

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

Injury No. 10-049057

Employee: Justin Holmes
Employer: City of Farmington
Insurer: Missouri Employers Mutual Insurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to determine the following issues: (1) average weekly wage and compensation rate for temporary total and permanent partial disability benefits; (2) whether employer is liable for additional temporary total disability benefits during the time period June 28, 2010, through June 27, 2012; and (3) permanent partial disability.

The administrative law judge rendered the following determinations: (1) employee's average weekly wage is \$697.14 resulting in compensation rates of \$464.76 for temporary total disability benefits and \$422.97 for permanent partial disability benefits; (2) employee was temporarily and totally disabled during the entire period from June 28, 2010, through June 27, 2012; and (3) the work injury resulted in a 35% permanent partial disability of the right shoulder at the 232-week level, a 10% permanent partial disability of the body as a whole referable to the low back, and a 10% permanent partial disability of the body as a whole referable to post traumatic headaches and mild cognitive dysfunction.

Employer filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in applying § 287.250.1(5) RSMo to determine employee's average weekly wage; (2) in finding employee is entitled to temporary total disability benefits for the period June 28, 2010, through June 27, 2012; and (3) in awarding 35% permanent partial disability referable to the right shoulder.

For the reasons stated below, we modify the award of the administrative law judge referable to the issue of temporary total disability.

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Discussion

Rate of compensation

The administrative law judge determined the appropriate rate of compensation for temporary total disability benefits is \$464.76. We agree with this result, but for different reasons than those cited by the administrative law judge. Specifically, we must disclaim the administrative law judge's reliance on § 287.250.1(5) RSMo, because employee was not employed for less than two weeks by employer as of the date of injury on June 27, 2010. Rather, as revealed by the payroll records submitted into evidence by the parties, employee had worked for employer at least since February 2010. Accordingly, we rely instead on § 287.250.4 RSMo, which provides, as follows:

If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.

The courts have declared that the foregoing section provides the fact-finder with broad discretion to determine a fair and just average weekly wage given the specific factual circumstances presented in each case. See, e.g., *Nielsen v. Max One Corp.*, 98 S.W.3d 585, 590 (Mo. App. 2003). Employer argues that we should apply the formula under § 287.250.1(4) RSMo for employees paid by the hour, which would result in a \$40 weekly compensation rate for temporary total disability benefits, or in other words, the statutory minimum rate. But in our opinion, this case presents exceptional facts, such that it would be unfair and unjust to use § 287.250.1(4) to determine employee's average weekly wage.

The record reveals that employee didn't merely respond to calls and work 2 to 3 hours at a time for employer, he also worked 24-hour shifts filling in for full-time firefighters who were absent. It follows that if, in the weeks leading up to the June 2010 injury, employee had had the "good fortune" of filling in for one or more full-time firefighters who were absent for one or more days, his average weekly wage under § 287.250.1(4) might have been significantly higher. As it turns out, however, employee's specific work history in the 13 weeks preceding the date of injury did not include any 24-hour shifts but rather only a handful of sporadic shifts of short duration. As a result of these chance circumstances, the formula under § 287.250.1(4) provides a rather paltry average weekly wage that, in our opinion, does not fairly and justly reflect employee's earnings. We deem these to constitute exceptional facts.

Also, given that the statute invests us with broad discretion to consider what is *fair* and *just* in this specific case, we find it appropriate to acknowledge that employee sustained his injuries in the course of performing duties indistinguishable from those performed by full-time firefighters, and that his injuries resulted from risks or hazards indistinguishable from those faced by full-time firefighters. It was of no consequence that employee was merely a part-time firefighter when the fire truck overturned that night, and the injuries he suffered were no less catastrophic owing to his part-time status. As a result of employee's commendable choice to confront the same risks and hazards as his peers

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who worked for employer on a full-time basis, he suffered severe injuries that resulted in financial hardship. These are, in our opinion, exceptional facts.

Ultimately, because a strict application of § 287.250.1(4) does not, in our opinion, provide a fair assessment of employee's average weekly wage, and because employee assumed the very same risks faced by his peers who worked for employer on a full-time basis, and suffered injuries resulting from those same risks, we deem it just to utilize the average weekly wage earned by full-time firefighters. We defer to, and hereby adopt as our own, the administrative law judge's finding that the average weekly wage earned by full-time firefighters working for employer during the relevant time period was \$697.14. Applying § 287.170 RSMo, the appropriate weekly compensation rate for temporary total disability benefits is \$464.76.

