

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0016

Reversed
Request to Reopen Granted
Merits Hearing Required

PROCEDURAL HISTORY: On September 21, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and was disqualified from receiving unemployment insurance benefits effective April 12, 2020 (decision # 84612). Claimant filed a timely request for hearing. On October 22, 2020, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for November 2, 2020 at 1:30 p.m. On November 2, 2020, claimant failed to appear for the hearing, and ALJ Williams issued Order No. 20-UI-155992 dismissing claimant's request for hearing because claimant failed to appear. On November 5, 2020, claimant filed a timely request to reopen the hearing. On November 25, 2020, OAH mailed notice of a hearing scheduled for December 9, 2020 to consider claimant's request to reopen, and if granted, the merits of decision # 84612. On December 9, 2020, ALJ Wyatt conducted a hearing, and on December 17, 2020, issued Order No. 20-UI-157832 denying claimant's request to reopen. On January 4, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare 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). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

The parties may offer new information such as written argument and other documents not considered in this decision into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing

FINDINGS OF FACT: (1) On October 22, 2020, OAH mailed claimant notice of a hearing scheduled for November 2, 2020 at 1:30 p.m. Claimant received the notice before November 2, 2020.

(2) On November 2, 2020, shortly before 1:30 p.m., claimant used her cell phone to call in for the hearing, but due to poor reception in Monmouth, Oregon where she was located at the time of call, she was unable to access the hearing. Claimant subsequently used a landline available to her at that time to call the telephone number to call in for the hearing. Claimant tried “multiple times” on her cell phone and the landline to call in for the hearing, but each time she entered the access code to enter the hearing that was provided on the notice of hearing, she was disconnected from the telephone line. Audio Record at 18:15. The owner of the landline told claimant their landline sometimes had poor reception.

(3) After 1:30 p.m., claimant realized that the time for the hearing to begin had passed, and called the number on the notice of hearing that it stated a party should call if they have difficulty calling in for the hearing. An OAH representative told claimant that her request for hearing had been dismissed and that she could request to reopen the hearing. The representative told claimant that she would “trace back” the three telephone numbers claimant used to call in for the hearing, and would call claimant back with that information. Audio Record at 19:06. OAH did not call claimant back.

(4) On November 5, 2020, claimant filed a timely request to reopen the hearing.

CONCLUSIONS AND REASONS: Claimant had good cause to reopen the November 2, 2020 hearing, and a hearing on the merits of decision # 84612 is required.

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). The party requesting reopening shall set forth the reason(s) for missing the hearing in a written statement, which the Office of Administrative Hearings (OAH) shall consider in determining whether good cause exists for failing to appear at the hearing. OAR 471-040-0040(3).

Order No. 20-UI-157832 concluded that claimant did not have good cause to reopen the hearing. The order relied on an internal OAH document regarding its telephone conference system, not provided to the parties before the hearing, and concluded that “an OAH report from [OAH’s information technology] showed that no call was received from claimant (or from any unidentified number) to the hearing number and access code for or after the 1:30 p.m. hearing.” Order No. 20-UI-157832 at 3. The order further relied on the fact that employer representative had no difficulty connecting to the hearing line on November 2, 2020. *See* Order No. 20-UI-157832 at 3. However, the record does not support the order’s conclusion.

The preponderance of the persuasive evidence in the record shows claimant had good cause to reopen the hearing. OAR 471-040-0040(2)(a)(B) states that, for telephone hearings, “unanticipated, and not reasonably foreseeable, loss of telephone service” is good cause for failing to appear at a hearing. Claimant’s firsthand testimony was that she attempted to call in repeatedly at the time of the hearing using three different telephone numbers, including a landline, and was disconnected from the hearing

line each time when she entered the access code for the hearing. Audio Record at 17:50 to 18:18, 22:09 to 22:48, 23:36 to 23:54. Even if the OAH internal telephone conference document could properly be considered as a record document or an exhibit, claimant's firsthand testimony outweighs the probative value of that document and its implications. Even if an OAH record showed that "no call was received from claimant (or from any unidentified number)," the record is insufficient to show if that record reflected all calls to OAH, or only calls that entered the hearing using the access code, which claimant was unable to do before she was disconnected. It is reasonable to presume that claimant did not know she would have poor cell phone reception at the time of her hearing, and there is no evidence in the record to suggest that claimant knew or should have known before the hearing time that the landline she used would also be unreliable. It is more likely than not on this record that claimant's failure to participate in the hearing was the result of unanticipated, and not reasonably foreseeable, loss of phone service. That the employer's witness in Corvallis, Oregon did not have difficulty accessing the hearing is irrelevant because the record shows claimant's telephone problems were due to poor reception in Monmouth at the time of the hearing.

At hearing, claimant testified that she "kept trying to access the hearing" rather than immediately calling the alternate phone number listed on the notice of hearing for parties who have difficulty connecting to their hearing. Even had claimant called the alternate number sooner, the record does not show that claimant would have been able to reach someone via the alternate number in time to join the hearing, which was dismissed about ten minutes after the time the hearing was scheduled to begin. *See* Order No. 20-UI-155992 at 1. Claimant's failure to call the alternate number sooner was, at worst, an excusable mistake.

Claimant had good cause for failing to appear at the November 2, 2020 hearing. Claimant is entitled to a hearing on the merits of decision # 84612.

DECISION: Order No. 20-UI-157832 is set aside, as outlined above. Claimant is entitled to a hearing on the merits of decision # 84612.

S. Alba and D. P. Hettle.

DATE of Service: January 22, 2021

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. 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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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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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
www.Oregon.gov/Employ/eab

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