

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

Injury No.: 99-001342

Employee: Mark Hampton
Employer: Sac-Osage Fire Protection District
Insurer: Missouri Employers Mutual Insurance Company
Date of Accident: January 5, 1999
Place and County of Accident: Osceola, St. Clair County , Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 8, 2006. The award and decision of Administrative Law Judge Mark S. Siedlik, issued August 8, 2006, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 17th day of January 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Mark Hampton

Injury No. 99-001342

Employer: Sac-Osage Fire Protection District

Insurer: Missouri Employer's Mutual Insurance Company

Additional Party: N/A

Hearing Date: July 6, 2006

Checked by: MSS/lh

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
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: January 5, 1999.
5. State location where accident occurred or occupational disease was contracted: Osceola, St. Clair 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? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: The employee was injured while fighting a fire.
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: Head, body as a whole and cervical portion of spine.
14. Nature and extent of any permanent disability: 20 percent body as a whole.
15. Compensation paid to-date for temporary disability: \$2,234.28.
16. Value necessary medical aid paid to date by employer/insurer? \$38,375.55.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: In dispute.
19. Weekly compensation rate: \$40.00/\$40.00
20. Method wages computation: Application of §287.250(6).

COMPENSATION PAYABLE

21. Amount of compensation payable:
permanent partial disability: \$3,200.00
22. Second Injury Fund liability: N/A

TOTAL: \$3,200.00

23. Future requirements awarded: None

Said payments to begin as of date of the award and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Hurley Mahon.

FINDINGS OF FACT and RULINGS OF LAW:

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On July 6, 2006, the parties appeared before the Court for a final hearing in injury #99-001342. Hurley Mahon represented the employee and Bruce Levine represented the employer at hearing. Prior to the hearing the parties entered into various admissions and stipulations. The sole remaining issue was as follows:

1. As the claimant was a volunteer firefighter, what is the appropriate wage rate?

FINDINGS

Mark Hampton ("claimant") is a 50-year-old volunteer firefighter who sustained injury on January 5, 1999 while responding to a fire. Claimant testified that he has lived in St. Clair County, Missouri for the past twenty-five years and that he has volunteered for the Sac-Osage Fire Protection District ("Sac-Osage") for those twenty-five years.

Claimant's regular and full-time work in January 1999 was as a motorcycle technician at Golden Valley Suzuki in Clinton, MO. He earned approximately \$7 an hour for his full-time employment at Golden Valley Suzuki. Claimant also testified that for income he has had full-time, paid employment since 1974 for various other employers.

Claimant volunteers for Sac-Osage as a firefighter and has done so since 1974. He receives no pay for his volunteer work and testified that he never sought or expected to be paid for his volunteer work. Claimant testified that in fact he has never been paid for any type of firefighting. He has never sought paid work as a firefighter.

Consequently, he has never received, nor reported income as a result of his volunteer work for Sac-Osage. Since he had no expectation of income from his volunteer work Claimant testified that he had no intention of supporting his family with the volunteer work he provided for Sac-Osage.

Nevertheless, the Claimant did participate in annual training in Columbia, MO although he testified that as a volunteer he was not required to pass the testing administered at training seminars. Claimant also paid his own way to the training seminars. He never sought nor expected reimbursement from Sac-Osage for the costs of training or for his emergency radio, which he purchased entirely on his own.

As a volunteer firefighter, Claimant will have his radio on and the local sheriff will broadcast a call on the radio when a fire is called in. Different counties have different tones indicating there is a fire in a particular county. If the tone matched the one for the Sac-Osage District Claimant would respond if he could. Claimant responds to the majority of calls in his county and attends to the emergency if he can. Claimant did concede that he is not actually required to respond to any or all calls and that there is no reprimand or punishment should he fail to appear for a call. As an example, Claimant testified that he would not leave his job at Golden Valley Suzuki to respond to a call at Stockton Lake because it was too far away.

When he would respond to a call, Claimant would drive his personal vehicle to the fire station and drive or ride in a fire engine to the scene of a fire. Once there, if he was the highest-ranking officer, Claimant would assign other volunteers to a task, make sure the gas and electricity were shut off and then proceed to extinguish the fire. Once the fire-fighting was done Claimant and the other volunteers would return to the station, check over the equipment, clean and hang hoses, restock used equipment and refuel the vehicles. Upon completion of these tasks, Claimant would go home or return to work and was not required to remain at the fire station.

