IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Ann T. KROETCH,
Petitioner,

v.

EMPLOYMENT DEPARTMENT
and Wells Fargo,
Respondents.

Employment Appeals Board
12AB2638R; A159521

Argued and submitted April 11, 2016.

David C. Sorek argued the cause and filed the brief for petitioner.

Denise G. Fjordbeck waived appearance for respondent Employment Department.

No appearance for respondent Wells Fargo.

Before Armstrong, Presiding Judge, and Hadlock, Chief Judge, and Shorr, Judge.

HADLOCK, C. J.

Reversed and remanded.

HADLOCK, C. J.

Claimant seeks judicial review of a final order of the Employment Appeals Board (EAB) that denied claimant unemployment benefits. This is the second time that we have reviewed an EAB order denying claimant those benefits. As we did the first time, *Kroetch v. Employment Dept.*, 267 Or App 444, 341 P3d 137 (2014), we reverse and remand to the EAB.

We begin with the facts, which we take from the EAB's findings and from undisputed facts in the record. *Id.* at 445. Employer terminated claimant's employment and claimant sought unemployment benefits. On October 12, 2011, using a "Form 197," the Employment Department notified employer's representative, Barnett Associates, Inc., of the potential charges to employer that would result from claimant's claim.[1] On October 18, 2011, the department issued its administrative decision number 113857, in which it determined that employer had discharged claimant, but not for misconduct. Thus, the department allowed claimant benefits.

The same day, the department mailed Barnett notice of its determination that claimant was eligible for benefits, and Barnett received that notice on October 21, 2011. The mailing included a form that could be filled out and returned to request a hearing on the eligibility determination. The period for requesting a hearing on that decision ran through November 7, 2011. *See* ORS 657.269(2) (allowing 20 days after mailing of notice of decision to file request for hearing).

On November 1, 2011, a Barnett employee faxed the Form 197 that Barnett had received from the department—with additional information added to the form by a Barnett employee—to the department's Salem office. That form is entitled "Notice of Claim Determination (Potential Charges)" and includes identifying information for the worker, the amount of the employer's base year wages, and a number for "potential charges." A Barnett employee had filled in the date

[1] In general, a claimant's employer or employers pay for the benefits to which the claimant is entitled: "[B]enefits paid to an eligible individual shall be charged to each of the individual's employers during the base year." ORS 657.471(1). An employer is charged the same percentage of the claimant's benefits as the percentage of the claimant's wages that it paid during the base year. *Id.*

of claimant's last day of work on the line for "worker's last day of work" and stated that the reason for separation or termination was "claimant violated code of ethics policy." The Form 197 states, "to request relief, please check this box," and the Barnett employee checked the corresponding box. Attached to the completed Form 197 were 88 pages of documentation regarding the circumstances of claimant's discharge.

On November 17, 2011, Barnett submitted a request for hearing on the department's eligibility determination, using the form that the department had provided with the notice of that decision. An attached letter stated, "We are in receipt of your Notice of Determination informing us that the claimant referenced above is eligible for unemployment benefits. We are protesting this determination as the claimant violated known Wells Fargo company policy. Please reconsider your determination or schedule an unemployment hearing via telephone."

As we will explain further below, Barnett's November 17 request for a hearing on the eligibility determination was untimely. Accordingly, the question presented here is whether employer's November 1 filing—the Form 197 and its attachment—expressed a present intent to appeal the eligibility determination and, consequently, also was a request for hearing on that decision (and a timely one). Before recounting the procedural history of this case, we provide a brief summary of the relevant unemployment compensation law.

After an authorized representative of the Employment Department allows unemployment compensation for a claimant, an employer may request a hearing. ORS 657.269(1). An employer might seek a hearing because, for example, it contends that the claimant should be disqualified from receiving benefits because she voluntarily left work without good cause or was discharged for misconduct. *See* ORS 657.176(2).

"Unless the claimant or [the employer] files *a request for hearing upon the decision* with the Director of the Employment Department in a timely manner ***, the decision is final and benefits must be paid or denied accordingly." ORS 657.269(1)(2) (emphasis added). "A request for

hearing may be filed on forms provided by the Employment Department or similar offices in other states. Use of the form is not required provided the party specifically requests a hearing *or otherwise expresses a present intent to appeal*." OAR 471-040-0005(1) (emphasis added).

