IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Samuel Goodwin, II, Claimant.

Samuel GOODWIN, II,
Petitioner,

v.

NBC UNIVERSAL MEDIA - NBC UNIVERSAL,
Respondent.

Workers' Compensation Board
1405977; A163239

Argued and submitted March 28, 2018.

Julene M. Quinn argued the cause and filed the briefs for petitioner.

Edward S. McGlone III argued the cause and filed the brief for respondent.

Before Ortega, Presiding Judge, and Powers, Judge, and Brewer, Senior Judge.

POWERS, J.

Reversed and remanded.

POWERS, J.

In this workers' compensation case, claimant assigns error to the Workers' Compensation Board's determination that his request for hearing from a denial of his new/omitted medical condition claim was untimely under ORS 656.319, and that the circumstances do not support a determination that claimant had "good cause" for failing to file a request for hearing within 60 days of the mailing of the denial. We review the board's order for errors of law and substantial evidence, ORS 183.482(8)(a) and (c), conclude for the reasons explained in this opinion that we are unable to review whether the board properly exercised its delegated discretion in determining that claimant did not have good cause, and therefore reverse and remand.

The facts are largely procedural and undisputed, and we draw them from the board's order and the record. In August 2012, claimant was injured while working for employer NBC Universal as a painter for the set of the television show Grimm, when he fell from the lift gate of a truck and onto his back while holding an air compressor. He reported the injury to employer, and employer's medic gave him over-the-counter medication and heat packs. Claimant did not file a claim at that time.

Then, on July 24, 2013, claimant was lifting a heavy piece of plywood at work when he felt a snap/pinch in his neck, the immediate onset of pain between his shoulder blades, and numbness in his left arm that extended into his fingers. Claimant sought chiropractic treatment and filed a claim. Claimant had an MRI, which his doctor interpreted to demonstrate disc protrusions at C5-6 and C6-7. Employer accepted a disabling claim for "neck and thoracic sprains." Employer closed the claim without an award of permanent partial disability, and claimant requested reconsideration of the notice of closure.

In the reconsideration process, claimant did not attend a required medical arbiter examination. The Workers' Compensation Division of the Department of Business and Consumer Services issued a notice suspending claimant's benefits and the reconsideration process, as described in

ORS 656.325(1)(a). The department ultimately reinitiated the reconsideration process and upheld the notice of closure.

Claimant continued to suffer symptoms. A neurosurgeon ordered a second MRI, which was interpreted to show degenerative disc disease with disc protrusions accompanied by osteophytes at multiple levels, most prominent at C5-6 and C6-7, for which claimant had surgery.

On August 1, 2014, claimant, through counsel, sought acceptance of a new/omitted medical condition described as "right C6 foramen disc rupture, however termed." AIG, employer's workers' compensation processing agent, arranged an independent medical examination of claimant by a neurosurgeon in Portland for September 2, 2014, but claimant had moved to Oklahoma and did not attend. On September 30, 2014, AIG denied the claim, stating that it lacked sufficient information to determine whether the condition was work related. On October 6, 2014, claimant discharged his attorney.

Claimant received AIG's denial of the new/omitted medical condition claim. The procedures for challenging the denial of a claim are set out in ORS 656.262(9), ORS 656.283, and ORS 656.319(1). ORS 656.283(1) provides that a party "may at any time request a hearing on any matter concerning a claim." ORS 656.283(2) provides:

> "A request for hearing may be made by any writing, signed by or on behalf of the party and including the address of the party, requesting the hearing, stating that a hearing is desired, and mailed to the Workers' Compensation Board."

ORS 656.262(9) provides that, if an employer denies a claim for compensation, then the worker may request a hearing pursuant to ORS 656.319. ORS 656.319(1)(a), in turn, provides that a request for hearing on a denied claim must be filed within 60 days after the mailing of the denial.[1]

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[1] ORS 656.319 provides, in part:

"(1) With respect to objection by a claimant to denial of a claim for compensation under ORS 656.262, a hearing thereon shall not be granted and the claim shall not be enforceable unless:

"(a) A request for hearing is filed not later than the 60th day after the mailing of the denial to the claimant; or

OAR 438-005-0070, the board's administrative rule implementing ORS 656.283(2), provides:

> "Proceedings before the Hearings Division are begun by filing a request for hearing meeting the requirements of ORS 656.283 and OAR 438-005-0046. *** In addition to the information required by [ORS] 656.283(2), the person requesting a hearing should include the person's full name, the name of the injured worker if different from that of the person requesting the hearing, the date of the injury or exposure, the name of the employer and its insurer, if any, and the claim number. A copy of the request should be served on the insurer, self-insured employer, claimant, or if represented, claimant's counsel."

