

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1222

Modified
Not Subject Employment - Disqualification

PROCEDURAL HISTORY: On September 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with RGM with good cause (decision # 144153). RGM filed a timely request for hearing. On October 12, 2016, ALJ Holmes-Swanson conducted a hearing, and on October 13, 2016 issued Hearing Decision 16-UI-69208, concluding RGM and claimant did not have an employer-employee relationship and that claimant was not disqualified from unemployment insurance benefits. On November 1, 2015, RGM filed an application for review with the Employment Appeals Board (EAB).

With its argument, RGM submitted new information to EAB, specifically, an independent contractor carrier agreement between claimant and RGM, screenshots of text messages, and copies of checks. ORS 657.275(2) requires that EAB perform "review on the record," meaning, review of the record compiled by the ALJ at the hearing. Under OAR 471-041-0090(2) (October 29, 2006), EAB may consider new information not offered at the hearing if the party presenting the information demonstrates that circumstances beyond the party's reasonable control prevented the party from offering the information at the hearing. Given that the employer was instructed by OAH on the notice of hearing to provide such documents before the hearing, had the opportunity to testify about the documents, and all the information the employer now seeks to offer into evidence existed at the time of the hearing, it does not appear likely that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information into evidence at the hearing. The employer's request to submit new information to EAB is, therefore, denied, and EAB considered the employer's argument only to the extent that it was based upon the record the ALJ developed at the hearing.

FINDINGS OF FACT: (1) On May 6, 2016, RGM Distributing hired claimant as a newspaper carrier. RGM and claimant entered into an independent contractor agreement.

(2) Claimant's duties involved collecting newspapers from a distribution site, adding inserts and ads, placing the newspapers in bags, and the delivering newspapers door-to-door at houses, condominiums, apartments and businesses along a specified route. He could not do the work without a vehicle.

(3) During July 2016, claimant's "check engine light kept going on and off." Transcript at 7. Claimant took his vehicle to a friend who also did some mechanic work on the side, and claimant's friend resolved the problem by fixing a wiring problem. Claimant's check engine light subsequently appeared again.

(4) Claimant felt he could not afford to take his car to a professional mechanic. He felt he could not "take a chance of losing my car completely for, you know, future jobs and stuff." Transcript at 7. He thought without a car he would be "completely screwed in trying to get a real job and . . . then not be able to have any transportation. Transcript at 8. Claimant decided that he needed to stop using his car to deliver newspapers for RGM in order to avoid or delay mechanical problems.

(5) On August 7, 2016, claimant sent a text message to the employer reporting that he had been pulled over by police and cited for driving an unregistered vehicle while delivering newspapers along his route, that he had unloaded and abandoned his undelivered newspapers at particular address, and "I'm done." Transcript at 24-25. Claimant did not return to work for RGM thereafter.

CONCLUSIONS AND REASONS: We agree with the ALJ that RGM and claimant did not have an employment relationship. However, we also conclude that claimant voluntarily ended his professional relationship with RGM without good cause and may be disqualified from receiving unemployment insurance benefits as a result.

Subject employment. An individual may only be qualified for benefits based on his earnings and/or hours from "subject employment." See ORS 657.150. The Department calculates the validity and weekly and maximum benefit amounts of an individual's claim for benefits based on his earnings and/or hours from his subject employment with his base year employers. *Id.* "Employment" generally means "service for an employer . . . performed for remuneration." See ORS 657.030(1). "Subject" employment means that the employer is liable to pay unemployment tax. See ORS 657.030(2). Employment is not "subject," employers are not liable for unemployment tax, and individuals may not monetarily qualify for benefits based on it, if the type of employment the individual performed falls within an exception to "employment" that is listed in ORS chapter 657. ORS 657.080(1) states, in pertinent part, that "employment" does not include service performed "[i]n the delivery or distribution of newspapers."¹

The evidence suggests that the service claimant performed for RGM was the delivery or distribution of newspapers. Because the applicable law specifically states that "delivery or distribution of newspapers" is not "employment" for purposes of unemployment insurance and unemployment tax, we must conclude that claimant did not work in subject employment. Claimant's earnings and hours from RGM cannot be used for purposes of establishing the monetary validity of his claim for benefits, nor may his earnings and/or hours from work in service to RGM be used to establish his weekly or maximum benefit amounts. We also conclude that RGM is not liable for unemployment tax based on payments to claimant for his newspaper delivery or distribution services.

