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In the Matter of the Compensation of  
**LISA M. KASEL, Claimant**  
WCB Case No. 10-07059  
ORDER ON REVIEW  
Daniel Snyder, Claimant Attorneys  
Eric Miller LLC, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Claimant requests review of Administrative Law Judge (ALJ) Dougherty's order that: (1) found that claimant's hearing request from the self-insured employer's denial of her occupational disease claim was untimely filed; and (2) upheld the employer's denial. On review, the issues are timeliness, good cause, and, potentially, compensability. We affirm, as modified.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following summary of pertinent facts related to the timeliness issue.

On September 16, 2010, the employer denied compensability of claimant's injury/occupational disease claim. (Ex. 24).

On October 6, 2010, claimant's counsel completed and signed a "Request for Hearing and Specification of Issues" form. (Ex. 24AA-1-2). A certificate of service indicated that the request was served on the employer's claim administrator by first-class mail on that same day. (Ex. 24AA-3).

On October 25, 2010, the employer's counsel provided claimant's counsel with a copy of the discovery to date and proposed exhibits "for the pending hearing." It also informed claimant's counsel that, as of that date, "WCB did not have a WCB number or hearing date assigned." (Ex. 25A).

On December 28, 2010, claimant's attorney informed the Board via letter that he had requested a hearing on October 6, 2010, but that he had "not received [a] Notice of Hearing." He explained, "I know that my request for hearing was sent to [the Board] because the insurance company received a copy." He stated that he had been told by the Board's staff that there was no record of his request for hearing. Claimant's letter included a copy of the October 6, 2010 request for hearing and corresponding certificate of service (which indicated that he had

mailed a copy of the hearing request to the employer's claim administrator), and a copy of his retainer agreement. He also enclosed a copy of the October 25, 2010 letter from employer's counsel, and the exhibit lists. (Ex. 26A).

Claimant's December 28, 2010 letter was sent to the Board via regular mail with a postmark date of December 28, 2010. The Board received the letter on December 29, 2010. (Ex. 28-4).

In a January 24, 2011 affidavit, claimant's counsel's legal assistant, Ms. Hentrup, stated that, on October 5, 2010,<sup>1</sup> she mailed, by regular mail, a request for hearing on behalf of claimant to the employer's administrator and the Board at its Salem address. Ms. Hentrup noted that the law firm received a "very prompt response" to the request for hearing from the employer's counsel and that she had worked with him to set up a deposition. However, she did not realize that the Board had not received the hearing request. (Ex. 29).

At hearing, Ms. Hentrup testified that there was "no doubt" in her mind that she mailed the October 6, 2010 request for hearing to the Board by first-class mail on that date. (Tr. 12-13, 16). She explained that she did not think it was necessary to send the request by certified mail because it was being sent so early after the denial issued. (Tr. 13, 17). She explained that she did not list the Board on the Certificate of Mailing because "the original is filed with the Board" and only "the copies that are sent are indicated on the Certificate of Service." (Tr. 17, 20). According to Ms. Hentrup, there was no "diary system" to follow up on whether the Board had received the request--"usually we just wait to receive confirmation in the mail." (Tr. 17).

Ms. Hentrup stated that she had no workers' compensation experience as a paralegal before she began working for claimant's attorney in mid-September 2010. Between that time and October 6, 2010, she guessed that she had worked on "probably less than 20 \* \* \* maybe 10" workers' compensation claims. (Tr. 15, 16). She did not know how many requests for hearing she had filed during that time. (Tr. 16). She stated that she now sends cover letters on "everything," but when asked why there was no cover letter for the October 6, 2010 hearing request, Ms. Hentrup responded, "I think at that time I didn't--I didn't realize that I was required to submit a cover letter \* \* \*." (Tr. 18). She explained,

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<sup>1</sup> This date appears to be a typographical error. Based on the remainder of the record, including Ms. Hentrup's testimony, the request at issue was dated "October 6, 2010," and mailed that same date. (Ex. 24AA, 26A; Tr. 12-13, 16).

“I think that I just started putting cover letters on everything as a precaution, so that I could--so that I could make sure when looking back on some things that I could have proof when I sent something out. It just kind of occurred over time--\* \* \* I started putting cover letters on everything.” (*Id.*)

After the hearing, the employer requested from the Board copies of claimant’s counsel’s requests for hearing made during the fall of 2010. (Ex. 24B). Based on the Board’s records, claimant’s counsel’s office filed requests for hearing on October 6, 2010, and December 3, 2010. The October 6 request, which was dated October 5, 2010, was sent to the Board with a cover letter containing the notation: “DS:mlh.” (Ex. 24C-2). The certificate of service with that request listed the “Hearings Division, Worker’s Compensation Board.” (Ex. 24C-4). The December 3 request was also sent to the Board with a cover letter. That request was signed by an associate of claimant’s counsel, and did not list the Board on the corresponding certificate of service or contain the “DS:mlh” notation. (Ex. 24C-5, -8).

### CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that claimant’s request for hearing was not timely filed. ORS 656.319. On review, claimant disagrees, contending that she filed her request for hearing on October 6, 2010, within the required time limit. Alternatively, to the extent the request for hearing was filed more than 60 days but within 180 days after her receipt of the denial, claimant argues that she has established “good cause” for the late filing of her hearing request.<sup>2</sup>

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<sup>2</sup> Claimant also contests the ALJ’s admission of Exhibits 24B and 24C, which pertained to information regarding claimant’s attorney’s hearing requests filed with the Board from August through December 2010. Specifically, claimant contends that the documents are hearsay and not subject to cross-examination. She also asserts that they were obtained through *ex parte* contact with the Board. Based on the following reasoning, we find no abuse of discretion in the ALJ’s admission of the contested exhibits.

ORS 656.283(7) provides that the ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. That statute gives an ALJ broad discretion on determinations concerning the admissibility of evidence. *See Brown v. SAIF*, 51 Or App 389, 394 (1981). We, therefore, review the ALJ’s evidentiary ruling for abuse of discretion. *Rose M. LeMasters*, 46 Van Natta 1533 (1994), *aff’d without opinion*, 133 Or App 258 (1995). Thus, an ALJ may receive hearsay evidence and evaluate its weight in light of the circumstances of the case. *Zurita v. Canby Nursery*, 115 Or App 330, 334 (1992); *see also Armstrong v. SAIF*, 67 Or App 498, 501 n 2 (1984) (hearsay evidence may be admitted in workers’ compensation proceedings when there are sufficient indicia of reliability and when it is in the interest of substantial justice to do so); *Kimberley A. Wilkerson*, 61 Van Natta 451, 452 (2009) (same).

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For the following reasons, we dismiss claimant's hearing request as untimely filed.<sup>3</sup>

A request for hearing must be filed not later than the 60th day after the mailing of the denial to claimant. ORS 656.319(1)(a). A hearing request that is filed not later than the 180th day after mailing of the denial, and where the claimant establishes at a hearing that there was good cause for the late filing, will be considered timely. ORS 656.319(1)(b). The standard for determining if "good cause" exists has been equated to the standard of "mistake, inadvertence, surprise or excusable neglect" under ORCP 71B(1). *Brown v. EBI Cos.*, 289 Or 455, 458 (1980); *Sekermestrovich v. SAIF*, 280 Or 723, 727 (1977); *Ogden Aviation v. Lay*, 142 Or App 469, 476 (1996); *James E. Dolan*, 63 Van Natta 2534 (2011). Lack of diligence does not constitute good cause. *Cogswell v. SAIF*, 74 Or App 234, 237 (1985).

We first address whether claimant's hearing request was timely filed under ORS 656.319(1)(a). For the following reasons, we conclude that it was not.

"Filing" means the physical delivery of a thing to any permanently staffed office of the Board, or the date of mailing. OAR 438-005-0046(1)(a). If filing of a request for hearing is accomplished by mailing, it shall be presumed that the request was mailed on the date shown on a receipt for registered or certified mail bearing the stamp of the United States Postal Service showing the date of mailing.

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Here, following the conclusion of Ms. Hentrup's testimony, the employer's counsel requested the opportunity to present (if available) information regarding other hearing requests filed by claimant's counsel around the time of the alleged hearing request in this case (October 2010). The ALJ determined that it was unnecessary to rule on the request unless and until the employer's counsel obtained such information and submitted it for admission into the record. Thereafter, the employer's counsel made a written request for such information to the Board, which produced the disputed exhibits. We find no abuse of discretion in the ALJ's evidentiary ruling.

The admitted exhibits were relevant to the "timeliness" issue and addressed Ms. Hentrup's sworn recollections. Specifically, they further developed the record regarding Ms. Hentrup's testimony regarding an October 6 mailing to the Board of a hearing request, as well as her use of cover letters and certificates of mailing. Furthermore, the employer's counsel's contact with the Board merely sought copies of hearing requests from existing case records. In response, the Board's secretary provided copies of those requested materials to the employer's counsel, who submitted them to the ALJ (with copies to claimant's counsel). Considering the relevance of these materials, including the manner in which they were obtained and disclosed, we find no abuse of discretion in the ALJ's decision to admit these documents.

