheduled the July 16<sup>th</sup> hearing was 18 pages long, included many duplicate passages, and primarily consisted of English words written in a smaller than usual font-size.

(4) On the day of the hearing, claimant waited for a call to participate in the hearing and did not receive one. Thirty to forty-five minutes after the hearing was scheduled to begin, claimant began calling phone numbers listed on the notice of hearing. Claimant's phone calls were answered by recorded messages instructing him to press certain buttons on his phone like "numbers that put you through computers" and "star" or "hashtag" in order to proceed, but claimant did not understand which buttons to push and was not able to complete his attempts to call.<sup>3</sup>

(5) On some date after July 16<sup>th</sup>, claimant showed the notice of hearing to another person. The other person told claimant that he was supposed to have called in for the hearing, and should not have waited for someone to call him.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ, and conclude that claimant has shown good cause to reopen the July 16<sup>th</sup> hearing and is entitled to a hearing on the merits of decision # 73535.

ORS 657.270(7) provides that an ALJ may dismiss a party's request for hearing if the party who requested the hearing failed to appear at it. ORS 657.270(5)(c) provides, in pertinent part, that an ALJ may reopen the hearing if the party requests reopening within 20 days of the date the decision dismissing the request for hearing was issued and shows good cause for failing to appear. OAR 471-040-0040(2) (February 10, 2012) defines "good cause" to include "an excusable mistake" and "factors beyond an applicant's reasonable control."<sup>4</sup>

The ALJ concluded that claimant did not have good cause to reopen the July 16<sup>th</sup> hearing because although he "did not understand the notice and asked his friend to help him with it," "he did not ask his friend to read the notice word-for-word or in its entirety."<sup>5</sup> The ALJ implicitly found that claimant's failure to ask his friend to read the entire 18-page notice of hearing to him verbatim resulted in claimant's failure to "learn that he was required to call for the hearing rather than wait for a call from someone to start the hearing."<sup>6</sup> The ALJ made a conclusory statement that asking his friend to read the entire notice of hearing was within claimant's reasonable control, and that his failure to do so was not an excusable mistake, before concluding that claimant did not establish good cause to reopen the hearing.<sup>7</sup>

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<sup>3</sup> Transcript at 7, 8.

<sup>4</sup> OAR 471-040-0040(2)(b)(B) states that good cause does not include "[n]ot understanding the implications of a decision or notice when it is received." That provision does not apply where, as here, it is not the "implications" of the notice claimant did not understand, but rather that he was incapable of understanding the text of the notice itself.

<sup>5</sup> Order No. 18-UI-114793 at 4.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

We disagree. It would have been unreasonable under the circumstances to expect claimant to ask his friend to read the notice to him verbatim in its entirety, given that the notice of hearing was primarily an English-language document, his friend was reading Spanish, the document itself included a lot of duplicate passages, and the document was 18 pages long and written in a very small font. Although it was certainly within claimant's reasonable control to ask his friend to read the entire document to him verbatim, under the circumstances, claimant's failure to do so was, at worst, a mistake.

Generally speaking, a mistake is considered "excusable" if it was the type of mistake that raised a due process issue, was the result of inadequate notice, resulted from an individual's reasonable reliance on another person, or resulted from the individual's inability to follow directions despite substantial efforts to comply.<sup>8</sup> In this case, claimant, who read neither English nor Spanish, asked a friend to help him understand the notice of hearing by asking his friend to "read the papers to me."<sup>9</sup> Claimant's friend looked at the notice, and communicated to claimant that he would receive a call from someone at the date and time scheduled for the hearing. There is nothing in this record that suggests it was unreasonable for claimant to have chosen that individual to help him or unreasonable for claimant to have relied upon what that individual told him about the hearing. That claimant relied upon an individual who was unwilling or unable to read the entirety of the notice or accurately communicate the contents of the document to claimant was therefore an excusable mistake resulting from claimant's reasonable reliance on another person.

Even if we had concluded that claimant's mistake was not excusable, however, the outcome of this decision would remain the same. First, although we have found that it was within claimant's reasonable control to "ask" his friend to read the entire 18-page notice of hearing to him verbatim, the record fails to show that his friend was capable of doing so, given the size of the font, technical legal content, and different languages located therein. Nor does the record suggest that claimant had the knowledge or ability to seek help from someone else prior to the hearing.<sup>10</sup> Second, even assuming that claimant's friend read the entire notice to claimant verbatim, the record still fails to establish that claimant was capable of calling in at the designated date and time of the hearing. It is unrefuted that at the time of the July 16<sup>th</sup> hearing claimant had such difficulty navigating phone systems that required him to listen to recorded messages instructing him to press certain buttons on his phone like "numbers that put you through computers" and "star" or "hashtag" in order to proceed, such as the hearing conference-call

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<sup>8</sup> See e.g. Appeals Board Decision 12-AB-2744 (October 18, 2012) (an excusable mistake includes mistakes resulting from inadequate notice, reasonable reliance and the inability to follow directions despite substantial efforts to comply); Appeals Board Decision 2017-EAB-0920 (August 16, 2017); Appeals Board Decision 2018-EAB-0623 (June 27, 2018); Appeals Board Decision 2018-EAB-0713 (July 26, 2018).

<sup>9</sup> Transcript at 5.

<sup>10</sup> We note that the notice of hearing included a language advisory written in Spanish that stated something to the effect of:

This concerns your hearing. If you do not understand the enclosed important document, please IMMEDIATELY contact the Office of Administrative Hearings at 1-800-311-3394.

However, claimant was unable to read Spanish well, suggesting that he was not aware or might have been incapable of reading that advisory, and therefore would not have known that he could obtain help understanding the notice of hearing by calling the Office of Administrative Hearings instead of relying on his friend.

system, that he was unable to complete a call seeking help after missing his hearing.<sup>11</sup> Those factors suggest that it was also likely beyond claimant's reasonable ability or control to call in for the July 16<sup>th</sup> hearing.

Either way, claimant established good cause to reopen the July 16<sup>th</sup> hearing. He is, therefore, entitled to a hearing on the merits of decision # 73535.

**DECISION:** Order No. 18-UI-114793 is set aside, as outlined above. *La Orden de la Audiencia 18-UI-114793 se deja a un lado, de acuerdo a lo indicado arriba.*<sup>12</sup>

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

**DATE of Service: August 30, 2018**

**NOTE:** The failure of any party to appear at the hearing will not reinstate Order No. 18-UI-114793 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

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*NOTA: La falta de cualquier parte de comparecer en la audiencia sobre no reinstalará la Orden 18-UI-114793 de la audiencia ni devolverá esta orden a la EAB. Solamente una aplicación oportuna para revisión de la orden subsiguiente de la nueva audiencia volverá este asunto a la EAB.*

**Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente.** Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.

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<sup>11</sup> The "two or three numbers" listed on the notice of hearing, which claimant attempted to call after missing the July 16<sup>th</sup> hearing, would necessarily have included the phone number for the hearing conference-call system. See notice of hearing. It is unrefuted that claimant's inability to navigate phone systems on the date of the hearing included an inability to navigate the hearing conference-call system.

<sup>12</sup> Claimant's representative expressed intent to submit a written argument for EAB's consideration; this decision is being issued prior to the September 13, 2018 written argument deadline. Because this decision is favorable to claimant and requires additional proceedings be scheduled at OAH before the case can ultimately resolved, we deemed it unnecessary to wait for the passage of the written argument deadline or submission of a written argument before issuing this decision.