

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1032

Reversed
Request to Reopen Allowed

PROCEDURAL HISTORY: On August 6, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant did not file a timely claim for benefits for the week of July 22, 2018 through July 28, 2018 (decision # 110548). Claimant filed a timely request for hearing. On August 16, 2018, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for August 30, 2018, at which claimant failed to appear. On August 30, 2018, ALJ Snyder issued Order No. 18-UI-115802, dismissing claimant's request for hearing for failure to appear. On September 10, 2018, claimant filed a timely request to reopen the August 30th hearing. On September 24, 2018, OAH mailed notice of a hearing scheduled for October 5, 2018. On October 5, 2018, ALJ R. Frank conducted a hearing, and on October 10, 2018 issued Order No. 18-UI-117970, denying claimant's reopen request. On October 29, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument when reaching this decision. We note that claimant stated in his argument that his October 5, 2018 hearing was with EAB. Claimant is incorrect. His October 5, 2018 hearing was before the Office of Administrative Hearings, not EAB.

FINDINGS OF FACT: (1) Claimant received advance notice of the August 30th hearing on decision # 110548 and planned to attend.

(2) On August 29, 2018, claimant found out that his new employer had unexpectedly scheduled him to work from approximately 7:00 a.m. to 6:00 p.m. on August 30th, and that the nature of the work claimant was scheduled to do would prevent him from participating in a hearing. Claimant was in training with a new employer and could not miss work. On August 29, 2018, claimant called one or more Oregon Employment Department telephone numbers about his inability to attend the August 30th hearing. He thought the number or numbers he called were the appropriate numbers to call under the circumstances, and did not call either of the phone numbers for OAH provided on the notice of hearing. Claimant's call(s) were unsuccessful, and he was unable to get through to anyone to discuss the matter. He did not attend the August 30th hearing or discuss his inability to attend the hearing with anyone.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant showed good cause to reopen the August 30th hearing.

A hearing may be reopened upon a showing of “good cause for failing to appear.” ORS 657.270(5)(c)(C). “Good cause” means “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).

The ALJ concluded that claimant did not have good cause to reopen the August 30th hearing in this case because although he was unable to attend the hearing due to a last-minute schedule change at work and attempted to call in to get the hearing rescheduled, claimant did not call the right phone number to do so. The ALJ wrote, “It was within claimant’s reasonable control to consult his hearing notice and contact the OAH at the designated number in order to request a postponement of the case” and, “[r]ather than doing so, claimant attempted to contact the Employment Department at another number . . . and did not speak with anyone.” Order No. 18-UI-117970 at 3. We disagree.

The notice of hearing mailed to parties in this case did not actually designate a phone number for claimant to call if he needed to reschedule the hearing or was unable to attend the hearing at its scheduled time. There was, therefore, no “designated number” for claimant to call. Notwithstanding, it more likely than not was within claimant’s “reasonable control” to have called a different phone number or numbers than he called, and/or to have called an OAH phone number, to request that his hearing date be rescheduled. However, the ALJ erred because the “good cause” inquiry does not stop at a determination that a particular action or inaction was within claimant’s reasonable control. Claimant’s failure to appear at the August 30th hearing must also be analyzed under the “excusable mistake” standard.

A “mistake” in this context occurs when, despite an action or inaction being within an individual’s reasonable control, some sort of error nevertheless prevented the individual from successfully completing the action, or caused the inaction to occur.¹ The mistake is generally considered to have been “excusable” when it raises a due process issue, or was the result of inadequate notice, reasonable reliance on another, or the inability to follow directions despite substantial efforts to comply.

Here, claimant learned on August 29th that he could not attend the August 30th hearing and promptly attempted to call to get the hearing rescheduled or otherwise discuss his inability to attend it. Given that he did not successfully complete any call, leave a message, or directly reach OAH about the hearing, he clearly made a mistake when he chose which number or numbers he should call. He could also reasonably be said to have made a mistake in failing to try other numbers when his initial efforts to speak with someone about the hearing were not successful. It appears, however, given that he did make some effort to call about rescheduling the hearing, and at all relevant times believed that he had called an appropriate phone number, that his mistake was likely the result of either a lack of knowledge of the correct phone number to call, the failure of OAH to explicitly provide him with the correct number to call, or his inability to follow OAH’s implicit directions to call a particular number if he was unable to

¹ In common usage, “mistake” is defined as “to blunder in the choice of;” “to misunderstand the meaning or intention of : misinterpret,” “to make a wrong judgment of the character or ability of,” or “to identify wrongly : confuse with another.” See <https://www.merriam-webster.com/dictionary/mistake>.

attend the hearing as scheduled.² A mistake occurring under such circumstances is, more likely than not, excusable as the result of inadequate notice or inability to follow directions despite substantial efforts to comply.

The ALJ therefore erred in denying claimant's request to reopen. Claimant showed that an excusable mistake prevented him from requesting in advance that the August 30th hearing when a last-minute change to his work schedule justifiably prevented him from attending the hearing as scheduled. He therefore established good cause to reopen the hearing. Order No. 18-UI-117970 is therefore set aside, and this matter returned to OAH for a hearing on the merits of decision # 110548.

DECISION: Order No. 18-UI-117970 is set aside, as outlined above.

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

DATE of Service: November 27, 2018

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² Notably, nothing in this record suggests that OAH provided claimant with a phone number or directions about which number to call in advance of the hearing if he was unable to attend it or needed to reschedule it. Claimant would have had to infer from the notice of hearing's instructions that he should use one of several phone numbers specified for other scenarios.