FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No. 11-049932

Employee: Albert Brown

Employer: City of Columbia

Insurer: Self-Insured

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 30, 2014, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued October 30, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17th day of June 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Albert Brown

Dependents:

Employer: City of Columbia

Insurer: (Self-insured)

Additional Party: Second Injury Fund

Hearing Date: August 18, 2014

Injury No. 11-049932

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: RJD/njp

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: Alleged as June 4, 2011.
5. State location where accident occurred or occupational disease was contracted: Alleged as Boone County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Employer is self-insured.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee alleges he sustained an episode of heat exhaustion.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: N/A.
14. Nature and extent of any permanent disability: N/A.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? $70.00.
17. Value necessary medical aid not furnished by employer/insurer? None.

18. Employee's average weekly wages: N/A.

19. Weekly compensation rate: N/A.

20. Method wages computation: N/A.

COMPENSATION PAYABLE

Employer liability:

No benefits awarded. The claim against Employer is denied in full.

Second Injury Fund liability:

No benefits awarded. The claim against the Second Injury Fund is denied in full.

FINDINGS OF FACT AND RULINGS OF LAW

Employee: Albert Brown

Dependents:

Employer: City of Columbia

Insurer: (Self-insured)

Additional Party: Second Injury Fund

Injury No. 11-049932

Before the
DIVISION OF WORKERS' COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

PRELIMINARIES

These three cases (Injury Nos. 09-046265, 10-063415, and 11-049932) were consolidated for evidentiary hearing. The evidentiary hearing was held in these cases on August 18, 2014 in Columbia. Claimant, Albert Brown, appeared personally and by counsel, Todd Werts. Employer, City of Columbia, appeared by counsel, Amanda Pope. The Second Injury Fund appeared by counsel, Assistant Attorney General Brian Herman. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on September 12, 2014.

ISSUES TO BE DECIDED IN INJURY NO. 09-046265

In Injury No 09-046265, the hearing was held to determine the following issues:

1. Whether the accident or occupational disease of June 23, 2009 was the prevailing factor in the cause of any or all of the injuries and/or conditions alleged in the evidence;
2. Employer's liability, if any, for permanent partial disability benefits; and
3. Second Injury Fund's liability, if any, for permanent partial disability benefits.

STIPULATIONS IN INJURY NO. 09-046265

In Injury No. 09-046265, the parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over the case;

2. That venue for the hearing is proper in Boone County;

3. That the claim for compensation was filed within the time allowed by the statute of limitations, §287.430;

4. That both Employer and Employee were covered by the Missouri Workers' Compensation Law at all relevant times;

5. That Employee Albert Brown sustained an accident or occupational disease arising out of and in the course of his employment with the City of Columbia on June 23, 2009;

6. That Claimant's average weekly wage is $359.09, and compensation rate is $239.39

7. That the notice requirement of §287.420 is not a bar to the claim for compensation;

8. That the City of Columbia was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times; and

9. That Employer paid $1882.75 in medical benefits and $118.15 in temporary total disability benefits.

ISSUES TO BE DECIDED IN INJURY NO. 10-063415

In Injury No 10-063415, the hearing was held to determine the following issues:

1. Whether the accident or occupational disease of August 10, 2010 was the prevailing factor in the cause of any or all of the injuries and/or conditions alleged in the evidence;
2. Claimant's average weekly wage and compensation rate;
3. Employer's liability, if any, for permanent partial disability benefits; and
4. Second Injury Fund's liability, if any, for permanent partial disability benefits.