On November 17, 2014, claimant mailed a certified letter to the Sanctions Unit of the department's Workers' Compensation Division. The letter described claimant's two injuries, his frustrations with his inability to work or to receive further medical treatment, and his disagreement with a doctor's view that there was a degenerative component to his condition. The letter did not explicitly mention the denial or request a hearing, but concluded with the request, "Can anyone help me with resolving these issues?"

The Sanctions Unit forwarded claimant's letter to the department's "Ombudsman for Injured Workers," who acts an advocate for injured workers.[2] On December 1, 2014,

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"(b) The request is filed not later than the 180th day after mailing of the denial and the claimant establishes at a hearing that there was good cause for failure to file the request by the 60th day after mailing of the denial."

[2] ORS 656.709, which establishes the ombudsman for injured workers, provides, in part:

"(1)(a) The Director of the Department of Consumer and Business Services, with the concurrence of the Governor, shall appoint an ombudsman for injured workers. The ombudsman is under the supervision and control of the director and, with the concurrence of the Governor, the director may terminate the ombudsman.

"(b) The ombudsman for injured workers shall:

"(A) Act as an advocate for injured workers by accepting, investigating and attempting to resolve complaints concerning matters related to workers' compensation;

"(B) Provide information to injured workers to enable them to protect their rights in the workers' compensation system; and

"(C) Report to the Governor in writing at least once each quarter. A report shall include a summary of the services that the ombudsman provided during the quarter and the ombudsman's recommendations for improving

an ombudsman spoke to claimant and his father by telephone at a number provided in the November 17 letter. The ombudsman confirmed from the conversation that it was claimant's intention in the letter to request a hearing on the denial of his new/omitted medical condition claim. The ombudsman told claimant that she would deliver the letter to the board, but that claimant should send another letter to the department requesting a hearing. The board found that the ombudsman told claimant that he had 60 days from the date of mailing of the denial within which to challenge the denial. The board further found that the 60th day for requesting a hearing was December 1, the date of the telephone conversation. The board did not find that the ombudsman told claimant that the last day to file the request for hearing was December 1, 2014.

On December 3, 2014, claimant sent a second certified letter to the department, which reached the ombudsman on December 5, 2014. The letter was entitled "Appeal and Object." It stated claimant's objections to the July 31, 2014, notice of closure and the notice of suspension of benefits, and asked for "help with processes." But once again, the letter made no mention of the denial and did not explicitly request a hearing. On December 5, the ombudsman hand delivered both of claimant's letters to the board, along with the ombudsman's own letter explaining her understanding that claimant intended by the letters to contest the denial of the new/omitted condition claim. By that time, the board had in its file a copy of employer's denial of claimant's new/omitted medical condition claim. The department then issued a notice of hearing.

Claimant retained new legal counsel. At the hearing, employer sought to dismiss the request for hearing as untimely. Employer contended that claimant's November 17 and December 3 letters did not refer to the denial or explicitly request a hearing and, further, that the December 3 letter had been mailed outside of the 60 days.

Claimant and his father testified at the hearing. Their testimony reflects a lack of sophistication and

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ombudsman services and for protecting workers' rights in the workers' compensation system."

understanding as to the procedural significance of the various notices claimant had received, including the notice of suspension of benefits and the notice of denial, and a lack of understanding of the requirements for requesting a hearing. Claimant has dyslexia and cannot read or write. Claimant's father and cousin assisted him with the November 17 and December 3 letters. The administrative law judge (ALJ) found that the November 17 letter met the requirements of a request for hearing under ORS 656.283(2).

