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

SHEILA R TOMS	:	
	:	**HEARING NUMBER:** 20B-UI-05072
Claimant	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
OPPORTUNITY LIVING	:	
	:	
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

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

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 it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Claimant worked for employer as an on-call nurse. Claimant's first day of employment was January 30, 2018. Claimant is still employed in that position. The last time Claimant worked was March 13, 2020. She returned to work on June 17, 2020. Claimant was not working during this time because she had a respiratory infection and did not want to expose the clients to that or risk exposing herself to COVID-19. Shifts were available, which claimant chose not to take for those reasons.

Claimant was able to perform work at her other job during this time. This employment was seasonal work. In the past, once the season started she worked this job in construction doing siding and windows. In 2020 this work slowed down due to the Pandemic.

REASONING AND CONCLUSIONS OF LAW:

In this case there are two provisions relevant to part-time employment, and on-call employment. One of them deals with whether to charge for benefits paid. The other deals with whether the pattern of employment in the base period is such that the worker is not qualified for benefits in the first place because not attached to labor market.

Same Employment Relief of Charges. First, the Code provides that "…if the individual to whom the benefits are paid is in the employ of a base period employer at the time the individual is receiving the benefits, and the individual is receiving the *same employment from the employer that the individual received during the individual's base period*, benefits paid to the individual shall not be charged against the account of the employer." Iowa Code §96.7(2)(a)(2)(a)(emphasis added). This provision relieves the employer of charges but does not, in itself, deny benefits. The typical pattern is a worker with a full time job and a moonlighting job who is laid off from the full-time job but keeps the moonlighting job. If this worker files for benefits she will be partially unemployed because of the loss of the full-time work. The presence of wages from the moonlighting job reduces the amount of benefits payable in a given week, but does not mean the claimant is denied benefits. But since the moonlighting employer provides the "same employment" as during the base period the moonlighting employer would be eligible to be relieved of charges. In other words, the worker gets partial benefits but the balancing fund pays for the moonlighting employer's share.

In the case before us the Claimant works the two jobs successively. One seasonal job, with regular hours during the season, and one on-call job she performs in the off-season of the other job. Here the Claimant was unavailable for the on-call work, due to COVID reasons, but she was available for the other work as the season was going to start. She was laid off from the seasonal job, also for COVID reasons. But she remained available to work, just not in the on-call nursing job. So, Opportunity Living was supplying the Claimant the "same employment," she just was not able to accept it (and obviously had "good cause" for doing so). Thus, we conclude that Opportunity Living should be relieved of charges. We note the Claimant is still able to use credits earned at Opportunity Living in her monetary calculations, but that Opportunity Living will not be charged for the proportion of benefits paid based on those credits.

On-Call Wage Credits: Completely different is the idea of an on-call worker. Here the paradigm would be a substitute teacher who is on call with a couple school districts. The teacher works on a catch-as-catch-can basis. Some weeks the calls come, some weeks they do not. On any given day the teacher does not know if the teacher is working the next day or not. The schedule is not regular, is determined daily, and no hours are required or guaranteed.

Now in order to be eligible the wage requirements are not high – with a claim date of March 2020 all that is required is over $1,660 in the high quarter, and $830 in the second high quarter. So, suppose this on-call teacher earns enough to be eligible, and then experiences weeks of total unemployment, as happens to a substitute teacher. Part-time regulations on being employed at the same hours and wages, would not prevent the substitute teacher from collecting total unemployment. Yet the school districts would be supplying the "same employment" and so could be relieved of charges. This would leave the balancing fund paying for benefits for the ordinary and expect down time of an on-call substitute worker. Thus, the rules of the Department provide that "[a]n individual whose wage credits earned in the base period of the claim consist *exclusively of wage credits by performing on-call work*, such as a banquet worker, railway worker, substitute school teacher or any other individual whose work is solely on-call work during the base period, is not considered an unemployed individual …." 871 IAC 24.22(i)(3)(emphasis added). What this regulation means is that if **all** the credits in the base period, from every employer, are for on-call work then the claimant is not considered unemployed and would thus not ever be eligible for unemployment benefits based on that base period.

Another provision provides that an on-call worker is not available for work if the worker accepts only on-call work and holds themselves available only for one employer. 871 IAC 24.22(2)(i). "An individual who is willing to accept only on-call work is not considered to be available for work." 871 IAC 24.22(2)(i)(3). We do not think either of these provisions applies here.