STIPULATIONS IN INJURY NO. 10-063415

In Injury No. 10-063415, the parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over the case;

2. That venue for the hearing is proper in Boone County;

3. That the claim for compensation was filed within the time allowed by the statute of limitations, §287.430;

4. That both Employer and Employee were covered by the Missouri Workers' Compensation Law at all relevant times;

5. That Employee Albert Brown sustained an accident or occupational disease arising out of and in the course of his employment with the City of Columbia on August 10, 2010;

6. That the notice requirement of §287.420 is not a bar to the claim for compensation;

7. That the City of Columbia was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times; and

8. That Employer paid $5779.45 in medical benefits and $794.29 in temporary total disability benefits.

ISSUES TO BE DECIDED IN INJURY NO. 11-049932

In Injury No 11-049932, the hearing was held to determine the following issues:

1. Claimant's average weekly wage and compensation rate;
2. Whether Claimant sustained an accident or occupational disease arising out of and in the course of his employment with the City of Columbia on June 4, 2011;
3. If found to have been sustained, whether the accident or occupational disease of June 4, 2011 was the prevailing factor in the cause of any or all of the injuries and/or conditions alleged in the evidence;
4. Whether Employer shall be responsible for the payment of any or all of the charges for past medical services to the Veterans' Administration in the claimed amount of $752.04;
5. The liability, if any of Employer for permanent partial disability benefits or permanent total disability benefits; and
6. Second Injury Fund's liability, if any, for permanent partial disability benefits or permanent total disability benefits.

STIPULATIONS IN INJURY NO. 11-049932

In Injury No. 11-049932, the parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over the case;

2. That venue for the hearing is proper in Boone County;

3. That the claim for compensation was filed within the time allowed by the statute of limitations, §287.430;

4. That both Employer and Employee were covered by the Missouri Workers' Compensation Law at all relevant times;

5. That the notice requirement of §287.420 is not a bar to the claim for compensation;

6. That the City of Columbia was an authorized self-insured for Missouri Workers' Compensation purposes at all relevant times; and

7. That Employer paid $70.00 in medical benefits and no temporary disability benefits.

EVIDENCE

The evidence consisted of the testimony of Claimant, Albert Brown, and the following exhibits:

Claimant's Exhibits

A. *Curriculum Vitae* of Dr. David Volarich;
B. July 12, 2011 Report of Dr. David Volarich;
C. February 21, 2012 Addendum Report of Dr. David Volarich;
D. Deposition of Dr. David Volarich;
E. *Curriculum Vitae* of Phillip Eldred;
F. March 25, 2013 Report of Phillip Eldred;
G. Deposition of Phillip Eldred;
H. Medical Records from Boone Hospital Center;
I. Medical Records from the Work Center;
J. Medical Records from University Hospital and Clinics;
K. Medical Records from University Hospital provided by Employer/Insurer;
L. Occupational Medicine of Mid-Missouri provided by Employer/Insurer;
M. Medical Records from Boone Hospital Center provided by Employer/Insurer;
N. Medical Records from Department of Veterans Affairs I;
O. Medical Records from Department of Veteran Affairs II;
P. Medical Records from Department of Veterans Affairs.

Employer's Exhibits

1. *Curriculum Vitae* of Dr. Russell Cantrell;
2. Report dated July 17, 2013 of Dr. Russell Cantrell;
3. Report dated August 30, 2013 of Dr. Russell Cantrell;
4. Deposition of Dr. Russell Cantrell with attached exhibits;
5. Deposition of Albert Brown, pp 1- 16, 36-104;
6. Wage information for Date of Injury June 23, 2009;
7. Wage information for Date of Injury August 10, 2010;
8. Wage information for Date of Injury June 4, 2011.

DISCUSSION

These cases all involve alleged incidents of heat exhaustion.

Albert Brown ("Claimant") was born on August 27, 1955 in Newport, Arkansas. He graduated from Soldan High School in St. Louis in 1973. He was in the USMC for over two years and was honorably discharged. Claimant worked in a GM auto assembly plant in St. Louis for 5-7 years, then worked for ten years at the U.S. Army Publication Center in St. Louis. After relocating to Columbia, Claimant worked for two years at Textron assembling dashboards, then worked at Uponor, a sewer pipe manufacturer. After going to truck-driving school, Claimant worked briefly as an over-the-road driver; this career was cut short when his cancerous kidney was removed. Claimant then worked several years for private trash-hauling firms. In 2009, Claimant began working for the City of Columbia ("Employer") as a driver of a trash truck; after about six weeks he became a recycling truck driver.