The board reversed the ALJ's order. The board found that claimant had not included a copy of the denial with either the November 17 or December 3 letter, and that that prevented the letters from being "referable" to a particular denial of employer, as required by our opinions in *Guerra v. SAIF*, 111 Or App 579, 826 P2d 1034 (1992), and *Naught v. Gamble, Inc.*, 87 Or App 145, 149, 741 P2d 901 (1987). The board therefore concluded that the November 17 and December 3 letters were ineffective as requests for hearing. In an order on reconsideration, the board further determined, without explanation, that, if the letter of December 3 was an effective request for hearing, claimant had not established "good cause" under ORS 656.319(1)(b) for failing to mail it within 60 days of the date of mailing of the denial. Claimant seeks judicial review, challenging both determinations.

Claimant's first contention is that the two letters constituted requests for hearing under ORS 656.283, because they included all the information required by that statute, *viz.*, they were in writing, "signed by or on behalf of the party and including the address of the party, requesting the hearing, stating that a hearing is desired." In claimant's view, his request in the November 17 letter for "help resolving these issues" was unequivocally a request for hearing.

Employer responds that, under *Guerra*, 111 Or App at 584, a request for hearing must be referable to a particular denial and that, even assuming that claimant's letters could be understood to contain requests for hearing, the letters are not referable to a denial of the new/omitted medical condition claim.

Claimant replies that if the letters themselves are not referable to a particular denial, they are sufficient when considered together with the ombudsman's letter stating that claimant intended to request a hearing on the denial. Claimant further asserts that *Guerra* was incorrectly decided and should be reconsidered, because there is no requirement in ORS 656.283 that a request for hearing relate to a particular denial or include any information other than what is described in ORS 656.283.

We first address the parties' contentions relating to *Guerra*. In that case, the claimant was injured at work but was confused as to which of two insurers was responsible for her injury. She filed claims against both insurers—Liberty Northwest Insurance Company and Crawford & Crawford. When Crawford failed to pay interim compensation for the claimant's temporary disability, the claimant requested a hearing asserting that Crawford was not properly processing the claim. Liberty then denied the claim, and the claimant filed a request for hearing challenging the denial but made the request outside the 60-day period allowed by ORS 656.319. Liberty sought to dismiss the second request for hearing as untimely, and the claimant asked that the hearing request as to Crawford be treated as a timely request with respect to Liberty. Citing our opinion in *Naught*, 87 Or App at 149, in which we held that a claimant must request a hearing as to each denied claim, the board held that the claimant's request for hearing as to Crawford did not constitute a request for hearing as to Liberty. *Guerra*, 111 Or App at 584.

On judicial review, we affirmed the board's order. We rejected the claimant's contention that the hearing request as to Crawford was sufficient as to Liberty because ORS 656.283 does not require specificity as to the insurer or the issue being raised. At the relevant time, *former* ORS 656.262(8) (now numbered ORS 656.262(9)) provided that a "worker may request a hearing *on the denial* at any time within 60 days after the mailing of the notice of denial." (Emphasis added.) ORS 656.319(1)(a) provided, as it does today, that, "with respect to objection *** *to denial of a claim*" a hearing will not be granted unless a request for

hearing is filed within 60 days after mailing of the denial. (Emphasis added.) We noted that each statute referred to a denial, and concluded that together they "evince a legislative intent that a request for hearing be referable to a particular denial[.]" We supported our holding in *Guerra* with the observation that, although the text of OAR 438-005-0070—the board's rule implementing ORS 656.283—is not mandatory, "its intent is to provide for the identification of the subject matter of requests for hearing" under ORS 656.283. 111 Or App at 584.

Employer contends that, as in *Guerra*, claimant's letters, which make no mention of the denied claim and also do not explicitly request a hearing, simply do not provide information that is referable to a particular denial.

Claimant responds that we were wrong in *Guerra* and that the case should be reconsidered, because ORS 656.283(2) does not include any requirement for specificity like that imposed by *Guerra*. We note that, in *Guerra*, we stated, without explanation, that the board is entitled to "some deference" in its interpretation of statutes, so long as the interpretation is consistent with the legislature's purpose and the board's own rules. *Id*. at 583. That statement must be qualified a bit: Generally, the determination of the meaning of a statute is a question of law; however, an agency's interpretation of a statute may be entitled to a measure of deference depending on the nature of the statutory terms at issue. *DCBS v. Muliro*, 359 Or 736, 742, 380 P3d 270 (2016) (citing *Springfield Education Assn. v. School Dist.*, 290 Or 217, 223, 621 P2d 547 (1980) (summarizing the "exact," "inexact," and "delegative" categorization of statutory terms)). In Guerra, we did not address whether ORS 656.262, ORS 656.283, or ORS 656.319 were the type of statute that would permit deference to the board's interpretation.