Temporary total disability

The administrative law judge determined that employee was temporarily and totally disabled during the entire time period from June 28, 2010, through June 27, 2012. After careful consideration, we must disagree. The administrative law judge relied on the opinions from employee's medical expert, Dr. Raymond Cohen, but the record reveals that Dr. Cohen was unaware of the material fact that employee returned to work for employer as a part-time firefighter in November 2010 after his release by the treating physician, Dr. Donald deGrange.

Specifically, in his initial report dated November 10, 2012, Dr. Cohen made no mention of employee's return to part-time work for employer between November 2010 and November 2011, and instead revealed his erroneous belief that, "[u]nfortunately this injury was significant enough that [employee] was no longer able to return to his prior occupation as a firefighter." *Transcript*, page 115. Then, in a letter dated February 21, 2013, employee's attorney incorrectly advised Dr. Cohen that "[f]rom the date of injury through June 27, 2012, [employee] did not work." *Transcript*, page 125. In response to this letter, Dr. Cohen issued the supplemental report containing his opinion that employee was temporarily and totally disabled through June 27, 2012. Because Dr. Cohen obviously relied on incorrect facts, we cannot credit his opinion with regard to temporary total disability.

In its brief, employer correctly notes that employee was not under any work restrictions from a treating physician during the time periods at issue. This leaves us with employee's own testimony as the only remaining evidence possibly supportive of an award of temporary total disability benefits. However, turning to employee's testimony, we find no indication that he was accommodated in any way in performing his work duties for employer following his return to work in November 2010. Instead, employee agreed on cross-examination that he believed he did all of the same jobs and duties for employer after his return to work that he did before his injury. *Transcript*, page 87. Those duties included wearing 50 to 60 pounds of fire gear, handling and carrying hoses weighing up to 110 pounds, using tools such as pike poles and axes to tear down walls and other structures, and assisting with the loading of victims onto stretchers and into ambulances. Employer's fire chief, Todd Mecey, credibly testified (and we so find) that employee never approached him after his return to work to report he was unable to or had any difficulty performing these

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duties. We find that employee performed his normal duties after his return to work, albeit while suffering from pain, and on a part-time basis.

We note also that employee agreed, on cross-examination, that he felt he could have performed a number of the jobs he applied for during the time periods at issue. *Transcript*, page 91. On redirect examination, employee somewhat inconsistently agreed to his attorney's leading question suggesting he would not have been able to perform those jobs. *Transcript*, page 101. We deem employee's earlier concession on cross-examination more persuasive than his later response to the leading question from his attorney, and after careful consideration, we do not find employee's testimony to persuasively support a conclusion that he was temporarily and totally disabled during the disputed periods.

Because this record ultimately lacks any persuasive evidence to support employee's claim for additional temporary total disability benefits, we conclude that employee was not rendered temporarily and totally disabled by the effects of the work injury during the entire period from June 28, 2010, through June 27, 2012. Rather, we find that employee was temporarily and totally disabled only during the three stipulated periods from June 28, 2010, to July 28, 2010; from August 12, 2010, through November 18, 2010; and from March 1, 2012, to June 27, 2012.

Because we have affirmed the administrative law judge's conclusion that the applicable rate for temporary total disability benefits is \$464.76, and because employer paid temporary total disability benefits at the rate of \$40 per week during those time periods, we conclude that employer is liable for a \$424.76 underpayment of temporary total disability benefits for each of the 35 and $\frac{4}{7}$ weeks that employee was temporarily and totally disabled. We conclude, therefore, that employer is liable for a total of \$15,109.32 in underpayment of temporary total disability benefits.

Corrections

On pages 6, 8, and 18 of the administrative law judge's award, she rendered findings with respect to the number of hours employee worked in the weeks preceding his injury. These findings appear to have derived from employee's Exhibit 7, which contains copies of employee's time and attendance records with employer. We note, however, that employer's Exhibit D contains a more complete record of employee's time and attendance, in that it includes the attached "Overtime Detail" pages for each pay period, which employee apparently omitted from his Exhibit 7. Accordingly, we disclaim the administrative law judge's findings on pages 6, 8, and 18, with respect to the hours employee worked in the weeks preceding his injury. We credit instead employer's Exhibit D with respect to this issue.