It is also important to note that Claimant's recycling truck did not have air conditioning. Claimant would drive the truck, but would also be in and out of the truck more than 200 times per day, retrieving and throwing bags filled with recyclables. Claimant testified that each bag weighed around 50 pounds. It is also important to note that Claimant would often work on Saturdays at the hazardous materials disposal center. This would require Claimant to wear a "haz-mat" suit for four hours or longer.

As noted above, Claimant had a kidney removed in 2002. Claimant also has a history of tobacco use, episodic cocaine abuse, episodic cannabis abuse and alcohol abuse. There is little question that Claimant was using cocaine during his period of employment with Employer.

As stipulated, Claimant sustained an episode of heat exhaustion on June 23, 2009 while driving the recycling truck and performing his regular duties of retrieving and throwing bags filled with recyclables. The temperature was in the 90's that day, and the heat indices were over 100°. Claimant began suffering cramps, blurred vision, lack of sweating, left-sided headaches, vomiting, and a feeling of nearly passing out. Claimant was seen by Dr. Richard Herting, an occupational medicine physician, who diagnosed heat exhaustion. Claimant was sent to the University Hospital. When seen by Dr. Herting on June 29, 2009, Claimant was noted as no longer dizzy, no longer nauseated or vomiting, with no blurred vision or headaches. Claimant returned to work at full duty. There were no additional incidents of heat exhaustion until August 10, 2010.

Also as stipulated, Claimant sustained an episode of heat exhaustion on August 10, 2010. Claimant was performing his regular duties; the heat indices were over 100°. Claimant experienced the same types of symptoms he experienced on June 23, 2009, with additional symptoms of numbness in his fingertips. Claimant went to the VA hospital that day for heat exhaustion. On August 11, 2010, Claimant was seen by Dr. Maria Katsaros, an occupational medicine physician, who diagnosed: "nausea and vomiting, headache, and muscle cramps secondary to heat exposure, work-related". Claimant continued to work for Employer at full duty, including the Saturday hazardous material work.

Claimant has alleged a third incident of heat exhaustion occurring on June 4, 2011, a Saturday. Claimant was working hazardous material recycling and was working in a haz-mat suit for over five hours. Claimant testified that he "felt heat exhaustion coming on", with symptoms of headache and dizziness. Claimant testified that he went home and took a cold shower and "thought I was alright". Claimant testified that he worked his regular shift the following Monday, Tuesday and Wednesday. Claimant testified that he worked on Thursday (June 9, 2011), but left work with headaches and dizziness and went to the VA Hospital. The VA Discharge Summary for Admission Date June 9, 2011/Discharge Date June 10, 2011 states the HISTORY as follows:

> Mr. Brown is a 55 y/o male with hx of cocaine abuse, ETOH abuse, chronic headaches, cardiomyopathy (EF 44% by MPS 6/23/2010), CKD stage III (baseline Cr 1.4.1.9), and s/p left nephrectomy for carcinoma. He was in his usual state of health until 4 days ago when he developed mild sxs of a cold (nasal congestion, mild sore throat, mild cough, myalgias, and low grade temp of 100). He continued to work outside in the heat as a garbage collector. States he maintained his fluid intake well. Also used cocaine 3 days ago. Drinks alcohol occasionally and states only drink in last 3 days was yesterday (1 beer). Reports of having hx of heat exhaustion the last 2 summers. C/o having very dark urine (reports as tea colored when promopted) (sic). C/o severe headache, nausea, vomiting x2 (Sat and Wed), dizziness upon standing. Also c/o severe abdominal pain rated 10/10, startin (sic) in epigastrum and radiating laterally into the left flank. Denies melena, hematochezia, hematemsis (sic). Denies NSAID use.

