

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MCCOMBS, KELLY, V**  
Claimant

**APPEAL NO. 10A-UI-17615-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FAREWAY STORES INC**  
Employer

**OC: 11/15/09**  
**Claimant: Respondent (5)**

Iowa Code Section 96.4(3) – Able & Available  
Iowa Code Section 96.4(3) – Still Employed Same Hours and Wages  
Iowa Code Section 96.7(2) – Employer Liability

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the December 16, 2010, reference 03, decision that allowed benefits effective October 31, 2010, based on an Agency conclusion that the claimant was still employed part time, was available for work, but that the employer did not have the same work available to the claimant as existed during the base period. After due notice was issued, a hearing was held on February 3, 2011. Claimant participated. Attorney Garrett Piklapp represented the employer and presented testimony through Jack Rusnak. The administrative law judge took official notice of the Agency's administrative record of wages reported by or for the claimant and benefits disbursed to the claimant.

**ISSUES:**

Whether the claimant has been able to work and available for work since October 31, 2010.

Whether the claimant was partially unemployed from his employment since October 31, 2010.

Whether the employer's account may be assessed for benefits paid to the claimant.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Kelly McCombs commenced working for Fareway Stores, Inc., as a part-time truck driver in February 2010. At the time of hire, the employer told Mr. McCombs that he could expect to work from one shift per week, likely a Saturday, up to 50 hours per week. Over the summer of 2010, the work picked up and Mr. McCombs consistently worked full-time hours. The employer computed Mr. McCombs *average* weekly hours for 2010 to be 32 hours per week. The full-time hours continued until the end of October 2010, when the available work hours significantly declined. In response to the decline in available work hours, Mr. McCombs established an "additional claim" for benefits that was effective October 31, 2010. The additional claim was based an "original claim" for benefits that was effective November 15, 2009. Fareway Stores, Inc. (employer account number 006745) is not a base period employer for purposes of the benefit year that

started November 15, 2009 and ended November 13, 2010. For the week ending November 6, 2010, Mr. McCombs reported \$230.00 in gross wages and received \$298.00 in gross unemployment insurance benefits. The employer had only made 14 hours of work available to Mr. McCombs for the week. For the week ending November 13, 2010, Mr. McCombs reported \$135.00 in wages and received \$393.00 in benefits. The employer had only made nine hours of work available to Mr. McCombs for the week. During both weeks, Mr. McCombs was available for full-time work. Mr. McCombs then discontinued his claim for benefits.

Mr. McCombs established a new "original claim" for benefits that was effective January 16, 2011. Fareway is the sole base period employer for purposes of the benefit year that started January 16, 2011. Mr. McCombs' new original claim for benefits was in response to the low number of hours he was receiving from Fareway. For the week ending January 22, 2011, Mr. McCombs reported \$125.00 in wages. For the week ending January 29, 2011, Mr. McCombs reported \$240.00 in wages. Mr. McCombs' hourly wage is between \$13.00 and \$14.00. Workforce Development has approved, but not yet disbursed, benefits for these two weeks. The hours that Fareway has for Mr. McCombs have begun to increase during the current week that will end February 5, 2011, but Mr. McCombs does not know yet what the total number of hours will be. Mr. McCombs continues to be available for full-time work with Fareway.

#### **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 section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 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 section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

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).

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). Contract for hire merely means the established conditions of the employment. See Wiese v. Iowa Dept. of Job Service, 389 N.W.2d 676, 679 (Iowa 1986).

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.]

The weight of the evidence establishes that Mr. McCombs was available for full-time work, but was partially unemployed from the employment at Fareway during the two-week period of October 31, 2010 through November 13, 2010. The several months of full-time work caused the full-time hours to become the established conditions of the employment. The weight of the evidence does not support the employer's assertion that the bulk of the full-time hours Mr. McCombs enjoyed until the end of October 2010 were from filling in while other drivers were on vacation over the summer months. Mr. McCombs was eligible for the benefits he received for the two-week period of October 31, 2010 through November 13, 2010. Because Fareway was not a base period employer for purposes of the claim year that began November 15, 2009 and ended November 13, 2010, Fareway's account will not be assessed for the benefits paid to Mr. McCombs for the October 31, 2010 through November 13, 2010.

The weight of the evidence establishes that Mr. McCombs has continued to be available for full-time work, but has been partially unemployed from the Fareway employment from the time he established the new "original claim" for benefits that was effective January 16, 2011. Mr. McCombs is eligible for benefits effective January 16, 2011. Fareway's account may be assessed for benefits paid to Mr. McCombs for the period beginning January 16, 2011.

#### **DECISION:**

The Agency representative's December 16, 2010, reference 03, is modified as follows. The claimant was available for work, but partially unemployed from October 31, 2010 through November 13, 2010. The claimant was eligible for benefits for those two weeks. The employer was not a base period employer for purposes of those two weeks and the employer's account

will not be assessed for benefits paid for those two weeks. The claimant continued to be available for work, but partially unemployed from the Fareway employment effective January 16, 2011. The partial unemployment continues as of the entry of this decision on February 3, 2011. The claimant is eligible for benefits effective January 16, 2011. Fareway's account may be assessed for benefits paid to the claimant for the period beginning January 16, 2011.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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