Through a process separate from a request for hearing on the eligibility determination, a base-year employer can seek relief from the charges to which it is ordinarily subject when the claimant receives benefits. That is, even if the claimant receives benefits, the employer may be excused from paying its share of those benefits. *See* ORS 657.471. Generally speaking, an employer may obtain relief from charges when the claimant is entitled to benefits but the employer is not responsible for the entitlement.

Some of the grounds for relief from charges overlap with reasons that an employer might challenge the initial eligibility determination: For example, the employer can obtain relief from charges when the claimant has been disqualified from receipt of benefits because she left work voluntarily without good cause or was discharged for misconduct. ORS 657.471(3), (4). Other reasons for relief from charges do not entirely overlap with the claimant's entitlement to benefits: For example, the employer can obtain relief from charges when the claimant left work for good cause but the good cause was not attributable to the employer or when the employer discharged the claimant because the claimant "was unable to satisfy a job prerequisite required by law or administrative rule." ORS 657.471(5); *see also* ORS 657.471(7) (providing mechanism for relief from charges for a base-year employer other than the most recent employer under circumstances in which the employer seeking relief did not cause the entitlement to benefits).

With that legal background in mind, we turn to the procedural history of this case. After employer submitted its November 17 request for hearing, an ALJ held a hearing to determine whether the request for hearing was timely. Employer raised two arguments: (1) that the Form 197, filed on November 1, was a timely request for hearing on the eligibility determination (because it was filed before the November 7 deadline) and, alternatively, (2) that it had good

cause for filing a late appeal of the eligibility determination on November 17, when it indisputably requested a hearing, because an employee of Barnett had received incorrect information from the department that caused Barnett employees to believe that the eligibility determination could not be appealed and, consequently, to return the Form 197 instead of timely returning the form sent with the notice of the eligibility determination. In support of the latter argument, employer presented testimony from a Barnett employee, Sfera, that someone at Barnett had called the department and received incorrect or misleading information.

The ALJ rejected employer's first argument, concluding that the Form 197 filed on November 1 did not constitute a request for hearing on the eligibility determination because it did not "give any specific indication that the employer intended to appeal the [eligibility] decision." The ALJ also rejected employer's second argument after finding that Sfera's testimony regarding the content of the advice received from the department was not credible.

On appeal, the EAB reversed the ALJ's order. First it addressed employer's argument that the Form 197 was a timely request for hearing on the eligibility determination. The EAB understood the ALJ to have reasoned that the Form 197 was not a request for hearing because it "failed to identify, specifically, [eligibility] decision # 113857." Looking to the text of OAR 471-040-0005, however, the EAB concluded that "a party is [not] required to identify the administrative decision sought to be challenged by date or docket number, or any other 'specific,' because the Department's rule does not require it." The EAB reasoned that, in this case, because the Form 197 asserted that claimant had been discharged for violating employer's policy, department staff "might have discerned the employer's intent to appeal [the eligibility determination] without difficulty" by reading that form and part of the attached documentation. Accordingly, the EAB concluded, the November 1 filing expressed a present intent to appeal the eligibility determination. The EAB nevertheless determined that the November 1 filing was not a timely appeal of that determination because it had been sent to the wrong office within the department.

Then the EAB turned to whether there was good cause for the late request for hearing filed November 17. Relying on Sfera's testimony, it found good cause for the late request for hearing because Barnett had relied on the department's advice. Thus, it held, the appeal was valid although it was late. After further proceedings, the EAB held that claimant had been discharged for misconduct and, consequently, denied her claim for unemployment benefits.

Claimant sought judicial review, asserting that the EAB's order lacked substantial evidence because it relied on Sfera's hearsay testimony despite the ALJ's finding that that testimony was not credible and without any explanation of why it disagreed. We agreed, reversed the final order, and remanded to the EAB for further proceedings.[2] *Kroetch*, 267 Or App at 143.

On remand, the EAB found it unnecessary to address Sfera's testimony. Instead, it reconsidered its previous determination that the Form 197 had been sent to the wrong office within the department and found that the form had been sent to the correct office. Then it reiterated its previous conclusion that the Form 197, in combination with the attachment, expressed a present intent to appeal the eligibility determination:

> "In the November 1 fax, the employer included extensive documentation—88 pages—of material related to the circumstances of claimant's work separation. These facts constitute an objective indication that the employer disagreed with the Department's administrative decision, wished to contest the Department's conclusion that claimant was not disqualified from receiving unemployment benefits, and wanted a hearing to present evidence regarding its position."

