

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building, 4TH Floor
Des Moines, Iowa 50319
eab.iowa.gov**

CHRISTINE M WARTH	:	
	:	HEARING NUMBER: 22B-UI-18971
Claimant	:	
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
ACOSTA EMPLOYEE HOLDCO LLC	:	
	:	
Employer	:	

NOTICE

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: 96.1A-37, 96.4-3

DECISION

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 WITH NO EFFECT ON THE EMPLOYER** as set forth below.

FINDINGS OF FACT:

The Administrative Law Judge's findings of fact are adopted by the Board as its own. The Board finds in addition the following.

The records of the Department establish the following uncontested monetary record for this Claimant for her **2020** claim. The Claimant filed for benefits after losing her job at TNG/Select Media in the first quarter of 2020. The first original claim date in this case is 02/09/2020. This makes the Claimant's base period the last quarter of 2019 and the first three quarters of 2019. The Claimant has the following wages in that period (note "Select Media" is TNG):

Employer	Q4, 2018	Q1, 2019	Q2, 2019	Q3, 2019
Premium Ret.	5.00	255.00	370.25	223.75
Advant. Sale	641.43	87.12	231.28	342.55
Market Conn	434.40	15.00	112.56	
Converg Mark	199.21	39.94		
Select Media	2367.60	1746.8	2311.1	1997.80
Acosta	352.00	244.75	401.50	209.00
FGX		594.53	736.63	83.82
Footprint		325.52	966.78	
Plant Essen			11.38	
Apollo			21.26	

Total Wages: \$15,327.96 Credits (=1/3 wages): \$5,109.32 WBA [0 dependents]: \$224

With these figures only Select Media (TNG) could make Claimant eligible for benefits by itself. The next three highest wage earnings in terms of total wage and in a single quarter are FGX, Footprint, and Advantage Sales. Acosta is fifth. Other than Select Media no single employer paid enough to make the Claimant eligible for benefits. Acosta not only is insufficient to make the Claimant eligible, but there is no other single employer, other than Select Media, which when combined with Acosta would make Claimant eligible. In terms of the year 2020 Select Media was the Claimant's regular employer and Acosta was a supplemental part-time employer.

As for the 2021 claim the figures break down as follows:

Employer	Q4, 2019	Q1, 2020	Q2, 2020	Q3, 2020
Premium Ret.	544.75	548.00	865.75	
Advant. Sale	488.79	151.19	46.95	
Select Media	2851.20	1111.57		
Acosta	354.75	704.00		
Strat. Ret.				128.00

Total Wages: \$7,794.95 Credits (=1/3 wages): \$2,598.32 WBA [0 dependents]: \$184

No single quarter exceeds \$1,700 unless the Select Media wages are included. Without the Select Media wages, the Claimant thus would not be monetarily eligible in the **2021** claim year. So for the 2021 claim year as well Acosta is a supplemental part-time employer in the base period.

REASONING AND CONCLUSIONS OF LAW:

This is a moonlighting case. The rule governing this situation is:

23.43(4) Supplemental employment.

a. An individual, who has been separated with cause attributable to the regular employer and who remains in the employ of the individual's part-time, base period employer, continues to be eligible for benefits as long as the individual is receiving the same employment from the part-time employer that the individual received during the base period. The part-time employer's account, including the reimbursable employer's account, may be relieved of benefit charges. On a second benefit year claim where the individual worked only for the part-time employer during the base period and the lag quarter, the part-time employer shall not be considered for relief of benefit charges with the onset of the second benefit year. It is the part-time employer's responsibility to notify the department of the part-time employment situation so the department may render a decision as to the availability of the individual and benefit charges. The individual is required to report gross wages earned in the part-time employment for each week claimed and the wages shall be deducted from any benefits paid in accordance with Iowa Code section 96.3(3).

871 IAC 23.43(4). Also Code section 96.7(2)(a)(2)(a) provides for a relief of charges for the part-time moonlighting employer. Rule 24.23(26), cited by the Administrative Law Judge, is not meant to deny benefits except in those cases where it is claimed that a reduction in hours by the part-time employer at issue is what caused the partial unemployment. In particular, a worker laid off, or having hours reduced, from full-time work, who continues to work another part-time time, is not disqualified merely because the part-time hours remain the same. The part-time employer is not charged, but the wages still count for benefit purposes, and **so long as the partial unemployment calculation is satisfied** the Claimant is eligible to collect benefits. On the other hand, a worker who seeks partial benefits because she is receiving fewer part-time hours from a part-time employer, **but** who understood this to be possible under the contract of hire with the part-time employer, would not ordinarily be considered partially unemployed **based on** that contemplated reduction in hours alone.