In any event, in *Guerra*, we did not defer to the board's interpretation of ORS 656.262 or ORS 656.319. Although we affirmed the board's order, we did so based on our own conclusion that the statutes implicitly "evince a legislative intent that a request for hearing be referable to a particular denial." *Guerra*, 111 Or App at 584.

We have reviewed those statutes again, particularly ORS 656.283(1), providing that any party "may at any time request a hearing on any matter concerning a claim," and ORS 656.319(1), providing that, "with respect to objection by a claimant to denial of a claim," a request for hearing must be "filed within 60 days after the mailing of the denial." Based on our own consideration of the statutory texts, we conclude that *Guerra* was not "plainly wrong." *Aguilar v. Washington County*, 201 Or App 640, 648, 120 P3d 514 (2005), *rev den*, 340 Or 34 (2006) (explaining that we regard our own statutory interpretations as binding precedent unless they are plainly wrong); *see also State v. Civil*, 283 Or App 395, 415-17, 388 P3d 1185 (2017) (discussing *stare decisis* and concluding that we will overrule a prior decision only if it is "plainly wrong," which is a "rigorous standard" that is "satisfied only in exceptional circumstances").

As we noted in *Guerra*, ORS 656.319(1) refers to the hearing request being made in objection to the denial of a claim. And ORS 656.283(1) refers to a claimant's right to request a hearing "on any matter concerning a claim."[3] Thus, it is reasonable to conclude that, in the context of this statutory framework, an employer must be able to connect a hearing request to the particular denial or matter to which it relates. We therefore adhere to the conclusion in *Guerra* that a request for hearing that is intended as a challenge to the denial of a claim must be referable to a particular denial, *viz*., a request for a hearing must be capable of being considered in relation to a particular denial by referencing the particular denial that is being challenged either directly or indirectly.

Having decided that a hearing request must be referable to a particular denial, the question in this case becomes whether claimant's letters are referable to the denial of the new/omitted condition claim. The board has said that, in determining whether a hearing request is referable to a particular denial, it considers the request itself, "read as a whole and in the context in which [it was] submitted."

[3] We note that the legislature amended ORS 656.262 in 1990, Or Laws 1990, ch 2, § 15, and the statute no longer provides that the worker must request a hearing "on the denial." Rather, the statute simply provides that a worker may request a hearing pursuant to ORS 656.319. *See* ORS 656.262(9).

Kevin C. O'Brien, 44 Van Natta 2587, 2588 (1992), *modified on recons*, 45 Van Natta 97 (1993). Although we agree with employer's observation that the letters themselves do not refer to the denials, the ombudsman's clarifications provide that reference. The ombudsman's letter stated that claimant's intention was to "appeal the denial of September 30, 2014."[4] Accordingly, we conclude that claimant's letters, considered together with the ombudsman's letter, constitute a request for hearing.

The ombudsman, however, did not deliver the letters to the board until December 5, which was after the 60-day period set forth in ORS 656.319(1)(a), but within 180 days after the denial was mailed to claimant as described in ORS 656.319(1)(b). Thus, claimant is entitled to have his request for hearing considered only if he has established "good cause" for failing to request a hearing within 60 days. ORS 656.319(1)(b).

The standard for determining "good cause" under ORS 656.319(1)(b) is analogous to the standard of "mistake, inadvertence, surprise, or excusable neglect" set forth in ORCP 71 B, for relief from a default judgment. *Sekermestrovich v. SAIF*, 280 Or 723, 573 P2d 275 (1977).[5] Recently, in *Union Lumber Co. v. Miller*, 360 Or 767, 778, 388 P3d 327 (2017), the Supreme Court explained that, although the ultimate determination on whether to grant relief from

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[4] The ombudsman's letter stated, in part:

> "As per my conversation with [claimant], [the] intention of his letter sent November 17, 2014 and the letter date[ed] December 3, 2014 [was] to appeal the denial of September 30, 2014 as well as *** the reconsideration suspensions."