Conclusion

We modify the award of the administrative law judge as to the issue of temporary total disability benefits.

Employer is liable for \$15,109.32 in underpayment of temporary total disability benefits.

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The award and decision of Administrative Law Judge Maureen Tilley, issued November 24, 2014, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an 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 11th day of September 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

SEPARATE OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Justin Holmes

SEPARATE OPINION
CONCURRING IN PART AND DISSENTING IN PART

I concur with the majority's decision to rely upon § 287.250.4 RSMo in affirming the administrative law judge's determination with respect to the appropriate rate of compensation for temporary total disability benefits, but I would also affirm the administrative law judge's finding that employee was temporarily and totally disabled during the entire time period from June 28, 2010, through June 27, 2012.

The majority points to employee's return to sporadic, part-time work for employer following his release by Dr. deGrange as preclusive of a finding that employee was temporarily and totally disabled during that time period. I disagree with the majority's view, because it departs from the well-settled and long-standing case law precedent on the topic:

Missouri courts have made clear that the Commission is not prevented from finding that a claimant is ... totally disabled simply because he or she holds limited, sporadic and/or highly accommodated employment. Certainly the ability to perform some work is relevant to th[e] [total disability] determination, but it is not dispositive. To the contrary, a number of cases have recognized that a claimant can be totally disabled even if able to perform sporadic or light duty work. Cases in this area specifically state that neither the worker's ability to engage in occasional or light duty work nor the worker's good fortune in obtaining work other than through competition on the open labor market should disqualify the worker from receiving . . . total disability benefits under the Workers' Compensation Law.

Molder v. Mo. State Treasurer, 342 S.W.3d 406, 412 (Mo. App. 2011)(citations omitted).

The record is, admittedly, somewhat thin with regard to the type of activities employee engaged in during his sporadic work for employer after his return in November 2010. But it is clear enough to me from employee's credible testimony that he was working in severe pain during that time period affecting both his right shoulder and low back, that he was suffering from regular debilitating headaches, and that his short-term memory was significantly compromised. In their analysis, the Commission majority seems to concede at least that employee was working in severe pain, yet they ignore the upshot of this evidence: that employee's ability to perform limited and sporadic work for employer while in severe pain is in no way demonstrative of an ability to compete for work in the open labor market. Indeed, it appears to be uncontested by the parties that employee lost his *full-time* job as a direct result of the effects of his work injury. I believe this evidence overwhelmingly compels an award of temporary total disability benefits, especially when combined with the fact employee didn't receive any offers from the numerous employers he approached during the relevant time period.

The majority also ignores that employer's authorized treating physician, Dr. Collard, despite acknowledging the existence of a likely right rotator cuff tear in employee's shoulder as early as July 2, 2010, returned employee to the performance of heavy duty work that unquestionably led to a deterioration of employee's right shoulder condition to the point that

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he needed a surgical repair of the rotator cuff by March 2012. If Dr. Collard wasn't going to aggressively treat the structural abnormality *he knew to exist* in employee's right shoulder, he should have at the very least restricted employee from the heavy work duties that he must have known were going to cause a worsening of employee's right shoulder condition. It's clear at least to me that Dr. Collard was more interested in saving employer money than providing this severely injured firefighter with the treatment he needed, and employee's right shoulder will never be the same as a result. For this reason, I believe it is folly to point to the absence of any restrictions from Dr. Collard as supportive of a finding that employee was not temporarily and totally disabled during the relevant time period.

With respect to Dr. Cohen, I must reluctantly agree with the Commission majority that his opinion is fundamentally worthless with respect to the issue of temporary total disability, owing to the inexplicable choice on the part of employee's attorney to provide the doctor with incorrect facts. But it is well-settled in Missouri that "[a] claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of temporary total disability." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. 2003). I read employee's testimony quite differently than the majority. Specifically, I fail to appreciate the "concession" described by the majority on cross-examination:

- Q. If the records reflected in the three months after the accident—strike that. The records reflect that in the three months after you return to work by Dr. DeGrange, that you worked more hours than you did the three months before, would you dispute that?
- A. No, I wouldn't, I was kind of hard up.
- Q. But you also said you couldn't do anything in that period of time, that was your testimony on direct examination.
- A. Yeah, I was in a lot of pain and stuff like that, but we were trying to keep our house, I was trying to do everything I could.
- Q. Be that, you worked as a firefighter?
- A. Correct.
- Q. You did all the jobs and duties prior to when you went on a run, would that be fair?
- A. I think so, yeah.
- Q. Required all the lifting, and pulling of hoses, and tearing down, lifting of the patients, correct?
- A. Yeah, I don't know exactly what I did on those calls.