The HOSPITAL COURSE of the Discharge Summary states that Claimant was found to be in acute renal failure with a creatinine of 5.17 and a potassium of 6.7. The record further states:

> Etiology of renal failure thought to be dehydration as patient works outside, though UOP was good and patient drinks a lot of fluids, vs. cocaine use without rhabdomyolysis. He was treated with IV fluids, sodium bicarb, galcium (sic) gluconate, insulin, and D50 with rapid resolution of his acute renal failure and hyperkalemia. CT of the abdomen did not reveal any etiology for his abdominal pain, which was likely due to acidosis and resolved. He was counseled to refrain from using cocaine and discharged home to follow-up with nephrology in 4 weeks with labs.

On June 30, 2011, Claimant was seen at Employer's request by Dr. Maria Katsaros, an industrial medicine physician. Claimant described to Dr. Katsaros the history of working in extreme conditions on June 4, 2011 with a complaint of heat exhaustion. Dr. Katsaros opined that Claimant's recent hospital admission was "non-work related".

On July 12, 2011, Claimant was seen at the request of his (Claimant's) attorney by Dr. David Volarich for an evaluation for workers' compensation litigation purposes. Claimant related to Dr. Volarich the history and *sequelae* of the June 23, 2009 and August 10, 2010 heat exhaustion incidents, but, quite apparently, did not tell Dr. Volarich about the June 4, 2011 alleged heat exhaustion incident. There is no mention in Dr. Volarich's July 12, 2011 report of

the June 4, 2011 alleged heat exhaustion incident. In his report of July 12, 2011 Dr. Volarich opined that Claimant sustained a 12.5% permanent partial disability of the body as a whole as a result of the June 23, 2009 heat exhaustion incident and a 15% permanent partial disability of the body as a whole as a result of the August 10, 2010 incident; Dr. Volarich also questioned Claimant's ability to compete in the open labor market and recommended a vocational evaluation. After receiving additional medical records (VA Hospital Records), Dr. Volarich saw Claimant again on February 21, 2012 and issued a report of the same date. That report does mention the June 4, 2011 alleged heat exhaustion incident. In the 2/21/2012 report Dr. Volarich opined that Claimant sustained a third heat exhaustion episode on June 4, 2011, and further opined that the August 10, 2010 incident resulted in a 10% permanent partial disability of the body as a whole (as opposed to the 15% previously assessed), and that the June 4, 2011 incident resulted in a 5% permanent partial disability of the body as a whole. It is also interesting to note that Dr. Volarich's deposition was taken on August 16, 2012 – approximately nine months ***before*** Claimant filed a claim for compensation for the alleged June 4, 2011 heat exhaustion episode. (The claim for compensation in Injury No. 11-049932 was filed with the Division of Workers' Compensation on May 22, 2013.)

At the request of Claimant's attorney, vocational rehabilitation counselor Phillip Eldred evaluated Claimant on March 12, 2013 and authored a report dated March 25, 2013. Mr. Eldred stated "Mr. Albert Brown is permanently and totally disabled as a result of his injury on August 10, 2010 combined with his pre-existing injuries and medical conditions." Mr. Eldred briefly mentioned, but did not discuss, Claimant's alleged June 4, 2011 heat exhaustion incident. Eldred's deposition was taken on May 14, 2013, eight days before the claim for compensation was filed in Injury No. 11-049932. Eldred was asked if he would testify consistently with his report, and he responded affirmatively. There were no questions directed to Mr. Eldred regarding the alleged June 4, 2011 heat exhaustion incident, or the effect of same on Claimant's disability status.