[5] The court's decision in *Sekermestrovich* predated *McPherson v. Employment Division*, 285 Or 541, 550, 591 P2d 1381 (1979), which held that "good cause" as used in the unemployment compensation framework was a delegative term and that the agency had "some range of agency responsibility for defining" that term. Subsequently, in *Brown v. EBI Companies*, 289 Or 455, 616 P2d 457 (1980), the court declined to reexamine *Sekermestrovich* and further explained:

> "One difference between [*former*] ORS 18.160 [a precursor to ORCP 71 B] and ORS 656.319(1)(b), noted in *Sekermestrovich* *** is that ORS 18.160, wisely or not, states relief from default judgments as a matter of the trial court's 'discretion,' while 'good cause' under ORS 656.319(1)(b) is not a matter of 'discretion' but of agency judgment in the sense stated in *McPheson*[.]"

Brown, 289 Or at 460 n 3.

a judgment under ORCP 71 B is discretionary and reviewed for an abuse of discretion, the question of whether a party has offered a cognizable ground for relief on account of mistake, inadvertence, surprise, or excusable neglect, is a legal question to be decided "in accordance with established legal principles."[6] Thus, the first step in the "good cause" determination is whether claimant has offered a reasonable excuse—due to neglect, surprise, inadvertence, or mistake—for failing to timely request a hearing. That determination is one of law that a court reviews for errors of law.

In its order on reconsideration, the board did not address whether the record shows that claimant has a cognizable basis for relief because of mistake, inadvertence, surprise, or excusable neglect. Because the facts are undisputed and the question is a legal one, we make that determination here. In so doing, we are mindful that courts construe ORCP 71 B(1)(a) liberally so as to avoid depriving a party of its day in court, and, thus, view the record in the light most favorable to the party seeking relief. *See, e.g.*, *Terlyuk v. Krasnogorov*, 237 Or App 546, 553, 240 P3d 740 (2010), *rev den*, 349 Or 603 (2011) (so stating). We conclude

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[6] The court explained:

> "As noted and as pertinent here, ORCP 71 B provides that a trial court may, 'upon such terms as are just,' grant a motion to set aside a judgment that was entered due to 'mistake, inadvertence, surprise, or excusable neglect.' A decision under ORCP 71 B can implicate multiple standards of review. For example, a trial court's decision can rest on findings of disputed fact. An appellate court will defer to a trial court's express or implied findings of disputed fact underlying its legal determinations. *** Second, the question whether a cognizable ground for relief has been shown must be decided in accordance with established legal principles. *** Thus, the question whether a party seeking relief from a judgment has offered a reasonable excuse for failing--on account of neglect, surprise, inadvertence, or mistake--to appear or otherwise defend its interests, is a legal question that we review for errors of law. *** Finally, where a trial court determines that a cognizable ground for relief has been shown, the decision whether to grant relief requires the court to exercise its discretion and, if it decides to grant relief, to do so on terms that are just. *** In exercising such discretion (again, where a cognizable ground for relief has been established), this court has stated that 'the courts are liberal in granting relief, for the policy of the law is to afford a trial upon the merits when it can be done without doing violence to *** established rules of practice that have grown up promotive of the regular disposition of litigation.'"

Union Lumber, 360 Or at 777-78 (citations and footnotes omitted; final ellipses in original).

that that same view of the record applies to the "good cause" determination under ORS 656.319(1)(b).[7]

It is undisputed that, well within the 60-day period for requesting a hearing, claimant mailed his first letter to the department. That letter failed as a request for hearing because, although claimant intended to challenge the denial of the new/omitted medical condition claim and, in fact, asked for help, he did not refer to the denial. Viewing the record in the light most favorable to claimant, it is clear that claimant's failure to explicitly request a hearing or refer to the claim denial was due to his lack of sophistication and his confusion, due to the many procedures that were in process, and we conclude that claimant's failure to explicitly state in the November 17 letter that he was seeking a hearing relating to the denial of the new/omitted medical condition claim was a "mistake" or "inadvertence."

