

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0174

Reversed
Late Request for Hearing Allowed
Merits Hearing Required

PROCEDURAL HISTORY: On December 6, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that wages and hours were correct as reported by Business Group Inc. on claimant's claim determination, and that claimant's claim determination remained unchanged. The decision did not refer to any other employer. The decision stated that the decision was final unless a hearing was requested within ten days of the date of the letter. On December 16, 2019, the December 6 decision became final without claimant having filed a request for hearing. On December 17, 2019, claimant filed a late request for hearing on the December 6, 2019 decision. On December 31, 2019, ALJ Kangas issued Order No. 19-UI-141943, dismissing claimant's late request for hearing, subject to his right to renew the request by responding to an appellant questionnaire by January 14, 2020. On January 3, 2020, claimant filed a timely response to the appellant questionnaire. On January 17, 2020, the Office of Administrative Hearings (OAH) cancelled Order No. 19-UI-141943 and on January 27, 2020, served notice of a hearing scheduled for February 7, 2020 on whether claimant's late request for hearing should be allowed and, if so, the merits of the December 6, 2019 decision. On February 7, 2020, ALJ Shoemake conducted a hearing on whether claimant's late request for hearing should be allowed, and on February 14, 2020, issued Order No. 20-UI-144527, re-dismissing claimant's request. On February 25, 2020, claimant filed a timely application for review of Order No. 20-UI-144527 with the Employment Appeals Board (EAB).

EAB did not consider claimant's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that claimant did not file a timely request for hearing on the December 6, 2019 decision is **adopted**. The remainder of the decision addresses whether claimant's late request for hearing should be allowed.

FINDINGS OF FACT: (1) Before December 6, 2019, claimant requested an adjustment of claim determination to include missing wages from Business Group Inc. and DCW Services (DCW) as a basis for his unemployment insurance benefit claim.

(2) On December 6, 2019, the Department advised claimant by telephone, “Tax is still working on wages from [employer] DCW but have added wages from Business Group [Inc.]”¹

(3) The Department determined that DCW and Business Group Inc. were one employer before it issued the December 6, 2019 administrative decision.

(4) On December 10, 2019, claimant received the December 6, 2019 administrative decision stating that wages were correct as reported by Business Group Inc. Claimant read the decision and understood that the deadline for a timely request for hearing on that decision was December 16, 2019. Claimant did not understand that in denying claimant’s request for an adjustment of claim determination, the Department denied claimant’s request to adjust wages and hours from DCW in addition to Business Group Inc. because it had determined they were not separate employers.

(5) On December 11, 2019, claimant told a Department tax representative who had worked on his request for an adjustment to his claim determination that he disagreed that DCW and Business Group Inc. were the same employer. Claimant told the representative, “DCW and Business Group [Inc.] are not the same employer and despite [information] from DCW . . . [claimant] was paid much more than the wages that were added ***.”² The tax representative told claimant they would call claimant back on December 17, 2019. Claimant understood the call would be regarding adding wages from DCW.

(6) Before December 16, 2019, the Department adjusted claimant’s claim determination to include wages that claimant considered to be directly from Business Group Inc. Claimant agreed with those adjustments.

(7) On December 17, 2019, claimant spoke with the Department tax representative again, and based on their conversation, claimant understood that the December 6, 2019 decision denied his request to add wages from DCW. Claimant filed a request for hearing by telephone at that time.

CONCLUSIONS AND REASONS: Claimant’s late request for hearing regarding the December 6, 2019 decision is allowed. Claimant is entitled to a hearing on the merits of that decision.

ORS 657.266 provides that the Department’s decisions become final unless a party files a request for hearing within 10 days after the date the decision is mailed. ORS 657.875 provides that the 10-day deadline may be extended a “reasonable time” upon a showing of “good cause.” OAR 471-040-0010

¹ EAB has taken notice of this fact, which is contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information 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(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

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(February 10, 2012) provides that “good cause” includes factors beyond an applicant’s reasonable control or an excusable mistake, and defines “reasonable time” as seven days after those factors ceased to exist.

Order No. 20-UI-144527 found that claimant did not request a hearing in a timely manner because he “thought the matter was resolved,” and that his assumption and failure to request the hearing were within his reasonable control.³ The order found that claimant could have requested a hearing to “preserve his hearing rights pending any *subsequent action* by the Employment Department,” and did not therefore show good cause to extend the filing deadline.⁴ However, the record shows that claimant showed good cause to extend the filing deadline.

The record supports the conclusion that filing timely was within claimant’s reasonable control. Claimant read the decision and understood that he must request a hearing by December 16, 2019 if he disagreed with the decision. However, under OAR 471-040-0010, determining that filing timely was within claimant’s reasonable control does not end the inquiry. The next inquiry is whether or not claimant’s late request for hearing was the result of an excusable mistake.

An “excusable mistake” is generally considered a mistake that 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, there is an issue of due process and inadequate notice because, although the Department considered DCW and Business Group Inc. to be one employer, the decision does not state that determination or otherwise mention DCW. Claimant understandably did not know from the December 6 decision that the adjustment denial was for wages from DCW in addition to wages from Business Group Inc. The Department had already added wages for Business Group Inc. before December 16, so claimant did not see a need to request a hearing if the December 6 decision was regarding only wages from Business Group Inc. When claimant spoke with a Department representative on December 11, 2019, the representative discussed adding additional wages from DCW, and told claimant they would discuss it further on December 17. Claimant therefore believed the matter was still under investigation regarding wages from DCW. The order under review states that claimant could have requested a hearing to preserve his rights for “subsequent action” by the Department. To require claimant to request a hearing to preserve his rights “pending any subsequent action,” requires claimant to request a hearing without notice. Due process requires that claimant receive notice of the decision for which he must request a hearing.

The remaining issue is whether claimant filed his request for hearing within a reasonable time. The circumstances that prevented a timely filing ceased to exist on December 17, 2019, when claimant learned that the Department’s denial of his request for adjustment of claim determination applied to DCW in addition to Business Group Inc. Claimant filed his request for hearing the same day, which is less than seven days after the circumstances that prevented at timely filing ceased to exist. Claimant therefore filed his request for hearing within a reasonable time.

Claimant’s late request for hearing on the December 6, 2019 decision therefore is allowed. Claimant is entitled to a hearing on the merits of that decision.

³ Order No. 20-UI-144527 at 2.

⁴ Order No. 20-UI-144527 at 2 (italics added).

DECISION: Order No. 20-UI-144527 is set aside, as outlined above.

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

DATE of Service: March 24, 2020

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-144527 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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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 desisyong ito.

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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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