The EAB also noted the relationship between the process for obtaining relief from charges and a challenge to the determination of eligibility for benefits:

---

[2] Claimant also objected to the EAB's reasoning regarding the Form 197, which we have set out above. Because that reasoning did not contribute to the EAB's legal conclusion that good cause justified the late appeal, we did not address that argument. *Kroetch*, 267 Or App at 143 n 6.

> "[We do not find] logical the ALJ's assumption that charge relief is a matter entirely separate from the matter of a work separation [decision]. To the contrary, the two issues are inextricably linked. On its face, the relief of charges Form 197 asks the employer to state the reasons for the separation or termination of employment, the same issue addressed in the administrative decision. As we noted in [the previous order], an employer may only be relieved of charges for benefits paid to a discharged employee under ORS 657.471 if it establishes that the employee was discharged for misconduct and therefore disqualified from receiving benefits under ORS 657.176. It is thus extremely probable that an employer would request both charge relief and a hearing on a work separation."

(Citation omitted.) Thus, the EAB concluded that the November 1 filing expressed a present intent to appeal the eligibility determination and, consequently, that employer had timely appealed the eligibility determination. It adhered to its conclusion on the merits that claimant was discharged for misconduct.

Claimant seeks judicial review, contending that the EAB incorrectly determined that the Form 197 was a timely request for hearing on the eligibility determination. She raises three arguments. First, she contends that, as a matter of law, a Form 197, which, as explained above, is designed to aid employers in asserting relief from charges, can never be used to appeal an eligibility determination. Second, claimant argues that, in *this* case, the EAB erred in determining that employer's Form 197 and its attachment expressed a present intent to appeal that administrative decision. Third, claimant contends that, contrary to the ALJ's determination that Sfera's testimony was not credible, the EAB has again relied on that testimony without explanation. Neither the Employment Department nor employer has appeared in this court; thus, neither has provided us with any response to claimant's arguments.

We review the EAB's order for substantial evidence, substantial reason, and legal error. *Franklin v. Employment Dept.*, 254 Or App 656, 657, 294 P3d 554 (2013). Here, as explained below, claimant's arguments require us to review

the EAB's construction of a statute and an administrative rule, which we evaluate for legal error.[3] *Id.* at 660.

Claimant's first and second arguments rely on our decision in *Johnson v. Employment Div.*, 124 Or App 77, 861 P2d 1032 (1993), in which we explained the respective roles of eligibility determinations and relief from charges. In *Johnson*, the employer did not request a hearing on the eligibility determination but later sought relief from charges. *Id.* at 79. On judicial review, he contended that, under ORS 657.471—that is, in a proceeding regarding relief from charges—he was entitled to: "(1) the right to request relief from charges for benefits paid to [the claimant]; (2) the right to an investigation to determine whether [the claimant] quit for reasons attributable to employer; and (3) the right to a hearing if the investigation results in a denial of his request for relief." *Id.* The Employment Division responded that, "if an employer does not contest [the initial eligibility determination] the employer is not entitled to a second opportunity under ORS 657.471 to determine whether the reason for leaving was attributable to the employer." *Id.*

We agreed with the division, explaining that "[t]he premise underlying" the framework for relief from charges established in ORS 657.471 "is that there has been [an eligibility] decision made." *Id.* at 81. Thus, to the extent that the initial eligibility determination decides issues that are also necessary to determine whether an employer is eligible for relief from charges, the employer's entitlement to relief from charges is determined by the outcome of the benefit decision. *Id.*

In *Kroetch*, we noted, in passing, that, in *Johnson*, we had "determined that the process for obtaining relief from charges under ORS 657.471 was independent of, and not a substitute for, the process to contest unemployment compensation eligibility determinations under ORS 657.266(5)."

[3] We "defer to any 'plausible interpretation'" of an administrative rule "by the agency that promulgated the rule." *Franklin*, 254 Or App at 660 (quoting *Don't Waste Oregon Com. v. Energy Facility Citing Council*, 320 Or 132, 142, 881 P2d 119 (1994)). However, OAR 471-040-0005 is a rule promulgated by the department, not the EAB. Consequently, we would defer to the department's interpretation of it if the department had supplied an interpretation of it (which it has not), but we do not defer to the EAB's interpretation. *Id.* at 661.

267 Or App at 446 n 1. Claimant relies on that statement to argue that, as a matter of law, an employer can never effectively request a hearing on an eligibility determination using a Form 197.