<sup>3</sup> We do not adopt the ALJ's findings, reasoning, and conclusions regarding the compensability issue.

OAR 438-005-0046(1)(c). If the request is not mailed by registered or certified mail and the request is actually received by the Board after the date of filing, it shall be presumed that the mailing was untimely unless the filing party establishes that the mailing was timely. (*Id.*)

Here, although claimant's October 6, 2010 request for review included a certificate of service indicating that copies of the request were sent to the employer's claim administrator by first-class mail on that date, the record does not establish that the request was mailed to the Board within 60 days of the date of mailing of the denial (*i.e.*, by or on November 15, 2010). Rather, the Board's hearing record establishes that our first receipt of claimant's request for hearing was December 29, 2010, when we received claimant's counsel's December 28, 2010 letter. Because that letter was mailed by regular, first-class mail, claimant's request was "filed" on December 29. *See* OAR 438-005-0046(1)(c). Inasmuch as December 29, 2010 is more than 60 days from the September 10, 2010 denial, the hearing request is presumed to be untimely unless claimant establishes that the mailing was timely. (*Id.*)

Claimant attempts to rebut the presumption of untimely filing by way of Ms. Hentrup's affidavit and testimony. Ms. Hentrup attested that she mailed, by regular mail, a request for hearing on behalf of claimant to the Board at its Salem address on October 5, 2010.<sup>4</sup> (Ex. 29). Likewise, she had "no doubt" that she mailed the request for hearing to the Board by first-class mail on October 6, 2010. (Tr. 12-13, 16). Ms. Hentrup explained that she did not list the Board on the certificate of mailing because it was getting the original, and only "the copies" were indicated on the certificate. (Tr. 17, 20). She also explained that there was no cover letter to the Board for the October 6, 2010 hearing request because "at that time I didn't--I didn't realize that I was required to submit a cover letter \* \* \*." (Tr. 18). She eventually started putting cover letters on everything. (*Id.*)

Standing alone, the testimony and affidavit provided by Ms. Hentrup regarding the date of mailing may be sufficient to rebut the presumption of untimely filing. *See, e.g., Michael D. Hulme*, 53 Van Natta 773 (2001) (presumption of untimely mailing rebutted by affidavit that the hearing request was deposited at a post office within the appeal period); *James R. Corum*, 52 Van Natta 984 (2000) (presumption of untimely filing rebutted where attorney's assistant attested to mailing the request for review within the appeal period);

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<sup>4</sup> See note 1, *supra*.

*Randolph King*, 51 Van Natta 82 (1999) (presumption of untimely mailing rebutted by an affidavit attesting that the request for hearing was timely mailed to the Board and parties).

However, the additional information in the record regarding claimant's counsel's requests for hearing in the fall of 2010 persuasively rebuts Ms. Hentrup's representations. Based on that information, it appears that Ms. Hentrup prepared a hearing request, dated October 5, 2010, for a different worker, which contained both a cover letter and a certificate of service listing the "Hearings Division, Worker's Compensation Board." (Ex. 24C). This October 5, 2010 hearing request would have been filed around the same time as she alleged for the October 6, 2010 hearing request. Because that request, which appears to have been prepared by Ms. Hentrup, contained both a cover letter and a certificate of service listing the Board, it casts doubt on Ms. Hentrup's sworn recollections regarding her reasons for not providing a cover letter or certificate of mailing for the Board with the October 6, 2010 request. Likewise, it calls into question Ms. Hentrup's representation that there was "no doubt" in her mind that she mailed a hearing request in this case to the Board on October 6.

Under these circumstances, we are not persuaded that Ms. Hentrup mailed a hearing request to the Board on or about October 6, 2010.<sup>5</sup> *See, e.g., Larry*

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<sup>5</sup> Claimant contends that this case is analogous to *Morelock Wood Products v. Bauer*, 105 Or App 371 (1991), which she argues stands for the proposition that a request for hearing can be found to have been made even when no request had actually been filed. However, the situation in *Morelock* is distinguishable.

In *Morelock*, during prehearing procedures to join the employer, Morelock, as a party in a responsibility hearing, the claimant's counsel sent a letter to the assigned ALJ along with a copy of Morelock's denial, expressing confusion about what steps to take procedurally regarding its joinder. Morelock filed a response that denied that the claimant had sustained a work-related accidental injury or occupational disease and denied that it was responsible. The response also said that it was demanding copies of "all medical reports and all other documents pertaining to this claim, whether or not claimant intends to rely on them *at hearing*." 105 Or App at 372 (emphasis in original). Morelock then wrote another letter, saying that it was enclosing "copies of additional documents presumably relevant to the issues *raised by the Request for Hearing* filed with regard [*sic*] to the referenced claim \* \* \*." *Id.* at 374 (emphasis in original). Citing ORS 656.319 and ORS 656.283, the court concluded that, although the claimant did not expressly request a hearing in his letter, Morelock treated the letter as a request by indicating in the response that its denial was at issue and requesting production of medical records in preparation for hearing. Thus, the court concluded that Morelock's response to the claimant's letter was, in effect, "recognition of a request for hearing."