¹ The statute excludes "delivery or distribution to any point for subsequent delivery or distribution" from the exception to employment. ORS 657.080(1). That does not change the outcome of this decision because it does not appear from claimant's description of his work activities that he delivered his newspapers to distribution points for others to deliver.

Our determination that claimant's service to RGM was not "subject employment" is dispositive of claimant's eligibility to receive benefits based on base year wages and/or hours of work from RGM. As such, we need not also address whether claimant's services for RGM were excluded from subject employment on the basis that he was an independent contractor.

Work separation. To any extent that claimant remains monetarily qualified for benefits based on work in subject employment with other employers, claimant may still be subject to disqualification based on his voluntary separation from RGM if he "[v]oluntarily left work without good cause," because "work" in the context of disqualification from unemployment insurance benefits "means the continuing relationship between an employer and an employee," which "*exists even in circumstances where the work performed is not subject employment.*" ORS 657.176(2)(c); OAR 471-030-0038(1)(a) (August 3, 2011) (emphasis added).

Claimant voluntarily stopped working for RGM at a time when continuing work remained available. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional time.

Claimant left work because his vehicle was beginning to experience mechanical problems and he was concerned it could break down.² At the time claimant left work, his vehicle was functional, and, while the check engine light came on and he had in the past experienced some minor mechanical problems he considered normal given the age and condition of his car, he had never had a "major" problem with his car. Transcript at 7. He did not assert or establish that he had a "major" problem with his car at the time he quit work, just that he suspected after his friend's wiring repair stopped working that "there obviously must have been some other issue, too, because it kept coming back on." Transcript at 8. On this record, however, there is no evidence about what the "other issue" might have been, and it is just as likely that the mechanical problem was a malfunctioning light or light sensor as it is that it was something more serious. We cannot conclude that claimant's vehicle had a serious mechanical problem that necessitated he quit work when he did.

Even if the vehicle was in danger of breaking down with a serious mechanical problem, quitting work to avoid such a breakdown was not claimant's only reasonable alternative. Claimant testified with respect to taking his car to a "real" mechanic that he could not afford to do so, as he was "basically broke" and struggling financially. Transcript at 9. There is no dispute that claimant's testimony about his financial situation was true. He did not, however, explain why he was unable to take the car back to his mechanic friend after his friend's wiring repair failed to totally solve the problem with his check engine light, or

² RGM alleged that claimant quit work because he lacked vehicle registration, was cited, and had deposited a draw check from RGM twice. Claimant did not assert or establish that any of those situations caused him to decide to quit work when he did, nor did he argue that he had good cause to quit work because of those situations. Since claimant has the burden to establish good cause in a voluntary leaving case, we confine our analysis to the reason he identified.

otherwise make an effort to determine whether or not there was a serious mechanical problem with the car. He did not explain why he was unable to have a diagnostic test run on his vehicle to try to identify the source of the problem or determine whether he could have any problem with the car fixed without having to take it to a mechanic shop.³ In the event such diagnostic tests identified a problem, claimant did not explain why he could not have contacted either his friend or a mechanic to determine whether the problem could be repaired and at what cost. Nor did he show that making such efforts to diagnose the problem with his car and resolve his concerns about his car short of quitting work would have been unreasonable or futile under the circumstances as he described them. Under the circumstances, no reasonable and prudent person of normal sensitivity would have considered quitting his only reasonable alternative, and any mechanical problem claimant's vehicle might have had at the time he quit work did not, therefore, constitute good cause for quitting work.

Claimant therefore quit work with RGM without good cause. To any extent claimant is monetarily qualified for benefits, he should be disqualified from receiving them until requalified under Employment Department Law.

DECISION: Hearing Decision 16-UI-69208 is modified, as outlined above.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: November 28, 2016

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

³ We take notice of the generally cognizable fact that many businesses offer and publicly advertise free check engine light diagnostic services to the public. For example, an internet search for "free car diagnostic testing" yielded five results on the first page, including three businesses that advertise free testing. *See e.g.* <http://www.bing.com/search?q=free+car+diagnostic+testing&src=IE-SearchBox &FORM=IESR02>. Any party that objects to our taking notice must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.