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Again, it is uncontested that employee suffered a significant and permanently disabling cognitive deficit as a result of the head injuries he sustained in the work injury. (Employer acknowledged as much by declining to appeal the administrative law judge's award of permanent partial disability for this condition.) Employee's memory is suspect at best, and he ultimately testified, and credibly so, that he can't remember what he did on the calls he worked for employer after his return to work. I find no "concession." Instead, I read the foregoing exchange as supportive of a finding that the only reason employee was working at all during this time period was because he had no other income and was trying to keep from losing his house—which, incidentally, he was unable to accomplish. Quite simply, employee was desperate. I strongly disagree with the majority's choice to fault him for his stoical attempt at continuing, despite the debilitating effects of his injuries, to accept part-time work from the only employer that would have him.

I am convinced that employee was temporarily and totally disabled during the entire time period from June 28, 2010, through June 27, 2012. Accordingly, I must respectfully dissent from that portion of the Commission's award holding otherwise.

Curtis E. Chick, Jr., Member

INTER-OFFICE COMMUNICATIONS
DIVISION OF WORKERS' COMPENSATION

November 17, 2014

Ms. Naomi Pearson
Division of Workers' Compensation
P.O. Box 58
Jefferson City, Missouri 65102-0058

In Re: Injury Number: 10-049057
 Employee: Justin Holmes
 Employer: City of Farmington
 Insurer: Missouri Employers Mutual Insurance

Dear Ms. Pearson:

I have enclosed an award in the above referenced workers' compensation case. The employee has been awarded temporary total disability and permanent partial disability against the Employer-Insurer.

Maureen Tilley
Administrative Law Judge
Cape Girardeau, Missouri

Employee: Justin Holmes

Injury No. 10-049057

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Justin Holmes

Injury No.10-049057

Dependents: N/A

Employer: City of Farmington

Additional Party: Second Injury Fund (Left Open)

Insurer: Missouri Employers Mutual Insurance

Hearing Date: August 25, 2014

Checked by: MT/sm

SUMMARY OF FINDINGS

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? June 27, 2010
5. State location where accident occurred or occupational disease contracted: St. Francois 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 happened or occupational disease contracted: Employee was ejected from a fire truck. He sustained injuries to his right shoulder and low back. He also sustained injuries to the body as a whole referable to post traumatic headaches and mild cognitive dysfunction.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Shoulder, low back and body as a whole referable to post traumatic headaches and mild cognitive dysfunction.
14. Nature and extent of any permanent disability: See findings
15. Compensation paid to-date for temporary total disability: \$1,422.84
16. Value necessary medical aid paid to-date by employer-insurer: \$52,136.01
17. Value necessary medical aid not furnished by employer-insurer: N/A
18. Employee's average weekly wage: \$697.14
19. Weekly compensation rate: Permanent partial disability: \$422.97 Temporary total disability \$464.76
20. Method wages computation: By agreement
21. Amount of compensation payable: See findings
22. Second Injury Fund liability: Left open
23. Future requirements awarded: N/A

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall 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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Kenneth Seufert

FINDINGS OF FACT AND RULINGS OF LAW

On June 27, 2014, the employee, Justin Holmes, appeared in person and with his attorney, Kenneth Seufert, for a hearing for a final award. The employer-insurer was represented by its attorney, Patrick McHugh. The Second Injury Fund was left open and therefore an attorney representing the Second Injury Fund was not present. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. Covered employer: Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Missouri Employers Mutual Insurance.
2. Covered employee: On or about the date of the alleged accident or occupational disease the employee was an employee of City of Farmington and was working under the Workers' Compensation Act.
3. Accident: On or about August 25, 2014, the employee sustained an accident or occupational disease arising out of and in the course of his employment.
4. Notice: Employer had notice of employee's accident.
5. Statute of limitations: Employee's claim was filed within the time allowed by law.
6. Medical causation. Employee's injury was medically causally related to accident or occupational disease.
7. The Employer-Insurer paid \$52,136.01 in medical aid.
8. The Employer-Insurer paid \$1,422.84 in temporary total disability.
9. The parties stipulate that Exhibit 9 represents the amount a full-time fireman made.