Here, the determinative issue does not concern prehearing joinder procedures, or correspondence between the parties and an assigned ALJ. Thus, we find *Morelock* of little value. Moreover, the issue in *Morelock* concerned whether a claimant's letter constituted a hearing request (where it was undisputed

*DeWeese*, 60 Van Natta 3521 (2008) (any potential “certification” of mailing by the claimant’s counsel persuasively rebutted by the Board’s record and the insurer’s counsel’s affidavit that he did not receive a copy of the letter until after the 30-day appeal period had ran); *Linda J. Higginbotham*, 56 Van Natta 2968, *recons*, 56 Van Natta 4032 (2004) (the presumption of an untimely-filed request for Board review was not persuasively rebutted because the affidavits did not establish a chain of custody and there was no persuasive evidence that the request for review was deposited in the mail on a specific date); *Wayne P. Szymanski*, 55 Van Natta 1100 (2003) (the employer’s attorney’s assertion that he did not receive a copy of the claimant’s request for review persuasively rebutted the claimant’s representation that a copy of his request was mailed to the employer’s attorney); *Claude E. Harris*, 40 Van Natta 803 (1988) (because the claimant’s affidavit regarding the mailing of his request for Board review was outweighed by the remainder of the record, request was dismissed as untimely filed).

We next address whether claimant has established “good cause” for her failure to request a hearing within 60 days. As noted above, “good cause” has been equated with “mistake, inadvertence, surprise or excusable neglect.” *Brown*, 289 Or at 458.

On October 25, 2010, while acknowledging claimant’s discovery request for a “pending hearing,” the employer’s counsel also informed claimant’s counsel that the Board did not have a case number or hearing date assigned. (Ex. 25A). Also, according to Ms. Hentrup, the only follow-up method used to verify Board receipt of a request was confirmation from the Board in the mail. (Tr. 17). However, no hearing request acknowledgment from the Board regarding claimant’s case was ever received by claimant’s counsel’s office.

Given these circumstances, the record supports a conclusion that within three weeks of the alleged mailing of the hearing request, claimant’s counsel had reason to question whether that request had been received by the Board. Yet, claimant’s counsel took no action until some two months later. As such, we are unable to equate claimant’s counsel’s oversight with “mistake, inadvertence, surprise or excusable neglect.” Therefore, claimant has not established “good cause” for failing to timely file the hearing request. *See Sekermestrovich*, 280 Or

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that it had been received by the ALJ within the requisite time parameters). Here, in contrast, no such written document (hearing request or otherwise) was received within the required time. Consequently, the Board’s “filing” rules for hearing requests become directly applicable. *See OAR 438-005-0046(1)(c)*.

at 727 (failure of an attorney to file a request for hearing does not constitute good cause unless the attorney's reason for failing to file would be good cause if attributed to the claimant; negligence of an attorney in filing the request for hearing is not good cause); *Mendoza v. SAIF*, 123 Or App 349, 352-53 (1993), *rev den*, 318 Or 326 (1994) ("failure to request a hearing by someone charged with that responsibility is not excusable neglect"); *EBI Cos. v. Lorence*, 72 Or App 75 (1985) (the claimant did not establish good cause for his untimely filed hearing request where the negligence of the attorney in failing to keep track of the preparation of the request and to make sure that it was filed on time was the cause of the late request); *John Wyncoop*, 43 Van Natta 220 (1991) (where the claimant's former attorney lacked good cause for the late request for hearing, his lack of good cause was attributable to the claimant).

Accordingly, we dismiss claimant's request for hearing as untimely filed.

Finally, because claimant's hearing request was untimely, neither we nor the ALJ have authority to consider the merits of the employer's denial. *Linda L. Slagle*, 60 Van Natta 2138 (2008); *Larisa V. Morozova*, 60 Van Natta 757 (2008). Instead, the employer's denial stands as written and untimely appealed.

#### ORDER

The ALJ's order dated May 3, 2011 is affirmed, as modified. Claimant's hearing request is dismissed. The employer's denial is final by operation of law.

Entered at Salem, Oregon on April 20, 2012