

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**JUSTINO R FERNANDEZ**  
Claimant

**APPEAL NO. 15A-UI-14014-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AAA CONCRETE**  
Employer

**OC: 12/21/14  
Claimant: Appellant (4)**

Iowa Code Section 96.4(3) – Able & Available  
Iowa Code Section 96.4(3) – Still Employed Same Hours and Wages

**STATEMENT OF THE CASE:**

Justino Fernandez filed a timely appeal from the December 18, 2015, reference 02, decision that denied benefits effective November 29, 2015, based on an Agency conclusion that he was working enough hours to be considered employed full time and, therefore, did not meet the availability requirement to be eligible for unemployment insurance benefits. After due notice was issued, a hearing was held on January 12, 2016. Mr. Fernandez participated in the hearing. The employer did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate in the appeal hearing. Spanish-English interpreter Ike Rocha assisted with the hearing. The administrative law judge took official notice of the employer's statement to the claims deputy at the time of the December 17, 2015 fact-finding interview.

**ISSUES:**

Whether the claimant has been able to work and available for work since establishing the additional claim for benefits that was effective November 29, 2015 (on the December 21, 2014 original claim date).

Whether the claimant has been temporarily laid or partially unemployed since he established the additional claim for benefits that was effective November 29, 2015 (on the December 21, 2014 original claim date).

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Justino Fernandez commenced his employment with AAA Concrete in June 2015 and worked as a full-time concrete laborer until Tuesday, December 15, 2015, when the employer temporarily laid him off with the expectation of recalling him to the employment when the weather improved and business needs increased. Mr. Fernandez's immediate supervisor was Jesus Lopez. Mr. Lopez would let Mr. Fernandez know from day to day what work was available Mr. Fernandez. Mr. Fernandez has repeated attempted to contact Mr. Lopez since the layoff,

but has not yet heard back from Mr. Lopez. The employer has not yet recalled Mr. Lopez to the employment.

Prior to going to work for AAA Concrete, Mr. Fernandez had established an original claim for unemployment insurance benefits that was effective December 21, 2014. Prior to the effective date of the temporary layoff from AAA Concrete, Mr. Fernandez established an additional claim for benefits that was effective November 29, 2015 (on the December 21, 2014 original claim date). The claim year that began on December 21, 2014 expired on December 19, 2015. Mr. Fernandez then established a new claim year that was effective December 20, 2015. Mr. Fernandez established the additional claim prematurely. During the weeks that ended December 5 and 12, 2015, AAA Concrete had full-time work available for Mr. Fernandez and he performed full-time work for the employer during those weeks. During the week of December 13-19, 2015, the employer had only one day of work for Mr. Fernandez. Workforce Development records indicates that even though Mr. Fernandez established an additional claim for benefits at the end of November 2015, he did not make any weekly claims until December 26, 2015, at which time he made a successful weekly claim for the week ending December 26, 2015. The administrative law judge notes that Mr. Fernandez would still have been able to make a timely weekly claim on December 26, 2015 for the week that ended December 19, 2015. Since December 26, 2015, Mr. Fernandez has made a weekly claim for the week ending January 2, 2016 and the week ending January 9, 2016.

On December 17, 2015, the employer participated in a fact-finding interview to address the additional claim for benefits and whether Mr. Fernandez was able and available for work, partially unemployed, or laid off. Jason Martin, Owner, represented the employer. Mr. Martin told the claims deputy that Mr. Fernandez had filed his claim too early. Mr. Martin told the claims deputy that Mr. Fernandez had worked during the weeks that included Monday, November 30, 2015 and Monday, December 7, 2015. Mr. Martin told the claims deputy that Mr. Fernandez had not worked the week that included Monday, December 14, 2015, because it was too cold to perform the work. Mr. Martin told the claims deputy that the employer had a reduced amount of work available, but not enough to keep all employees busy. Mr. Martin told the claims deputy that he had last had work for Mr. Fernandez on December 12, 2015.

Mr. Fernandez has not looked for other employment since the effective layoff from AAA Concrete and expects to return to the employment when the employer again has work available for him.

AAA Concrete is not a base period employer for purposes of the claim year that was in effect from December 21, 2014 through December 19, 2015.

#### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.4(3) provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in § 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in § 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept

suitable work of § 96.5, subsection 3 are waived if the individual is not disqualified for benefits under § 96.5, subsection 1, paragraph "h".

Iowa Admin. Code r. 871-24.22(2) provides:

Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

(2) Available for work. The availability requirement is satisfied when an individual is willing, able, and ready to accept suitable work which the individual does not have good cause to refuse, that is, the individual is genuinely attached to the labor market. Since, under unemployment insurance laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. A labor market for an individual means a market for the type of service which the individual offers in the geographical area in which the individual offers the service. Market in that sense does not mean that job vacancies must exist; the purpose of unemployment insurance is to compensate for lack of job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which the individual is offering the services.

Iowa Admin. Code r. 871-24.23(23) provides:

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

(23) The claimant's availability for other work is unduly limited because such claimant is working to such a degree that removes the claimant from the labor market.

An individual shall be deemed partially unemployed in any week in which, while employed at the individual's then regular job, the individual works less than the regular full-time week and in which the individual earns less than the individual's weekly benefit amount plus fifteen dollars. Iowa Code section 96.19(38)(b).

*An individual shall be deemed temporarily unemployed if for a period, verified by the department, not to exceed four consecutive weeks, the individual is unemployed due to a plant shutdown, vacation, inventory, lack of work or emergency from the individual's regular job or trade in which the individual worked full-time and will again work full-time, if the individual's employment, although temporarily suspended, has not been terminated. Iowa Code section 96.19(38)(c).*

Iowa Code section 96.7(1) and (2) provides, in relevant part, as follows:

Employer contributions and reimbursements.

1. Payment. Contributions accrue and are payable, in accordance with rules adopted by the department, on all taxable wages paid by an employer for insured work.
2. Contribution rates based on benefit experience.

a. (1) The department shall maintain a separate account for each employer and shall credit each employer's account with all contributions which the employer has paid or which have been paid on the employer's behalf.

(2) The amount of regular benefits plus fifty percent of the amount of extended benefits paid to an eligible individual shall be charged against the account of the employers in the base period in the inverse chronological order in which the employment of the individual occurred.

(a) However, 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, notwithstanding subparagraph (3) and section 96.8, subsection 5.

[Emphasis added.]

This appeal concerns the additional claim for benefits that was effective November 29, 2015 and the claim year of December 21, 2014 through December 19, 2015. That is to say, this decision addresses the able and available issues, along with the partial and/or temporary unemployment issues for the three-week period of November 29, 2015 through December 19, 2015. The evidence indicates that Mr. Fernandez was employed full-time and working full-time during the weeks that ended December 5 and 12, 2015. For that reason, he did not meet the "availability" requirement for those two weeks and is not eligible for benefits for those two weeks. In addition, Mr. Fernandez was neither partially unemployed nor temporarily laid off during those two weeks. The evidence indicates that Mr. Fernandez was able to work, available for work, but partially unemployed during the week that ended December 19, 2015. Mr. Fernandez is eligible for benefits for that week, provided he meets all other eligibility requirements. As the employer was not a base period employer for purposes of the claim year that was effective December 21, 2014 through December 19, 2015, the employer's account will not be charged for benefits paid to Mr. Fernandez for the week that ended December 19, 2015.

**DECISION:**

The December 18, 2015, reference 02, decision is modified as follows. During the weeks that ended December 5 and 12, 2015, the claimant was working full time, did not meet the availability requirement, and was neither partially unemployed nor temporarily unemployed. Accordingly, the claimant is not eligible for benefits for the weeks that ended December 5 and 12, 2015. During the week that ended December 19, 2015, the claimant was able to work, available for work, but partially unemployed and temporarily laid off. The claimant is eligible for benefits for the week that ended December 19, 2015, provided he meets all other eligibility requirements. AAA Concrete is not a base period employer for purposes of the claim year that ended on December 19, 2015 and will not be charged for benefits paid to the claimant for that week.

This decision concerning the November 29, 2015 additional claim (on the December 21, 2014 original claim date) is not intended to have any impact on the new claim year that started December 20, 2015.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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