We disagree. As explained above, the issue in *Johnson* related to the substance of a charge-relief proceeding. The employer sought relief from charges; he conceded that he had not challenged the eligibility determination. Here, by contrast, employer contends, and the EAB concluded, that it *did* challenge the eligibility determination. The only question is whether its filing, which happened to be a Form 197 and an attachment, "express[ed] a present intent to appeal" the eligibility determination. OAR 471-040-0005(1). *Johnson* does not purport to answer that question. Nor does claimant point to any other source of law that would prevent a Form 197 that expressed a present intent to appeal an eligibility determination from serving as an effective request for hearing on the eligibility determination.

Claimant's second argument, however, has more traction. She asserts that, read in light of ORS 657.269, which requires a "request for hearing upon the decision," OAR 471-040-0005(1)'s requirement of an expression of "a present intent to appeal" demands more than just a statement of facts that are inconsistent with the facts found in the eligibility determination. As explained below, we agree.

Under these circumstances, we interpret statutes and administrative rules under the legal framework that the Supreme Court set out in *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). *Franklin*, 254 Or App at 660; *see also* 289 Or App 298 n 3 (explaining that we do not defer to the EAB's interpretation of a rule promulgated by the Employment Department). We begin our analysis by considering the text of statutes and rules in context. *Gaines*, 346 Or at 171-72. If that inquiry is conclusive, we need proceed no further. *See id.*

Here, we begin by explaining the EAB's interpretation of ORS 657.269 and OAR 471-040-0005(1), as we understand it. The EAB noted that OAR 471-040-0005(1) does not require a party requesting a hearing to identify the

challenged eligibility determination by date or docket number. It also evaluated what *is* sufficient to be an "express[ion of] a present intent to appeal." It held that the facts contained in the attachment "constitute an objective indication that the employer disagreed with the Department's administrative decision, wished to contest the Department's conclusion that claimant was not disqualified from receiving unemployment benefits, and wanted a hearing to present evidence regarding its position." Finally, it seemed to assert that a Form 197 will often constitute both a request for charge relief and a request for hearing on the eligibility decision because charge relief is not allowed unless the claimant has been disqualified, *i.e.*, unless the eligibility issue is decided in the employer's favor.

We agree with the EAB's first proposition, namely, that a party need not identify the challenged eligibility determination by date or docket number. However, we disagree with the EAB's understanding that a statement or documentation of facts inconsistent with the challenged eligibility determination is enough, by itself, to express a present intent to appeal that determination. Before an "appeal," or, as stated in the statute, a "request for hearing *upon the decision*," ORS 657.269(1)(a) (emphasis added), can exist, there must be an underlying decision to appeal or upon which to request a hearing. *Cf. Webster's Third New Int'l Dictionary* 103 (unabridged ed 2002) (defining the verb "appeal" as "to take proceedings for the removal of (a case) *from a lower to a higher court for rehearing*" (emphasis added)). Thus, to express a present intent *to appeal*, a party must at least implicitly acknowledge that a decision has been made—a decision that the party wishes to challenge.

Here, nothing in the November 1 filing even implicitly acknowledges the eligibility decision. The department sent the Form 197 to employer before the department made the eligibility determination, so that form necessarily does not refer to the department's subsequent determination. Employer sent back the completed Form 197 after the department had made its eligibility determination, but none of the information that employer supplied refers to the eligibility determination in any way. Nor do any of the documents that the employer attached to the form that are part of the

record on judicial review refer to or otherwise acknowledge the eligibility determination. Because it contains no indication whatsoever that any decision has been made, employer's filing cannot reasonably be understood to disagree with or seek to contest the eligibility decision. Thus, as a matter of law, it is not an expression of a present intent to *appeal* that decision.

We also note that, although the issues addressed in eligibility determinations often overlap with the issues addressed in charge-relief proceedings (and, when they do, the facts as determined in the eligibility determination dictate the facts for purposes of the charge-relief proceeding, *Johnson*, 124 Or App at 81), under some circumstances, an employer is entitled to relief from charges for reasons other than the claimant's disqualification from receipt of benefits. *See* ORS 657.471(5), (7). Thus, an employer's filing of a Form 197 does not necessarily indicate that the employer contends that the claimant is disqualified from receipt of benefits. Consequently, the mere act of filing a Form 197 does not, itself, implicitly express a present intent to appeal an unfavorable eligibility determination.

Because we agree with claimant's second argument, we need not address her third. In sum, we conclude that employer's November 1 submission did not express a present intent to appeal the eligibility determination and, consequently, was not a timely request for hearing.

Reversed and remanded.