We now turn to the reason the Administrative Law Judge denied benefits. The Administrative Law Judge's decision is based on her conclusion that "Claimant is not unemployed within the meaning of applicable law. The wage credits during her base period consist exclusively of wage credits for on-call work." In other words, the Administrative Law Judge applies rule 871 IAC 24.22(2)(i)(3) that denies benefits to an "individual whose wage credits earned in the base period of the claim consist exclusively of wage credits by performing on-call work…" We emphasize to the parties that if this regulation applies here to deny benefits then the Claimant will not be getting **regular** benefits in the benefit year running from March, 29, 2020 - not ever. There is nothing anyone can do at this point to change the character of the wages paid in the base period. Either they *were* exclusively for on-call work, or they *were not*. No matter what work the Claimant may perform since then, no matter what the Claimant has done since then, nothing changes the past.

The issue is thus whether all the credits in the Claimant's base period are from "on-call" work. Unfortunately, the concept of "on-call" work does not appear in the Code, and is not defined by regulation. We start by what it is not. It is not how someone is paid. So, a *per diem* payment, or an hourly payment, or a salary basis for remuneration does not determine whether the work is "on-call." We can certainly imagine a worker with a regular two day a week schedule who is paid out at the end of each day, that is, *per diem*. This method of payment is a factor in our consideration, but it is not by any means dispositive. Next "on call" for our purposes is not "after hours" work. Sometimes a worker works an entire week, and then remains "on call" for emergencies during her off days or hours. This is not the sort of "on call" the regulation is concerned with.

As far as availability in the benefit year the record does not support that the Claimant is waiting by the phone for a call from a single employer, so that she is available for work as contemplated by the Employment Security Law. This may be true during part of the year, but is not true during the on-season with her other employer. Second, we do not find that her base period wage credits are from solely on-call work. The substitute worker provision is discussed in *FDL Foods v. EAB*, 460 NW 2d 885 (Iowa App. 1990). The Court explained claimant Lambert's circumstances:

> At FDL's direction, Lambert has reported to work each morning since September 1985. If work is available within his medical restrictions, he is assigned to the job. If such work is not available, he is sent home. FDL has been unable to place Lambert in a permanent full-time position.

FDL Foods argued that since Mr. Lambert could not qualify for a full-time job then he was an on-call worker and not available for work. The Court then addressed rule 24.22(2):

> [T]he Iowa Administrative Code § 345-4.22(2)(i) defines on-call workers as:
>
> > (1) Substitute workers (i.e. post office clerks, railroad extra board workers), who hold themselves available for one employer and who do not accept other work, are not available for work within the meaning of the law and are not eligible for benefits.
>
> Lambert is clearly not an on-call or substitute worker.

FDL at 887. We think the same applies here. With her seasonal employer Claimant was not the paradigmatic substitute worker waiting for a call, and not knowing from one day to the next whether she will get it. Obviously, construction workers have days when weather will not permit working, but this is not a substitute worker called only at need as when a regular worker is sick etc.. The fact that available hours vary and are irregular is true of many part-time jobs that are not, however, substitute worker jobs. We emphasize how harsh the on-call rule would be if it were applied liberally to deny benefits. Workers who have trouble finding regular work but who patch together enough wages to qualify for benefits from low-hours part-time employers would still not be eligible no matter how eagerly seeking work and no matter how available for work. Yet Iowa Code §96.3(6) states that part-time workers are those where "a majority of the weeks of work in such individual's base period includes part-time work," and that such workers need not look for full-time work. The allowance of benefits to part-time workers was one of the conditions allowing Iowa to collect an incentive payment under the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 in section 2003(a); *Letter Culver to Atkinson, May 4, 2009* ("The part-time provision is permanent in Iowa law and is not subject to discontinuation and the incentive payment will be placed in the Iowa Unemployment Insurance Trust Fund…"). In construing the Employment Security Law the Board "must keep in mind the beneficial purposes of the Act,…and [the p]recedent that the disqualification provisions of the Act are to be strictly construed against the employer." *Irving v. EAB*, 883 N.W.2d 179, 193 (Iowa 2016).

Based on our understanding of on-call work, as illuminated by *FDL*, and the directive to liberally construe the Act in favor of allowing benefits, we find that this Claimant did not have *exclusively* on-call wages in her base period.

DECISION:

The administrative law judge's decision dated July 13, 2020 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was eligible for benefits and that her wage credits do not consist of exclusive on-call work. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible. The overpayment entered against claimant in the amount of $5726.00 is vacated and set aside.

The Employer is relieved of any charges for regular benefits under Iowa Code §96.7(2)(a)(2)(a) for any week following the week commencing March 29, 2020. Of course, an employer is never charged for the FPUC (the extra $600).

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Ashley R. Koopmans

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James M. Strohman

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Myron R. Linn

RRA/fnv