ISSUES

1. Determination of claimant's average weekly wage and applicable temporary total disability and permanent partial disability rates.
2. Claimant's entitlement to additional TTD benefits, which claimant alleges should be paid at a weekly rate of \$464.12. Claimant alleges TTD benefits are owed for the period of time of 6/28/10 through 6/27/12, or 104-2/7 weeks which, applying credit for benefits paid, results in a claim for \$46,975.63 in past due TTD benefits. In the event it is found claimant was paid TTD benefits for the proper period of time, claimant alleges an underpayment of \$424.12 (\$464.12 minus \$40.00 = \$424.12), for 35-4/7 weeks.
3. Nature and extent of permanent partial disability.

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- 1A. Medical report of Raymond F. Cohen, D.O. dated 11/10/12
- 1B. Medical report of Raymond F. Cohen, D.O. dated 3/19/13, with letter from Mr. Seufert requesting supplemental opinion
- 1C. Curriculum Vitae of Raymond F. Cohen, D.O.
2. Medical records (and Index of Records prepared by Mr. Seufert) of the following health care providers:
 - A. St. Francois Ambulance District
 - B. Parkland Health Center
 - C. Matthew D. Collard, D.O.
 - D. Donald deGrange, M.D.
 - E. ProRehab
 - F. Professional Imaging
 - G. Gregory H. Smith, D.O.
 - H. Shirley Caggiano, LCSW, Ph.D.
 - I. Wayne Stillings, M.D.
 - J. Albert A. Barton, LCSW
3. Report of Injury
4. Claim for Compensation
5. Missouri Uniform Accident Report
6. Second job wage lost – Riverside Water Technology, Inc. a/k/a Schaefer Water Centers with accompanying payroll register
7. City of Farmington – Time and attendance records: 2/20/10 – 6/25/10
8. Work Status Reports of Dr. Collard and Dr. deGrange
9. City of Farmington – Payroll history reports of six full-time firemen
10. MEM payment ledger – 6/27/10 -- 12/31/13

Employer-Insurer's Exhibits

- A. Matthew D. Collard, D.O. – medical report of 7/24/12
- B. Medical report of Donald A. deGrange, M.D. – 5/2/11
- C. Medical report of David M. Peebles, M.D. – examination of 8/27/13
- D. City of Farmington – Time and attendance and payroll records for 3/6/10 – 6/25/10
- E. City of Farmington – Time and attendance records for 11/20/10 – 12/9/11
- F. City of Farmington payroll records – 11/20/10 – 12/9/11

FINDINGS OF FACT

Since 2008, Todd Mecey was the fire chief for the City of Farmington. In 2010, the City of Farmington had six full-time firefighters, five captains, and one fire chief. The full-time firemen worked 24 hour shifts on a rotating basis as follows:

Day 1:	24 Hours
Day 2:	Off
Day 3:	24 Hours
Day 4:	Off
Day 5:	24 Hours
Day 6 through Day 9:	Off

Repeat Cycle

According to Chief Mecey, the firefighters averaged 112 hours every two weeks and were paid overtime. They earned somewhere between \$9.00 to \$10.00 per hour.

By stipulation of the parties, Exhibit 9, pages 2 through 7, accurately reflect what the six full-time firemen made in the year 2010. The accuracy of the calculations made on page 1 of Exhibit 9 are not mathematically correct because fireman 5's annual total was understated by \$300.00. The correct calculation is as follows:

1.	\$ 36,162.34
2.	\$ 36,284.10
3.	\$ 35,196.78
4.	\$ 36,742.66
5.	\$ 36,414.21
6.	<u>\$ 36,707.40</u>
Total:	<u>\$217,507.49</u>

\$217,507.49 divided by 6 = \$36,251.25
 \$36,251.25 divided by 52 = \$697.14 per week
 Maximum PPD rate as of 06-27-2010 is \$422.97

In addition to the six full-time firemen, the City of Farmington maintained a compensated volunteer firemen force of 25 persons in 2010. These are individuals who had volunteered to fill in for full-time firemen or, in the alternative, to be on-call in the event there was a lack of manpower to handle all the duties of the Farmington Fire Department. Volunteer compensated firemen were required to perform the essential duties of a full-time fireman. These duties included responding to first alarms, as well as EMS calls. First alarms were essentially a multiple truck response to a building fire, while an EMS call was as response to someone in need, requiring immediate medical attention. The work of an on-call compensated volunteer fireman was physically demanding, the same as for a full-time fireman.