If no calls were coming in Claimant would occasionally visually inspect equipment to make sure it was ready for use. One Sunday a month most of the volunteer fire fighters would go around the community and check hydrants, run inspections, run the trucks and clear tree limbs. Otherwise, according to Claimant, there was generally someone near the station although Claimant was clear that there were no shifts, required hours, overnight stays at the stations or full-time work requirements.

While a call could come in at anytime, Claimant conceded that his work as a volunteer was not full time. For example, he had no set shift and was not required to be at the fire station at any particular time. He was not required to leave his paying job at Golden Valley Suzuki to respond to a call, although some employers allowed volunteers to leave their job to respond to a call.

Claimant had no idea how many calls he answered in 1998 (the year before his injury), how many fires he fought in 1998 or how many hours he actually put in as a volunteer in 1998.

The only other witness, Russell Ritchey, appeared by deposition. Mr. Ritchey, the fire chief in Clinton, MO, which borders St. Clair County, was described by Claimant as like a "Granddad." Mr. Ritchey testified that the City of Clinton has 14 paid, full-time firefighters but that Clinton also retains 15 volunteers who are paid on a per-call basis. (Ex. A, Page 5). Ritchey testified that given Claimant's training, Claimant would have qualified to be a shift-supervisor in 1999 if he were a full-time firefighter and not a volunteer. At that time, shift supervisors earned \$8.67 per hour.

However, Mr. Ritchey also testified that the paid Clinton firefighters worked 24/48 shifts, where they would be on the clock for 24 straight hours and off the clock for the next 48 hours. In contrast, Claimant was at home on January 5, 1999 and not at the station working a 24/48 shift. In fact, Claimant agreed that Sac-Osage does not have a 24/48 shift for volunteer firefighters, nor any type of scheduled shift.

Further, paid Clinton fire fighters were required to work 2,800 hours per year whereas there were no set or minimum hours for Sac-Osage volunteers like Claimant. Unlike Sac-Osage, the paid firefighters in Clinton were required to respond to radio calls and there were penalties if a paid Clinton fire fighter did not respond to a call: he would be fired. (Ex. A, Page 18).

Mr. Ritchey testified that Clinton has 15 volunteer firefighters, similar to Claimant, and that these 15

volunteers are paid on a per call basis. The per call payments to the volunteers range from a minimum of \$10 to a maximum of \$14, depending on the experience of the volunteer according to Mr. Richey. (Ex. A, Page 14-16).

LAW

There is no dispute that Claimant was a volunteer firefighter for the Sac-Osage Fire Protection District. There is likewise no dispute that as a volunteer Claimant was not compensated for his volunteer work.

Claimant argues before the Division, however, that he is entitled to have a compensation rate similar to the paid firefighters in Clinton, Henry County, Missouri imputed to his volunteer work for the purposes of determining his average weekly wage.

In contrast, Sac-Osage argues that as a volunteer Claimant's compensation rate should be the applicable statutory minimum, \$40 per week. The parties stipulated that Claimant sustained 20% permanent partial disability as a result of his January 5, 1999 injury and should receive 80 weeks of compensation.

Case law clearly provides that the employee has the burden of proving all material elements of his claim. Fischer v. Arch Diocese of St. Louis-Cardinal Richter Inst., 793 S.W. 2d 195 (Mo.App. 1990); Griggs v. A.B. Chance Co., 503 S.W. 2d 1997 (Mo.App. 1973); Hall v. Country Kitchen Restaurant, 936 S.W. 2d 917 (Mo.App. 1997).

Wage rate is determined by application of §287.250. The paragraphs are applied in descending order until the appropriate formula is found. Given that Mr. Hampton was injured while performing volunteer work I turn to §287.250.1(6), which states:

If the hourly wage has not been fixed or cannot be ascertained or the employee earned no wage, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees of the employer or any other employer.

Even though it was decided by application of a slightly different version of §287.250(6) the standard for determining the compensation rate for a volunteer worker was set by Johnson v. City of Duenweg Fire Department, 735 S.W. 2d 364 (Mo. 1987). In that case, a volunteer firefighter presented evidence that a firefighter in a neighboring city received compensation for his work. However, the Court ruled that Johnson and the similar paid employee did not have the "equal duties or responsibilities of employment." Id., at 368. The Court therefore entered an order that Johnson be paid at the then statutory minimum weekly amount.

