BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

PETER J SCHUELLER	:	
	:	**HEARING NUMBER:** 21B-UI-03626
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD**
	:	**DECISION**
KINTZLE CONSTRUCTION INC	:	
	:	
Employer	:	

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.4-3, 24.22

D E C I S I O N

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. With the following modification, the administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION**:

The Board modifies the Reasoning and Conclusions of Law to add the following analysis.

Seasonal work and on-call work are different. The on-call regulations deny benefits to a worker who is only seeking on-call work, or whose wage credits are all on-call work. Such workers may never receive benefits so long as all their credits are on-call. The typical example of this is substitute teachers. The reason the law works this way is to prevent a substitute from claiming during those occasional weeks, during the school year, when they would not get a call. Since the schools are supplying the "same employment" as in the base period, if benefits were allowed for off weeks, then the benefit account would end up paying benefits for the expected down time of on call work.

On the other hand, seasonal work is more common. This is typically workers who work outside, such as in construction or landscaping, but for only a portion of the year. While other states commonly have express provisions addressing seasonality, Iowa leaves this to be addressed through the concept of monetary eligibility. Those provision require that "the claimant must have (1) base period wages greater than 125% of an individual's highest-earning quarter within the base period, (2) highest-earning-quarter wages at least 3.5% of the statewide average annual wage for insured work, and (3) second-highest-earning-quarter wages at least 50% of the wages required by (2)." *Stanley v. EAB*, No. 16-2047, slip op. at 4 (Iowa App. 1/10/2018)(summarizing Iowa Code §96.4(2)). This means first of all, that a worker who is so heavily seasonal that he earns *no* substantial wages except in a single quarter will not be eligible for benefits. But the definition of *substantial* is statutory, that is, the next highest quarter has to be at least 1.75% of the statewide average annual wage for insured work. If it is not then the worker is just not employed in the off-season at all (assuming a season that fits in one quarter), and is not monetarily eligible for benefits no matter how bountiful the take during the season. The second seasonal provision is the distribution requirement. The Code requires that the base period wages must be greater than 125% of the high quarter. This mean algebraically that the high quarter wages can be no more than 80% of the total base period wages. This is obviously addressed to asymmetrical distribution of the wages, that is, it is meant to deny benefits to workers who earns a bunch more in the season than they do in the off-season. Unlike the minimum earnings requirement, this distribution requirement will deny benefits to people who earn a lot of money in the off-season, if they still earn disproportionally more during the season. But what is disproportionate is determined by the statute. And if the Claimant's pattern of wages is not too seasonal under these statutory provisions it is not up to use to devise our own test for excessive seasonality.

Nor is seasonality swallowed by the idea of "on-call." If it were then workers in entire industries would end up without being able to collect benefits even if permanently separated. This would be a very surprising result for a concept that only appears in the agency regulations, not in the statute. There are considerable textual reasons to conclude that seasonality is not subsumed by the "on call" concept. These include the very regulations we cite below. If being season meant your work was "on call," then the availability regulations below would serve little purpose.

We conclude that the Claimant is not on-call as that term is used in the regulations. Nevertheless, we are not allowing benefits. This is because, as identified by the Administrative Law Judge, the Claimant was not available to work over the summer since he was occupied on the farm. *E.g.* 871 IAC 24.23(7)("Where an individual devotes time and effort to becoming self-employed."); 871 IAC 24.22(1)(b)("in some reasonably suitable, comparable, gainful, full-time endeavor, other than self-employment, which is generally available."). Furthermore, the regulations address people who are laid-off in the off season and what they must do to collect unemployment. Under rule 24.22(2)(c) "[a]n individual cannot restrict employability to only temporary or intermittent work until recalled by a regular employer." *See also* 871 IAC 24.23(10) ("Where availability for work is unduly limited because the claimant is waiting to be recalled to work by a former employer or waiting to go to work for a specific employer and will not consider suitable work with other employers."). Based on

the Administrative Law Judge's analysis, and these regulations as well, we find the Claimant was not available for work during the off season, and thus we affirm the denial of benefits.

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James M. Strohman

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Ashley R. Koopmans

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Myron R. Linn

RRA/fnv