Dr. Russell Cantrell evaluated Claimant at the request of Employer on June 17, 2013, and authored reports dated June 17, 2013 and (after being provided with additional medical records) on August 30, 2013. Dr. Cantrell's deposition was taken on January 29, 2014. Dr. Cantrell opined that Claimant suffered symptoms of heat exhaustion on June 23, 2009 and again on August 10, 2010; Dr. Cantrell did not believe that Claimant sustained any permanent disability as a result of either of those incidents. Dr. Cantrell testified that it was not likely that Claimant sustained an episode of heat exhaustion on June 4, 2011. Dr. Cantrell noted that patients with heat exhaustion typically present to an emergency room the day of the exposure, and not five days later in the context of drug ingestion and a respiratory infection. Dr. Cantrell reviewed the medical records leading up to June 9, 2011, and found that many of Claimant's symptoms including dizziness, shortness of breath, and pulmonary issues were present before June 4, 2011. Dr. Cantrell also noted that Claimant's complaints on June 9, 2011 included a sore throat, a cough, cold and nasal congestion and a low grade fever, which is not consistent with a heat related illness; it is more consistent with a viral illness, especially in light of the fact that Claimant reported that he maintained his fluid intake well, had good urine output and had an elevated white blood cell count. The symptoms, along with Claimant's history of cocaine use three days beforehand, drinking the night before and substance abuse in general caused

Dr. Cantrell to believe that Claimant's work activities were not the prevailing factor in causing his symptoms on June 9, 2011.

Claimant has other disabilities, per Dr. Volarich, summarized as follows:

1. 20% permanent partial disability of the right knee due to patellofemoral syndrome and tibial fracture sustained in a 2002 motor vehicle accident.
2. 15% permanent partial disability of the body as a whole due to kidney cancer and left nephrectomy from 2002.
3. 15% permanent partial disability of the body as a whole rated at the lumbar spine, due to chronic lumbar syndrome dating from a lifting injury in 2002.
4. 20% permanent partial disability of the left hand, from a 1974 left thumb fracture.

5. 20% permanent partial disability of the body as a whole rated at the cervical spine, due to a June 9, 2010 lifting injury.

Accident/occupational disease in Injury No. 11-049932. The first crucial issue that must be addressed is whether Claimant sustained a compensable accident or occupational disease on June 4, 2011. Did Claimant sustain a third incident of heat exhaustion on June 4, 2011?

On June 23, 2009 and on August 10, 2010, Claimant experienced cramps, blurred vision, lack of sweating, left-sided headaches, vomiting, and a feeling of nearly passing out; on June 4, 2011, Claimant's only symptoms were headaches and dizziness.

On June 23, 2009 and on August 10, 2010, Claimant quit working early to seek out immediate medical treatment; on June 4, 2011, Claimant completed his shift, went home, took a shower and "felt alright". After June 4, 2011, Claimant worked three full days and part of a fourth before seeking medical treatment. He also used cocaine and drank beer during that time.

A simple comparison of the undisputed facts surrounding the three incidents would lead one to conclude that there was no incident or episode of heat exhaustion on June 4, 2011. This is the same conclusion reached by Dr. Cantrell. I am compelled to find that Dr. Cantrell is correct. There simply is no evidence that Claimant sustained an incident of heat exhaustion on June 4, 2011, and there is substantial evidence consistent with Claimant *not* having sustained an incident of heat exhaustion on June 4, 2011

Therefore, the claim for compensation in Injury No. 11-049932 must be denied in full against Employer and against the Second Injury Fund and all other issues in Injury No. 11-049932 are moot.

Claim of permanent total disability. Prior to the hearing, the parties clearly stated that the issue of permanent total disability was only to be decided in Injury No. 11-049932, and that Claimant was seeking only permanent *partial* disability benefits in Injury Nos. 09-046265 and 10-063415. Therefore, the issue of permanent total disability should not be further addressed.

However, as noted above, Phillip Eldred is the only expert witness that testified regarding permanent total disability. Eldred not only concluded that Claimant is permanently and totally disabled, but that Claimant "is permanently and totally disabled as a result of his injury on

August 10, 2010 combined with his pre-existing injuries and medical conditions." If Eldred is indeed correct, this would clearly mean that the Second Injury Fund is liable for permanent total disability benefits in Injury No. 10-063415. I am at a loss to imagine why permanent total disability was not made an issue in Injury No. 10-063415, particularly considering that when Eldred's deposition testimony was taken, Claimant had not even filed a claim for compensation in Injury No. 11-049932!

