

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0938**

*Affirmed*  
*Request to Reopen Denied*

**PROCEDURAL HISTORY:** On May 25, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 91200). On June 14, 2018, decision # 91200 became final without claimant having requested a hearing. On July 12, 2018, the Department served notice of an administrative decision based on decision # 91200 concluding that claimant willfully failed to report his work separation from the employer and therefore was overpaid benefits, disqualified from future benefits, and assessed a monetary penalty (decision # 193846). On July 25, 2018, claimant filed a late request for hearing on decision # 91200 and a timely request for hearing on decision # 193846.

On July 30, 2018, the Office of Administrative Hearings (OAH) served, by mail, notice of a hearing on decision # 91200 scheduled for August 13, 2018 at 9:30 a.m., and notice of a hearing on decision # 193846 scheduled for August 13, 2018 at 10:45 a.m. On August 13, 2018, claimant failed to appear at the hearing decision # 91200, but appeared at the hearing on decision # 193846. On August 13, 2018, ALJ Amesbury issued Order No. 18-UI-114831, dismissing claimant's request for hearing on decision # 91200 due to his failure to appear at that hearing. On August 16, 2018, ALJ Amesbury issued Order No. 18-UI-115049, modifying decision # 193846.

On September 4, 2018, claimant filed, by fax, a timely application for review of Order No. 18-UI-114831 to EAB that was treated timely request to reopen the hearing on decision # 91200.<sup>1</sup> On September 5, 2018, Order No. 18-UI-115049 became final without claimant having filed an application for review of that order with the Employment Appeals Board (EAB). On September 6, 2018, ALJ Kangas considered claimant's request to reopen the hearing on decision # 91200 and issued Order No. 18-UI-116180, denying the request. On September 26, 2018, claimant filed an application for review of Order No. 18-UI-116180 with the Employment Appeals Board (EAB).

In his application for review, claimant asked EAB to consider new information regarding his failure to appear at the August 13, 2018 hearing on decision # 91200. However, claimant's new information may

<sup>1</sup> See OAR 471-041-0060(4) (January 8, 2008) and OAR 471-040-0040(6) (February 10, 2012).

be considered only if claimant establishes that factors or circumstances beyond his reasonable control prevented him from including the information with his September 4, 2018 request to reopen the hearing. *See* OAR 471-041-0090(2) (October 29, 2006). In support of his request, claimant asserted that the fax he sent EAB on September 4<sup>th</sup> included his application for review, which was received, along with a document containing an explanation as to why he missed the hearing, which according to claimant, “Apparently . . . never made it through, although I received a confirmation that the fax was sent . . . .”

However, although claimant attached the document he allegedly faxed to EAB on September 4, 2018, he did not provide a copy of the confirmation allegedly showing that he faxed it along with the fax cover sheet and the completed, one-page application for review form that EAB received on September 4<sup>th</sup>. *See* Exhibit 5. Indeed, the fax cover sheet and the application for review both indicate that claimant faxed only those two pages, and there is no indication that a third page was caught behind either of the other two when scanned. *See* Exhibit 5. We therefore find the evidence, at best, equally balanced as to whether claimant faxed the document to EAB along with the completed application for review form. Claimant therefore failed to meet his burden to establish that factors or circumstances beyond his reasonable control prevented him from including his new information with his September 4, 2018 request to reopen the hearing on decision # 91200. Claimant’s request for EAB to consider his new information is denied.

However, even if we considered claimant’s new information, the outcome would remain the same. Claimant asserts that he failed to appear at the hearing on decision # 91200 because he did not receive the notice of hearing on that decision, only the notice of hearing on decision # 193846. However, the notices were mailed on the same day to claimant’s same address. Documents sent through U.S. Postal Service as first class mail are presumed to have been received subject to evidence to the contrary.<sup>2</sup> The record fails to show that the notice of hearing on decision # 91200 was returned to the Department as undeliverable. Claimant’s bare assertion that he did not receive the notice of hearing on decision # 91200 is not sufficient to overcome the presumption that he did. We find it just as likely that claimant either misplaced the notice of hearing or failed to understand that he had two hearings scheduled for the same day. Claimant’s new information therefore fails to establish good cause for failing to appear at the hearing on decision # 91200, as required for a reopening under OAR 471-040-0040(2) (February 10, 2012).<sup>3</sup>

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the Order under review is **adopted**.

**DECISION:** Order No. 18-UI-116180 is affirmed.

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

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<sup>2</sup> *See accord* ORS 40.135(q) (setting forth the legal presumption a letter duly directed and mailed was received in the regular course of the mail).

<sup>3</sup> “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. Good cause does not include not understanding the implications of a decision notice when it is received. OAR 471-040-0040(2)(b)(B).

**DATE of Service: October 15, 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](http://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.