

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0157

Affirmed
Ineligible

PROCEDURAL HISTORY: On December 23, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant failed without good cause to accept suitable work when offered (decision # 140935). Claimant filed a timely request for hearing. On January 28, 2015, ALJ Triana conducted a hearing, and on January 30, 2015 issued Hearing Decision 15-UI-32622, affirming the Department's decision. On February 18, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the claimant's written argument to the extent it was based on the hearing record. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) On March 10, 2014, claimant filed an initial claim for unemployment insurance benefits.

(2) Claimant was registered with Barrett Business Services, Inc. (BBSI), a staffing agency, seeking work as a fork lift operator and general laborer in his labor market of Bend, La Pine, Redmond, Sunriver and Sisters, Oregon. Claimant worked for the City of Bend, Oregon through BBSI performing seasonal general labor. Claimant's duties working for the City of Bend included shoveling cement while standing in the back of a truck.

(3) On September 28, 2014, claimant suffered a non-work related back injury, and began receiving treatment from a chiropractor on October 9, 2014. The chiropractor diagnosed claimant with a "cervicothoracic sprain/strain, lumbosacral and sacroiliac sprain/strain." Exhibit 2. Although the chiropractor did not impose any work restrictions, the injury caused claimant pain when he was sitting, standing and bending. Exhibit 2. Claimant did not inform BBSI of his back injury, and was able to continue working for the City of Bend until his seasonal position ended at the end of October.

(4) Claimant restarted his unemployment benefits claim on October 23, 2014.

(5) On November 5, 2014, BBSI offered claimant a two-day job in Bend, where claimant lived. BBSI told claimant the job was for Deschutes Brewery as a packager for \$11.00 per hour. BBSI also told claimant the job was from 7:00 a.m. to 4:00 p.m. on Thursday and Friday, November 6 and 7, 2014. Claimant told BBSI he had a medical appointment on November 6, and did not tell BBSI he was unable to perform the packaging work due to his back injury. He initially accepted the offer of work.

(6) Claimant had worked as a packager for the same client before, and the previous packaging position required him to engage in standing, bending and lifting. The prevailing rate of pay for a packager in claimant's labor market was \$10.06 per hour.

(7) Claimant had an appointment scheduled with his chiropractor the afternoon of November 6, 2014. The only day the chiropractor offered appointments in Bend was Thursday. Claimant did not attempt to reschedule the appointment or ask BBSI or the client if he could miss work to attend a medical appointment.

(8) The morning of November 6, 2014, claimant told BBSI he would not accept the offer because it paid only \$11.00 per hour and he preferred to look for other work. Claimant would have accepted the job if it had paid \$13.00 or more per hour.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant refused an offer of suitable work without good cause.

ORS 657.176(2)(e) requires a disqualification from unemployment insurance benefits if claimant failed without good cause to accept suitable work when offered. "Good cause" is such that a reasonable and prudent person, exercising ordinary common sense, would refuse to accept suitable work when offered by the employer.¹ OAR 471-030-0038(6) (August 3, 2011). Factors to consider when determining whether work is "suitable" include, among other factors, the degree of risk involved to the health, safety and morals of the individual, the physical fitness and prior training, experience and prior earnings of the individual. ORS 657.190.

The employer extended claimant a *bona fide* offer of work that included information about the type of work, its location, the wage, the starting date, and the expected duration of the work. Claimant refused the offer of work before he performed any services. Claimant did not dispute that the employer extended him a *bona fide* offer of work, or that he refused the offer.

The work offered to claimant was at a brewery as a packager. When claimant had performed the same type of work for the same client in the past, it involved bending and lifting. Because claimant had a back injury that caused him pain when he did bending and lifting, it is necessary to determine if the offered work was unsuitable for him because it posed a risk to his health and safety, and based on his physical fitness. Claimant performed laborer duties, including shoveling, for his prior job assignment after he injured his back and until that assignment ended at the end of October. The record does not show the new packaging assignment would require claimant to engage in more strenuous work, or that

¹ Claimant suffered a back injury on September 28, 2014. The record does not show that his health condition constituted a long-term or permanent impairment under 29 CFR 1630.2(h). We therefore applied the standard of a reasonable and prudent person without impairment in determining whether claimant had good cause to refuse the work offered to him on November 5, 2014.

the client for that assignment would not accommodate claimant with duties that did not involve bending and lifting. Thus, despite his back injury, the record fails to show that the offered work was unsuitable based on claimant's health, safety and physical fitness for the work.

Claimant testified that he was not willing to accept the offer of work for \$11.00 per hour, but would have accepted it had it paid \$13.00 per hour. Transcript at 27. ORS 657.195(1)(b) provides that work is suitable based on the rate of pay unless the wage for the work offered is substantially less favorable to the individual than the prevailing wage for similar work in the locality. Because the offered work paid more than the prevailing wage of \$10.06 per hour for packaging work in Bend, the rate of pay for the offered work was more favorable than the prevailing wage, and claimant therefore failed to show the work was unsuitable based on the rate of pay. Nor did claimant assert or show that the offer of work was unsuitable for any other reason. Thus, claimant refused an offer of suitable work and, absent a showing that he had good cause for doing so, must be disqualified from receiving unemployment insurance benefits.

In addition to being dissatisfied with the wage rate, claimant testified that he asked the employer for a different job referral because he had a doctor's appointment on November 6, and planned to travel to Portland to visit a friend on November 7. Transcript at 18. However, a claimant who refuses work must show that no reasonable and prudent person would have accepted the work when offered. *Vail v. Employment Department*, 30 Or App 365, 567 P2d 129 (1977). Claimant's medical appointment was the afternoon of November 6, and he testified that he did not attempt to change the appointment to later in the day, or ask the brewery if he could have time off work for the medical appointment. Transcript at 24-25. Moreover, claimant testified that the brewery had let him take time off work for appointments in the past. Transcript at 25. Claimant failed to show that no reasonable and prudent person would have accepted the employer's offer of work and, if necessary, missed work only to attend the medical appointment. Claimant failed to establish that he had good cause to refuse the employer's offer. Claimant therefore is disqualified from the receipt of benefits.

DECISION: Hearing Decision 15-UI-32622 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: April 7, 2015

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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