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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0640

Order No. 20-UI-152271 Modified – Claimant's Requests to Reopen Allowed
Order No. 20-UI-150463 Vacated
Order No. 20-UI-149450 Modified – Employer's Request to Reopen Allowed, Merits Reversed & Remanded
Order No. 19-UI-137525 Reversed & Remanded
New Merits Hearing Required

PROCEDURAL HISTORY: On August 27, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct within 15 days of claimant's planned voluntary leaving without good cause, and that claimant was disqualified from receiving benefits effective July 28, 2019 (decision # 131331). On September 11, 2019, claimant filed a timely request for hearing on decision # 131331.

On September 16, 2020, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for September 25, 2019 at 2:30 p.m. On September 25, 2019, ALJ Shoemake conducted a hearing at which time the employer failed to appear, and on October 3, 2019 issued Order No. 19-UI-137525, concluding that claimant's discharge was not for misconduct and that he therefore was not disqualified from benefits. On October 23, 2019, Order No. 19-UI-137525 became final without the employer having filed a request to reopen the hearing.

On February 26, 2020, the employer filed a late request to reopen the September 25, 2019 hearing. On March 31, 2020, OAH mailed notice of a hearing scheduled for April 17, 2020 at 9:30 a.m. On April 17, 2020, ALJ Shoemake convened a hearing at which claimant failed to appear, and continued the hearing to another date. On April 17, 2020, OAH mailed notice of the continued hearing scheduled for May 1, 2020 at 10:45 a.m. On May 1, 2020, ALJ Shoemake conducted the continued hearing, at which claimant again failed to appear. On May 8, 2020, ALJ Shoemake issued Order No. 20-UI-149450, allowing the employer's request to reopen the September 25th hearing, and concluding that the employer had discharged claimant for misconduct and that claimant was therefore disqualified from benefits effective July 14, 2019.

On May 11, 2020, claimant filed a request to reopen the hearing that had been held on April 17th and May 1st. On May 18, 2020, OAH mailed notice of a hearing scheduled for May 29, 2020 at 10:45 a.m., at which time claimant failed to appear. On May 29, 2020, ALJ Shoemake issued Order No. 20-UI-150463, dismissing claimant's May 11th request to reopen for failure to appear. On June 2, 2020, claimant filed a request to reopen the May 29, 2020 hearing. On June 17, 2020, OAH mailed notice of a hearing scheduled for July 15, 2020 at 10:45 a.m. On July 15, 2020, ALJ Shoemake conducted a hearing at which both claimant and the employer appeared,[1] and on July 17, 2020 issued Order No. 20-UI-152271, allowing claimant's request to reopen the May 29th hearing, but denying claimant's request to reopen the May 1, 2020 hearing.[2]

On August 4, 2020, claimant filed a timely application for review of Order No. 20-UI-152271 with the Employment Appeals Board (EAB). EAB received claimant's application for review on September 30, 2020.

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) The Department mailed notice of decision # 131331, and OAH mailed the notice of hearing scheduling the September 25th hearing and Order No. 19-UI-137525, to the employer at an address on Fuller Road in Milwaukie, Oregon. The employer did not receive any of those documents because the employer's address of record was not on Fuller Road. The employer was not aware that they had missed the September 25th hearing, and was not aware of Order No. 19-UI-137525, which allowed claimant benefits.

(2) On February 24, 2020, the employer received a document from the Department indicating that claimant had been allowed benefits. The employer then contacted the Department and learned of the September 25th hearing and the order that allowed claimant benefits. Two days later, on February 26, 2020, the employer filed a request to reopen the September 25th hearing.

(3) Prior to March 2020, claimant maintained a mailbox located on Sunnyside Road in Clackamas. After March 1, 2020, claimant discontinued using that address to collect his mail. Claimant did not immediately change his address of record with OAH after he stopped using the Sunnyside Road address. He received Order No. 19-UI-137525, which became final on October 23, 2019, and because that case was resolved, he no longer had ongoing business with OAH. Claimant did not immediately change his address of record with the Department because he was not actively claiming benefits between September 15, 2019 to July 27, 2020.[3]

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[1] The employer disconnected from the conference line before the July 15th hearing ended and did not offer evidence.