As noted above, Claimant bears the burden of proof on the wage rate issue. The evidence presented is the testimony Russell Ritchey, the fire chief in Clinton, Henry County, Missouri, and the nearest district to St. Clair County that pays its firefighters.

Mr. Ritchey credibly testified that if the Claimant were to work as a full-time firefighter in Clinton, Missouri then he would have qualified for an hourly compensation rate of \$8.67. This rate applied to firefighters who worked full-time for the Clinton fire department. Claimant, however, did not work as a full-time fire fighter though. In fact, he had no set hours or shift. Claimant testified that some weeks there were no calls to respond to.

The firefighters in Clinton earning \$8.67 an hour did work required shifts, worked 24/48 shifts, were required to be at the fire station, could not fail to respond to a call and were subject to termination if they did fail to respond to a call. Presumably these full-time firefighters also supported their families on their wages as firefighters, something Claimant testified he does not do nor ever attempted to do.

Thus, the duties and responsibilities of a full-time paid firefighter in Clinton are quite different from the duties and responsibilities of a volunteer firefighter in St. Clair County.

In addition to this, the Clinton fire department actually does retain volunteer workers like Claimant. These volunteers are expected to respond to calls but are not required to, just like the Claimant. These volunteers have no set shifts, just like the Claimant. These volunteers are not required to be at the fire station at any set time, just

like the claimant. These volunteers are not paid a regular wage, just like the Claimant.

The Clinton volunteer firefighters do, in fact, receive a set amount for each call they respond to. While Mr. Ritchey suggested this was a "reimbursement" to volunteers for expenses, the amounts differed not because of any expenses the volunteers incurred but based apparently solely on their experience. Since these payments were tied to experience and not really any actual expenses, they appear to be minimal compensation to the Clinton volunteers for responding to a call and not mere "reimbursement" as suggested by Claimant.

The evidence supports a finding that the Claimant's duties and responsibilities are equal to those of the volunteers in the Clinton fire department and are not equal to the full-time paid firefighters in the Clinton fire department. I therefore find that Claimant's volunteer work at Sac-Osage is more in line with the payments made to Clinton fire department volunteers than the paid full-time firefighters in Clinton. This is based on the expectations of the volunteers, the hours actually worked by the volunteers and the requirements of the volunteers versus those of the paid firefighters.

I further find that the expectations the two fire departments apparently had of their volunteers is similar but that the Clinton fire department reasonably expects much more from its paid firefighters than from its volunteers and it pays some firefighters to meet those expectations. It expects so much that according to Mr. Richey the paid firefighters will be fired if they do not fully execute their duties and responsibilities, duties and responsibilities that are not placed on their volunteer staff.

I find that Claimant failed to meet his burden and demonstrate that he would have been compensated beyond the statutory minimum for another employer for the volunteer services he provided to Sac-Osage. Claimant presented no evidence that on call firefighters similar to Claimant are paid to be on call and to respond to calls whenever they happen to come in.

Even assuming that the evidence showed that Claimant would have qualified for the \$14 per call reimbursement in Clinton, Claimant's wages would still fall below the statutory minimum. Claimant would have received 150 payments at \$14 per equaling \$2,100.00. Divided by 52 weeks this equals \$40.38 per week. Two-thirds of \$40.38 per week is below the statutory minimum of \$40.

I therefore find that Claimant's compensation rate is \$40 / week per §287.250.6. Eighty weeks multiplied by \$40.00 equals \$3,200.00 and the employer/insurer is hereby ordered to pay this amount to Claimant. I grant Claimant's attorney Hurley Mahon a lien for 25% of this amount.

In conclusion, I find that Claimant failed to meet his burden of proof and show that the evidence supported a higher wage rate than the statutory minimum. As a volunteer employee with no set schedule, expectations or employment, Claimant's duties and responsibilities were not equal to those of the paid firefighters in the Clinton, Missouri fire department. Rather, Claimant's duties and responsibilities are at best more equal to volunteer firefighters in the Clinton fire department who received between \$10 and \$14 for each call to which they responded. Claimant should be recognized and commended for his volunteer work. However, the evidence does not support that he should be compensated at a wage rate higher than the statutory minimum.

Date: _____

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest

Director
Division of Workers' Compensation