The board focused on claimant's letter of December 3 and his failure to mail a request for hearing on December 1 after speaking to the ombudsman. The transcript of the hearing includes this exchange between employer's counsel and claimant:

> "Q. And did [the ombudsman] tell you that you had to do this in writing 60 days from September 30, 2014?
>
> "A. Yeah, pretty sure she did.
>
> "Q. And why didn't you do that? Because the letter that she's talking about was dated December 3, 2014.
>
> "A. I don't know about none of that. I—as soon as she said appeal it with another letter stating in there such, that's what we did. And we got it right to them as fast as we could."

The board apparently did not consider claimant's testimony to be an explanation of why claimant could not have mailed

[7] Assuming, without deciding, that the legislative direction embedded in ORS 656.012(3) affected a substantive change in the manner in which this court should interpret workers' compensation statutes, we do not consider viewing the record in the light most favorable to the party seeking relief, as required by the Supreme Court's case law for purposes of the relief afforded from a default by ORS 656.319(1)(b), to conflict with ORS 656.012(3), which requires the statutes to be interpreted in "an impartial and balanced manner."

the second letter on December 1.[8] But, viewing the record in the light most favorable to claimant, it appears that claimant's failure to act on December 1 was, again, based on a lack of understanding. Despite having been told by the ombudsman that he had 60 days from the date of mailing of the denial to request a hearing, it appears from the record that claimant did not understand that the request for hearing had to be mailed on December 1, and believed that he could comply by mailing the letter "as fast as [he] could."[9] Under the circumstances, claimant's explanation of his misunderstanding was a reasonable one, and the misunderstanding is also properly characterized as a mistake or inadvertence.

Having concluded that claimant has met the first step in the "good cause" determination under ORS 656.319(1)(b), it is for the board to decide in the first instance whether claimant's mistakes and inadvertence constitute "good cause" for the untimely filing of his request for hearing. *See Brown v. EBI Companies*, 289 Or 455, 460, 616 P2d 457 (1980); *Ogden Aviation v. Lay*, 142 Or App 469, 473, 921 P2d 1321 (1996) (explaining that "the ultimate determination whether particular circumstances constitute 'good cause' for filing an untimely request for hearing under ORS 656.310(1)(b) is a matter within the Board's delegative discretion").

The board did not include its reasoning in support of its conclusion that the facts did not give rise to good cause, so we cannot review whether, in light of claimant's mistakes and inadvertence, the board properly exercised its delegated discretion under ORS 656.319(1)(b) to determine that claimant did not have "good cause." As the Supreme Court explained in *Union Lumber*, after a cognizable ground for relief has been shown, a discretionary decision on whether to grant relief must be made:

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[8] We note that the December 3 letter, on its face, would not have been sufficient, even if it had been mailed on December 1, because it also did not refer to the denial.

[9] The board did not find that the ombudsman told claimant that the last day to request a hearing was December 1. Claimant testified that the ombudsman told him that he would have to rewrite the letter, and that he "had just the amount of time to do it in, and had to get it there." The ombudsman herself testified that she hand-delivered claimant's correspondences to the board because she "knew the time frame, that we were running out."

> "In exercising such discretion (again, where a cognizable ground for relief has been established), this court has stated that 'the courts are liberal in granting relief, for the policy of the law is to afford a trial upon the merits when it can be done without doing violence to *** established rules of practice that have grown up promotive of the regular disposition of litigation.' *Wagar v. Prudential Ins. Co.*, 276 Or 827, 833, 556 P2d 658 (1976) (quoting *McFarlane v. McFarlane*, 45 Or 360, 363, 77 P 837 (1904))."

360 Or at 778. We therefore remand to the board for it to reconsider whether, in light of the circumstances, including claimant's difficulty understanding the process, lack of sophistication, and effort to file the request for hearing as fast as he could, claimant's mistakes and inadvertence constitute good cause under ORS 656.319(1)(b).[10]

Reversed and remanded.

[10] In light of our disposition, we do not address claimant's contention that the board erred in failing to excuse claimant from compliance with its administrative rules because he was unrepresented. OAR 438-005-0035(3) ("The unrepresented party shall not be held strictly accountable for failure to comply with these rules."). Claimant may raise that issue on remand.