

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0208**

*Reversed*  
*Late Request to Reopen Granted*

**PROCEDURAL HISTORY:** On October 29, 2018, the Oregon Employment Department (the Department) served, by mail, notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143133). On November 7, 2018, claimant filed a timely request for hearing. On November 15, 2018, the Office of Administrative Hearings (OAH) served, by mail, notice of a hearing scheduled for November 29, 2018. On November 29<sup>th</sup>, claimant failed to appear at the hearing, and ALJ M. Davis issued Order No. 18-UI-120462, dismissing claimant's request for hearing due to his failure to appear. On December 19, 2018, Order No. 18-UI-120462 became final without claimant having filed a request to reopen the November 29<sup>th</sup> hearing. On December 20, 2018, claimant filed, by fax, a late request to reopen the hearing. On February 8, 2019, ALJ M. Davis conducted a hearing, and on February 11, 2019 issued Order No. 19-UI-124397, dismissing claimant's late request to reopen. On February 5, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

With his application for review, claimant submitted a copy of his request to reopen the November 29<sup>th</sup> hearing, which was admitted into the hearing record as Exhibit 1. EAB considered the entire hearing record, including Exhibit 1, when reaching this decision.

**FINDINGS OF FACT:** (1) Claimant did not receive the November 15<sup>th</sup> notice of the November 29<sup>th</sup> hearing on decision # 143133 in the mail. He failed to appear at the hearing because he did not know that it had been scheduled.

(2) After receiving Order No. Order No. 18-UI-120462 in the mail, claimant called OAH, explained why he failed to appear at the hearing and was given instructions on how to appeal the decision. On December 13<sup>th</sup>, claimant used his laptop at work to draft a request to reopen the hearing, and attempted to file his request by fax. Unknown to claimant, however, OAH did not receive the fax.

(3) While out-of-town on December 16<sup>th</sup>, claimant called OAH to check on the status of his request to reopen the hearing and learned that OAH had not received his request. Claimant did not make another

attempt to file request to reopen the hearing while out-of-town because the laptop on which he saved a copy of his request to reopen and the information he needed file it was at work.

(4) On December 19<sup>th</sup> claimant returned home from out-of-town. On December 20<sup>th</sup>, he returned to work, and retrieved his request to reopen and the information he needed from his laptop. That same day, claimant faxed his request to reopen from a FedEx location to ensure that the fax was successful.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and grant claimant's late request to reopen the November 29<sup>th</sup> hearing on decision # 143133.

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,<sup>1</sup> and the party 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). The party requesting reopening shall set forth the reason(s) for missing the hearing in a written statement, which OAH shall consider in determining whether good cause exists for failing to appear at the hearing. OAR 471-040-0040(3).

The period within which a party may request reopening may be extended if the party requesting reopening has good cause for failing to request reopening within the time allowed, and acts within a reasonable time. OAR 471-040-0041(1). "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. OAR 471-040-0041(2). "A reasonable time," is seven days after the circumstances that prevented a timely filing ceased to exist. OAR 471-040-0041(3).

The first issue in this case is whether claimant had good cause for failing file a request to reopen the November 29<sup>th</sup> hearing by the December 19<sup>th</sup> deadline. In Order No. 19-UI-124397, the ALJ found that on December 13<sup>th</sup>, claimant attempted to fax a request to reopen the hearing, and that on December 16<sup>th</sup>, he contacted OAH and learned that his request to reopen had not been received.<sup>2</sup> The ALJ further found that claimant was out-of-town and did not have his paperwork to file a request a reopen, and that he therefore filed a late request to reopen on December 20<sup>th</sup> after returning home on December 19<sup>th</sup>.<sup>3</sup> The ALJ then dismissed claimant's request to reopen as late without good cause, summarily asserting that while claimant may have been out-of-town, he was able to contact OAH and could have submitted a request prior to returning home.<sup>4</sup>

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<sup>1</sup> Where, as here a request to reopen is filed by fax, the filing date is the encoded date on the fax document unless such date is absent, illegible, or improbable, in which case the fax receipt date stamped or written by the agency employee, if available, shall be the date of filing. See OAR 471-040-0005(4)(c) (July 15, 2018), OAR 471-040-0040(5) (February 10, 2012), OAR 471-040-0041(5) (February 10, 2012). If a filing date cannot otherwise be determined, the most probable date of faxing shall be the date of filing. *Id.*

<sup>2</sup> Order No. 19-UI-124397 at 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id. at 3.*

However, several factors beyond claimant's reasonable control contributed to his failure to file a timely request to reopen the hearing, including OAH's failure to receive the request to reopen he faxed on December 13<sup>th</sup>, and claimant being out-of-town until December 19<sup>th</sup> without his laptop when he learned on December 16<sup>th</sup> that OAH had not received the fax. The record fails to show that claimant could have submitted a request to reopen including a written statement explaining why he missed the hearing without the laptop, on which he had saved a copy of his request and the information he needed to file it. Nor does the record show that claimant returned home on December 19<sup>th</sup> in time to go to work, access his laptop, and file a request to reopen before the end of the day. However, even if it was possible for claimant to have filed a timely request to reopen between December 16<sup>th</sup> and 19<sup>th</sup>, his failure to do so nevertheless arose from factors beyond his reasonable control and was, at worst, an excusable mistake under the circumstances. And because claimant filed his late request to reopen only one day after he returned from out-of-town, he filed the request within a reasonable time.

The remaining issue is whether claimant had good cause for failing to appear at the November 29<sup>th</sup> hearing. In Order No. 19-UI-124397, the ALJ found that claimant did not receive the November 15<sup>th</sup> notice of the hearing in the mail.<sup>5</sup> We agree with that finding. At hearing, claimant testified that he did not receive the notice.<sup>6</sup> Claimant likely would have appeared at the hearing if he had received it, given that he filed a timely request for hearing after receiving decision # 143133 in the mail, attempted to fax a timely request to reopen the hearing after receiving Order No. 18-UI-120462 in the mail, contacted OAH to check the status of his request to reopen while he was out-of-town, re-faxed his request to reopen from a FedEx location when he returned to ensure that the fax was successful, and filed a timely application for review after receiving Order No. 19-UI-124397 in the mail. Claimant's testimony and corroborating circumstantial evidence are sufficient to establish that he did not receive the notice of hearing in the mail, which was a factor beyond his reasonable control that prevented him from appearing at the hearing. Claimant therefore established good cause for failing to appear at the hearing.

Claimant's late request to reopen the November 29<sup>th</sup> hearing on decision # 143133 is granted.

**DECISION:** Order No. 19-UI-124397 is set aside, as outlined above.

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

**DATE of Service:** March 22, 2019

**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.

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<sup>5</sup> *Id.* at 2.

<sup>6</sup> Audio Record at 9:00.

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# Understanding Your Employment Appeals Board Decision

## English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

## Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

## Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

## Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

## Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

**Khmer**

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**Laotian**

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

**Arabic**

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**Farsi**

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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