[2] On July 18, 2020, claimant requested that the July 15th hearing be continued; claimant mailed the letter requesting the continuance to the employer. On August 10, 2020, Presiding ALJ Lohuis denied the request.

[3] EAB has taken notice of the dates claimant claimed benefits, which are contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Department records show that last claimed benefits during the week ending September 14, 2019 and did not begin claiming again until July 28, 2020. 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

(4) OAH mailed notice of the April 17, 2020 and May 1, 2020 hearings to claimant at his address of record at the time, which was the Sunnyside Road address that he no longer used. Claimant did not receive either of those notices of hearing. Claimant subsequently learned of the April 17th and May 1st hearings. On May 11, 2020, claimant filed a timely request to reopen with OAH that included his current address.

(5) OAH mailed notice of the May 29th hearing to the address claimant had provided. At all relevant times claimant was regularly monitoring and receiving mail at that address. On May 26, 2020, claimant checked his mail. The notice of hearing was not included in the mail he collected. On May 30, 2020, the day after the hearing was held, claimant collected his mail again. He received a notice in his mailbox that he had mail items that were too large to fit in his mailbox. Claimant collected the oversized mail items at that time, including the envelope containing notice of the May 29th hearing. He filed a request to reopen the May 29th hearing four days later on June 2nd.

CONCLUSIONS AND REASONS: Claimant's and the employer's requests to reopen are allowed, and this matter is remanded to OAH for a hearing on the merits of decision # 131331.

Claimant's request to reopen the May 29th hearing. The first issue that must be decided is whether or not claimant had good cause to reopen the May 29th hearing.

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).

Claimant failed to appear at the May 29th hearing because he did not receive the notice scheduling that hearing until May 30th. Claimant had provided OAH with his correct address and regularly monitored the mail that was sent to that address. His failure to attend the May 29th hearing was therefore attributable to factors beyond his reasonable control. Claimant's request to reopen the May 29th hearing is allowed.

Claimant's request to reopen the April 17th and May 1st hearings. Having concluded that claimant's request to reopen the May 29th was allowed, the next issue that must be decided is whether claimant established good cause to reopen the April 17th and May 1st hearings.

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).

Claimant also failed to appear at the April 17th and May 1st hearings because he did not receive the notices of hearing OAH mailed to his address of record. Order No. 20-UI-152271 denied claimant's request to reopen, attributing claimant's failure to receive the notice of hearing "to his failure to change his address that he had not been using since March," and concluding it was within his reasonable control

to have changed his address with OAH, received the notices of hearing, and attended the hearings. *See* Order No. 20-UI-152271 at 4. However, the hearing record, and Department records of which EAB has taken notice, do not support a denial of claimant's request to reopen the April 17th and May 1st hearings.

OAR 417-040-0040(2) excludes from the definition of "good cause" a "[f]ailure to receive a document due to not notifying the Employment Department or Office of Administrative Hearings of an updated address *while the person is claiming benefits or if the person knows, or reasonably should know, of a pending appeal*." (Emphasis added.) In this case, claimant was not claiming benefits at the time the notices scheduling the April 17th and May 1st hearings were mailed, and he had not claimed benefits since the previous September. Claimant did not know, and could not reasonably have known, of a pending appeal because Order No. 19-UI-137525, which allowed him benefits and resolved the issues related to his receipt of benefits, became final on October 23, 2019 without the employer having filed a timely request to reopen. By the time the employer requested reopening and OAH mailed notices of the April 17th and May 1st hearings, claimant had not claimed benefits in almost seven months, and had not had business before OAH in approximately six months. Under those circumstances, claimant had no reasonable obligation to keep the Department or OAH informed of changes to his address. Attending the April 17th and May 1st hearings was therefore beyond claimant's reasonable control, and he has established good cause to reopen those hearings.

The employer's late request to reopen the September 25th hearing. Having concluded that claimant established good cause to reopen the April 17th and May 1st hearings, the next controversy that must be decided is whether the employer had good cause for filing a late request to reopen the September 25th hearing, and, if so, whether he had good cause to reopen that hearing.