Nevertheless, I find Mr. Eldred's conclusion of total disability less than compelling. The facts that Eldred cites in support of his conclusion of total disability suggest *partial* disability only. The reasonable conclusion that I draw from the evidence is that Claimant can no longer work in hot environments; by no means does this equate to total disability. Therefore, even if the parties had framed the issues to include a claim for permanent total disability against the Second Injury Fund in Injury No. 10-063415, I would be compelled to find that issue against Claimant.

Permanent partial disability. The evidence supports a finding that the heat exhaustion incident of June 23, 2009 (Injury No. 09-046265) resulted in a permanent partial disability of 10% of the body as a whole. The evidence further supports a finding that the heat exhaustion incident of August 10, 2010 (Injury No. 10-063415) resulted in additional permanent partial disability of 10% of the body as a whole. Claimant is further entitled to permanent partial disability benefits from the Second Injury Fund in Injury Nos. 09-046265 and 10-063415.

Average weekly wage ("AWW") and compensation rate in Injury No. 10-063415. I find that Section 287.250.1(4), and a portion of Section 287.250.2 are pertinent to this issue.

Section 287.250.1(4) reads:

> If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision;

and the pertinent portion of Section 287.250.2 reads: "'Wages', as used in this section, does not include fringe benefits such as retirement, pension, health and welfare, life insurance, training, Social Security or other employee or dependent benefit plan furnished by the employer for the benefit of the employee."

Exhibit 7 contains the compensation information necessary to compute the AWW pursuant to Sections 287.250.1(4) and 287.250.2. Ex. 7 contains compensation information for 14 one-week pay periods. I believe that only 13 pay periods are pertinent, and the information for payment date 5/08/10 is excluded from the computation.

"Week 13" On 8/7/10, Claimant received "regular pay" of $379.89 and "step-up" pay of $34.61, totaling **$414.50.** He also received pay for 8 hours of sick leave (an excluded "fringe benefit"), and thus clearly missed **one** scheduled work day.

"Week 12" On 7/31/10, Claimant received "regular pay" of $289.30 and "step-up" pay of $26.36, totaling **$315.66.** He also received pay for 8 hours of sick leave (an excluded "fringe benefit") and pay for 8 hours vacation (an excluded "fringe benefit") and thus clearly missed **two** scheduled work days.

"Week 11" On 7/24/10, Claimant received "regular pay" of $467.56, "step-up" pay of $43.13, "step-up overtime" pay of $3.59, "Time and a half overtime" of $39.45, and "incentive pay" of $5.84 totaling **$559.57**. He missed **zero** scheduled work days.

"Week 10" On 7/17/10, Claimant received "regular pay" of $467.56, "step-up" pay of $42.60, "step-up overtime" pay of $28.62, and "Time and a half overtime" of $113.97, totaling **$652.75**. He missed **zero** scheduled work days.

"Week 9" On 7/10/10, Claimant received "regular pay" of $467.56, "step-up" pay of $42.60, "step-up overtime" pay of $.80, and "Time and a half overtime" of $8.77, totaling **$519.73.** He missed **zero** scheduled work days.

"Week 8" On 7/3/10, Claimant received "regular pay" of $467.56, "step-up" pay of $42.60, "step-up overtime" pay of $.80, and "Time and a half overtime" of $8.77, totaling **$519.73.** He missed **zero** scheduled work days. Also on 7/5/10, Claimant received 8 hours of holiday pay (an excluded "fringe benefit"); the holiday pay was for the Monday Independence Day holiday – not a scheduled work day.

"Week 7" On 6/26/10, Claimant received "regular pay" of $204.56, and "step-up" pay of $8.52, totaling **$213.08**. He had 24 hours of "FMLA no-pay" and thus clearly missed **three** scheduled work days.