On the issue of same hours and wages the rules of the Department provide:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

....

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

871 IAC 24.23(26). Thus if the part-time worker experiences a downturn in hours, but that downturn is consistent with the contract of hire then the worker is not considered partially unemployed from the part-time job. The ineligibility is based on the idea that worker is getting the same level as work as usual and that she is not unemployed. But this regulation only applies if the claimant is drawing benefits on credits earned in that part-time job, **and** is only becoming eligible for partial benefits because of a reduction in hours at that part-time job. If the credits being drawn upon include some other work, and the hours reduction is taking place at the claimant's regular employers, then the claimant is considered partially unemployed so long as she earns sufficiently less than her benefit amount plus \$15— which benefit amount depends on the wages earned in the *base period*.

What is to be done in this situation is set out by the Iowa Supreme Court: “a claimant who is unemployed as a result of a separation from his regular, full-time employment and who continues to meet the other eligibility requirements of availability and actively and earnestly seeks work pursuant to Iowa Code section 96.4(3) may work part-time and still receive benefits as a result of his separation from his full-time employment. However, the weekly earnings must not exceed the weekly benefit amount plus \$15.” *Welch v. IDES*, 421 N.W.2d 150, 152 (1988). This rule also applies where the claimant is working a reduced schedule at the other employer. In other words, so long as the Claimant meets the calculation of partially unemployed, and this partial unemployment is caused by a reduction in hours by the other employer(s), then the mere fact that she is also doing the same moonlighting work as she did in her base period does *not* mean she is not partially unemployed. Since the partial unemployment was *not* caused by a reduction in hours by the part-time employer in question, then the cited regulation does not apply.

Here the Claimant is unemployed from her regular base period employer and can draw on all credits but Acosta will not be charged **for the weeks prior to the Claimant’s separation** from Acosta. Iowa Code §96.7(2)(a)(2)(a). Whether Acosta will be charge for weeks after the separation, and whether the Claimant’s benefit rights will be affected by the separation, is to be determined by the Administrative Law Judge’s remand.

Critically, the Claimant must report wages from any supplemental employers, or odd-job employers, when claiming for benefits. It appears that she may not have. She was initially disqualified in the **2021** claim year for failing to earn 8 times her weekly benefit amount since February 9, **2020**. She seemingly has earned that amount, (the initial lock was likely the result of the delay in wage reports). The Claimant reported a total of \$722 wages when filing her claims from February 9, 2020 through January 22, 2022. But IWD wage records show \$4,098 in wages paid from April 1, 2020 through December 31, 2021. For example, in April, May and June of 2021 the Claimant filed 12 weekly claims and reported zero wages, but IWD wage records show \$1,100 paid by Acosta in this quarter. The issue of unreported wages must be cleared up by a remand to the appropriate Bureau of Iowa Workforce.

Charging of Employer: Next we come to the charging of Acosta. The general rule is “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. This provision applies to both contributory and reimbursable employers...” Iowa Code §96.7(2)(a)(2). This means that since **before the Claimant’s separation from Acosta** that employer was supplying the Claimant the same employment that the Claimant received during the base period then Acosta will be relieved of charges for weekly claims made prior to the Claimant’s separation from Acosta.

DECISION:

The administrative law judge’s decision dated December 22, 2020 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was unemployed within the meaning of the employment security law even during her employment with Acosta during her claim year. Accordingly, the Claimant is **not denied** benefits based on her being employed with Acosta. As a result, the Claimant’s claim should not be locked prior to her separation from Acosta **based on** her continued employment with Acosta. However, because of the apparent failure to report wages, **the claim will remain locked pending the remand on the reporting issue**. Once this is clarified, and the amount of benefits can be thus calculated, the outcome in this case will no longer cause a claim lock and the Claimant may be paid benefits for which she is *otherwise eligible*.

Acosta will not be charged for benefits paid for claim weeks which predate the Claimant's separation from Acosta.

We **REMAND** to the appropriate Bureau of Iowa Workforce the issue of the Claimant's reporting of wages during the 2021 claim year.

James M. Strohman

Ashley R. Koopmans

Myron R. Linn

RRA/fnv