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. 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) (February 10, 2012). "Good cause" in this context includes "[f]ailure to receive a document because [the Department or OAH] mailed it to an incorrect address despite having the correct address." OAR 471-040-0041(2)(a)(A). "A reasonable time," is seven days after the circumstances that prevented a timely filing ceased to exist. OAR 471-040-0041(3).

The employer filed a late request to reopen the September 25th hearing because the employer did not receive notice of decision # 131331, the notice scheduling the September 25th hearing, or the order resulting from that hearing, until late February 2020. Each of those documents was mailed to an incorrect address, which is both beyond the employer's reasonable control and fits squarely within the definition of good cause outlined above. The employer filed the late request to reopen within a "reasonable time," because the employer filed within two days after finding out about this matter. The employer therefore had good cause to file a late request to reopen.

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" in this context includes "[f]ailure

to receive a document because [the Department or OAH] mailed it to an incorrect address despite having the correct address." OAR 471-040-0040(2)(a)(A) (February 10, 2012).

The employer failed to attend the September 25th hearing because OAH did not mail notice of the hearing to the employer's correct address. The employer therefore had good cause to reopen the September 25th hearing.

The merits of decision # 131331. Because claimant and the employer have established good cause to reopen the September 25, 2019 hearing, the April 17, 2020 hearing, the May 1, 2020 hearing, and the May 29, 2020 hearing, the final issue that must be decided is whether claimant should be disqualified from receiving unemployment insurance benefits because of his work separation from the employer.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a). "'[W]antonly negligent' means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c).

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." OAR 471-030-0038(4). "[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work." OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant with a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h) who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment would have continued to work for their employer for an additional period of time.

ORS 657.176(8) states, "For purposes of applying subsection (2) of this section, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that: (a) The voluntary leaving would be for reasons that do not constitute good cause; (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for

benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date."

The record, viewed as a whole, cannot support a finding about the nature of the work separation or whether claimant should be subject to disqualification from receipt of benefits because of the work separation. For instance, the combined hearings do not show what the final incident(s) were that caused claimant to give notice of his intent to quit work, or the final incident(s) that resulted in his discharge.

Claimant attended the September 29th hearing and provided testimony about his work separation. His testimony resulted in an order concluding that the employer discharged claimant, not for misconduct, on July 19th, and that claimant was not subject to disqualification from unemployment insurance benefits. The employer did not appear at that hearing, but established that they had good cause to reopen that hearing, and has not had the opportunity to meaningfully respond to claimant's testimony.

The employer attended the April 17th and May 1st hearings and provided testimony about claimant's work separation. The owner's testimony resulted in an order concluding that the employer discharged claimant for misconduct within 15 days of a planned voluntary leaving without good cause. Claimant failed to appear at those hearings, but established good cause to reopen those hearings, and has not had any opportunity to respond to the employer's testimony.

Because the parties in this case have not mutually appeared at a hearing about claimant's work separation, and have not had a meaningful opportunity to either develop a full record or respond to each other's evidence, due process requires that the parties be allowed to appear at a hearing about the merits of decision # 131331, provide evidence about claimant's work separation, and respond to each other's testimony about the work separation. Given the state of the record in this matter, due process would be best served by a hearing on the merits of decision # 131331 being scheduled, at which time the ALJ would conduct that hearing anew, as if for the first time.

This matter is therefore remanded for a completely new hearing on the merits of decision # 131331.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order Nos. 20-UI-152271, 20-UI-150463, 20-UI-149450, or 19-UI-137525 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

DECISION: Order No. 20-UI-152271 is modified as outlined above; claimant's May 11th and June 2nd requests to reopen are allowed. Order No. 20-UI-150463, dismissing claimant's May 11th request to reopen, is therefore vacated. Order No. 20-UI-149450 is modified as outlined above; the employer's February 26th request to reopen is allowed, but the order is set aside and remanded with respect to the work separation. Order No. 19-UI-137525 is set aside and remanded. A new hearing on the merits of decision # 131331 is required.

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

DATE of Service: <u>October 8, 2020</u>

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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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 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 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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www.Oregon.gov/Employ/eab

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