

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0889

Affirmed
Request to Reopen Denied

PROCEDURAL HISTORY: On June 21, 2018, the Oregon Employment Department (the Department) mailed notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 104044). On June 26, 2018, the employer filed a timely request for hearing by fax. On July 5, 2018, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for July 17, 2018 at 3:30 p.m. On July 17, 2018, the employer failed to appear at the hearing, and on July 18, 2018 ALJ Snyder issued Order No. 18-UI-113314, dismissing the employer's request for hearing due to its failure to appear. On August 6, 2018, the employer filed a timely request to reopen the hearing. On August 21, 2018, ALJ Frank conducted a hearing on the employer's request for a reopening and on August 23, 2018 issued Order No. 18-UI-115466, denying the request. On September 10, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer submitted written argument containing some new information regarding its failure to appear at the July 17, 2018 hearing, which is construed as a request for EAB to consider the new information under OAR 471-040-0090 (October 29, 2006). Under OAR 471-040-0090(2), new information may be considered when the party offering the information establishes that the new information is relevant and material to EAB's determination, and that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing. In support of its request, the employer asserted that at the August 23, 2018 hearing, ALJ Frank treated its representative unfairly, repeatedly interrupted her, cut her off and argued with her, and disregarded her attempts to correct his misunderstanding of the relevant facts.

We reviewed the hearing record in its entirety and generally agree with the employer's characterization of ALJ Frank's behavior during the August 23rd hearing. The employer's new information is relevant and material to EAB's determination of whether the employer's request to reopen the July 17th should be denied. ALJ Frank's behavior during the August 23rd hearing was a factor or circumstance beyond the employer's reasonable control that prevented it from offering the information into evidence at that time. The employer's request for EAB to consider its new information therefore is granted. The employer's written argument is marked and admitted into evidence as EAB Exhibit 1, a copy of which is attached to

this decision. Any party that objects to the admission of EAB Exhibit 1 must submit such objection to EAB 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, EAB Exhibit 1 will remain in the record.

FINDINGS OF FACT: (1) On June 25, 2018, the employer telephoned the Department, asked why claimant was paid benefits, and was advised by a Department employee that a decision was issued on June 21, 2018 allowing claimant benefits. The employer complained that it never received a call from the Department, and the Department employee advised the employer to appeal the decision.¹

(2) The Department employee also mistakenly advised the employer that after it appealed, a telephone hearing would be scheduled, and the employer would be called at the time of the hearing. However, the first page of July 5, 2018 notice of the hearing stated, in relevant part:

If you have questions prior to your hearing, call 1-800-311-3394 (or local Salem area 503-947-1515).

This is a telephone hearing.

1. This hearing has been scheduled for **July 17, 2018** and will begin at **3:30 PM Pacific Time** with Administrative Law Judge Ilsa L. Snyder.
2. At the time of the hearing, you must call 1-877-622-4041. Using the telephone keypad, enter the access code **8884342** followed by the “#” key.
3. If either an administrative law judge or a representative from the Office of Administrative Hearings has not appeared in the hearing within (5) minutes of the scheduled start time of the hearing, or you are having difficulty calling in for the hearing, hang up and call 1-800-311-3394.
4. If you requested the hearing and you do not call **1-877-622-4041** at the time set for your hearing, the hearing will be dismissed.

Exhibit 1 (emphases in original).

(3) The employer received the July 5th notice of the hearing in the mail. The employer’s representative read and understood that portion of the notice stating that a telephone hearing had been scheduled for July 17, 2018 at 3:30 p.m. with ALJ Snyder. However, the employer’s representative did not continue reading the notice of hearing because she didn’t feel like it was “worthy” of her time, and the hearing was “on the bottom” of her and the employer’s list of priorities. Audio Record at 16:18; EAB Exhibit 1 at 3. The representative therefore did not read that portion of the notice stating that the employer had to call into the hearing or the hearing would be dismissed. The representative continued to believe, based on the Department employee’s advice on June 25th, that the employer would be called at the time of the hearing.

¹ We take notice of these facts, which are contained in Employment Department records. 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 facts will remain in the record.

(4) On July 17th, the employer's representative was scheduled to start work at 9:00 a.m. and intended to appear at and participate in the 3:30 p.m. hearing while at work. However, when the representative left home that morning, she forgot to bring the July 5th notice of the hearing with her. The representative waited to be called from 3:20 p.m. to approximately 3:45 p.m., after which she began searching for OAH's contact information online. However, she was unable to contact OAH until after the hearing had been dismissed.

CONCLUSIONS AND REASONS: The employer's request to reopen the July 17, 2018 hearing on decision # 104044 is denied.

ORS 657.270(5) provides that any party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and shows good cause for failing to appear. "Good cause" exists when the requesting party's failure to appear at the hearing arose from an excusable mistake or from factors beyond the party's reasonable control. OAR 471-040-0040(2) (February 10, 2012).

Here, the employer offered several reasons, business-related and personal, for why its representative was so "distracted" that she failed to read the entire July 5th notice of hearing or remember to bring the notice of hearing with her to work on the day of the hearing. *See Exhibit 1* at 4. However, the notice of hearing stated on the first page that the employer had to call into the hearing or the hearing and enter the access code, and that if it did not call the number provided at the time of the hearing, the hearing would be dismissed. The underlined instruction to call into the hearing immediately followed the sentence stating that a telephone hearing had been scheduled for July 17, 2018 at 3:30 p.m. with ALJ Snyder, which the employer's representative read. The warning that if the employer did not call in at the time of the hearing, the hearing would be dismissed, was within the same numbered paragraph.

At hearing, the employer's representative testified that she did not continue reading the notice of hearing because it was not "worthy" of her time, and admitted in writing that it was because the hearing was "on the bottom" of her and the employer's list of priorities, and not because it was beyond her reasonable control to do so. Nor did the employer show that it was beyond its representative's reasonable control to remember to bring the notice of hearing with her to work. And although the representative's failure to continue reading the notice of hearing or bring it with her to work were mistakes, they were not "excusable" mistakes because they did not, for example, raise a due process issue, and were not the result of inadequate notice, 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 July 17th hearing.

The remaining issue is whether the employer is entitled to have the July 17th hearing reopened under the doctrine of equitable estoppel based on the Department employee misinforming the employer on June 25, 2018 that the employer would be called at the time of the hearing. However, the doctrine of equitable estoppel "requires proof of a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it." *Keppinger v. Hanson Crushing, Inc.*, 161 Or App 424, 428, 983 P2d 1084 (1999) (citation omitted). In addition, to establish estoppel against a state agency, a party "must have relied on the agency's representations and the party's reliance must have been reasonable." *State ex rel SOSOC v. Dennis*, 173 Or App 604, 611, 25 P3d 341, *rev den*, 332 Or

448 (2001) (citing *Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995)).

Here, the record fails to show that the Department employee's misrepresentation, made before the employer had even requested a hearing, was made with knowledge of the fact that the employer had to call into the hearing, or with the intention that it would induce the employer to not follow the instructions set forth in the notice of hearing. Nor was it reasonable for the employer to rely on the employee's representation instead of reading and following the instructions set forth in the notice of hearing. The employer therefore is not entitled to have the July 17th hearing reopened under the doctrine of equitable estoppel.

The employer's request to reopen the July 17, 2018 hearing on decision # 104044 therefore is denied.

DECISION: Order No. 18-UI-115466 is affirmed.

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

DATE of Service: October 10, 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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