"Week 6" On 6/19/10, Claimant received $64.76 in "Sick FMLA" pay (an excluded "fringe benefit") and $153.24 in "Vacation FMLA" pay (also an excluded "fringe benefit"). He was also charged with 40 hours of "FMLA no-pay" and thus clearly missed **five** scheduled work days.

"Week 5" On 6/12/10, Claimant received "regular pay" of $140.27 and "step-up" pay of $12.78, totaling **$153.05.** He also received pay for 10.550 hours of sick leave (an excluded "fringe benefit") and pay for 17.450 hours vacation (an excluded "fringe benefit") and thus clearly missed **three** scheduled work days.

"Week 4" On 6/5/10, Claimant received "regular pay" of $467.56, "step-up" pay of $42.60, "step-up overtime" pay of $11.18, and "Time and a half overtime" of $122.73, totaling **$644.07**. He missed **zero** scheduled work days. Also on 5/31/10, Claimant received 8 hours of holiday pay (an excluded "fringe benefit"); the holiday pay was for the Memorial Day holiday – not a scheduled work day.

"Week 3" On 5/29/10, Claimant received "regular pay" of $414.96 and "step-up" pay of $29.29, totaling **$444.25.** He also received pay for 8 hours of vacation leave (an excluded "fringe benefit"), and thus clearly missed **one** scheduled work day.

"Week 2" On 5/22/10, Claimant received "regular pay" of $412.04 and "step-up" pay of $27.16, totaling **$439.20.** He also received pay for 8 hours of sick leave (an excluded "fringe benefit"), and thus clearly missed **one** scheduled work day.

"Week 1" On 5/15/10, Claimant received "regular pay" of $467.56 and "step-up" pay of $45.03, totaling **$512.59.** He also received pay for 8 hours of sick leave (an excluded "fringe benefit"), but since he worked 40 hours of regular pay, it is unclear as to whether he missed a scheduled work day.

Summary For the thirteen weeks, Claimant was paid $5,388.18. He also missed 16 scheduled work days. Therefore, per section 287.250.1(4), Claimant is deemed to have missed three "calendar weeks". Therefore, the total wages of $5,388.28 must be divided by ten weeks, not thirteen. This yields an **AWW of $538.81** and a **compensation rate of $359.21**.

FINDINGS OF FACT AND RULINGS OF LAW IN INJURY NO. 11-049932

In Injury No. 11-049932, in addition to those facts and legal conclusions to which the parties stipulated, I find the following:

1. On Saturday, June 4, 2011, Claimant was working hazardous material recycling and was working in a haz-mat suit for over five hours;
2. While working on June 4, 2011, Claimant began to experience symptoms of headache and dizziness;
3. Claimant finished working his scheduled shift on June 4, 2011, went home and took a cold shower and felt "alright";
4. Claimant worked his regular shifts on June 6, 7 and 8 without incident;
5. Claimant worked on Thursday (June 9, 2011), but left work with headaches and dizziness and went to the VA Hospital;
6. On June 9, 2011, Claimant advised VA Hospital personnel that he was fine until four days prior when he started with mild symptoms of a cold: nasal congestion, mild sore throat, mild cough, myalgias, and low grade temp of 100; Claimant also advised VA Hospital personnel that he maintained his fluid intake well and that he used cocaine three days prior;
7. Claimant did not have an episode of heat exhaustion on June 4, 2011;

8. Claimant did not sustain an accident arising out of and in the course of his employment with the City of Columbia on June 4, 2011;
9. Claimant did not sustain an occupational disease arising out of and in the course of his employment with the City of Columbia on June 4, 2011; and
10. All other contested issues in Injury No. 11-049932 are moot.

AWARD IN INJURY NO. 11-049932

In Injury No. 11-049932, the claim for compensation against Employer, City of Columbia, is denied in full. The claim for compensation against the Second Injury Fund is also denied in full. No compensation is awarded.

Made by /s/Robert J. Dierkes 10/30/2014
Robert J. Dierkes
Chief Administrative Law Judge
Division of Workers' Compensation