Volunteer compensated fireman worked irregular hours and had no scheduled hours. If a member of the 25 person compensated volunteer force was called, he did not have to respond; no job action, such as demotion, suspension or termination was taken for failure to answer call. If a

compensated volunteer responded, he was paid \$8.00 per hour from the time the call went out until he finished his duties and was guaranteed a minimum of two hours. In addition, on call compensated volunteers might be asked to work as full-time firemen when a regular full-time fireman was absent due to vacation, sick time, etc.

The employee was one of the 25 compensated volunteer firemen for the City of Farmington in 2010. He had no scheduled hours in 2010. Leading up to June 27, 2010, the employee worked the following hours: (Employer's Exhibit E and Employee's Exhibit 7)

06-24-10:	2.0 hours
06-04-10:	2.0 hours
04-26-10:	3.0 hours
04-19-10:	4.0 hours

This covered the 13 weeks prior to the week of the injury on June 27, 2010.

Although the employee was an on-call compensated volunteer fireman, he was not eligible to be hired as a full-time fireman because he did not have the certification required by the City of Farmington. According to Chief Mecey, if he would have had that certification, he would have, in all likelihood, been hired as a full-time fireman.

Employee's Exhibit 11 reflects dates and hours of each day that the employee worked for the City of Farmington after June 27, 2010. This is similar to Employer's Exhibit E and F. An evaluation of these hours after June 27, 2010, shows that the employee worked on April 25, 2011, October 7, 2011, November 17, 2011, as a full-time fireman for 24 hours each day. He also worked on March 7, 2011, for 13.5 hours and on March 8, 2011, for 13.0 hours, as well as 12 hours on April 21, 2011. Otherwise he worked two to three hours per day when called; on rare occasion he would work four or six hours. The period of time from November 18, 2010, to December 19, 2011, is 397 days. During this period of time, the employee worked as a compensated volunteer for the City of Farmington a total of 40 distinct days. During these 40 days, he worked approximately 200 hours. But again the substantial part of this work was in increments of two or three hours.

JUSTIN HOLMES

The employee was born on September 18, 1982. He is presently 31 years-old. The last four digits of his social security number are 4928. He resides in Bonne Terre, Missouri, with his wife, Cathy, and son, Cooper Lee.

The employee lost his home after the accident of June 27, 2010, when he was unable to work his full-time job at Schaefer Water Systems as a delivery person. Without his regular full-time income, he could not make his mortgage payments and he had to move to his present address, which is 215 North Norwine, Bonne Terre, Missouri 63628.

The employee is presently employed at Accent Marketing, Inc., working as a customer service representative, answering calls for Sprint Telephone Company. The work is sedentary and involves answering calls and operating a computer to resolve customer problems. He started in July, 2012, after he was released by Dr. Matthew Collard, D.O., at a base rate of \$9.00 per hour. He presently makes \$9.55 per hour and works 40 hours per week.

The employee graduated from Farmington High School. He attended Mineral Area College for two years on a baseball scholarship and one year at Central Methodist College on a partial baseball scholarship. He left college after his third year.

He can read and write and perform basic math. He has no learning disabilities. He can operate a computer, but has no proficiency with any software programs.

His firefighter education was obtained at Mineral Area College. He completed Firefighter I and II and an EMT class. He has passed Firefighter I certification, but not Firefighter II certification. He has never been a certified firefighter. Even so, he is not required by the State of Missouri to be certified in order to work as a firefighter. City of Farmington requires most of its firemen to be certified but not all of them.

The employee's work history includes the following:

1. After leaving Central Methodist College after his third year in college he went to work at ABC Auction Company in Indianapolis, Indiana, for nine months. He traveled and solicited business. The job involved some manual labor.
2. He returned to Farmington to play uncompensated baseball. He also started a full-time job for Eden Brothers which operated a consignment business selling on E-Bay. The employee's duties were to pack and ship sold items to buyers.
3. He was next employed by Rent-to-Own as a delivery person.
4. His last job before the accident was a full-time job at Schaefer Water System which he started in July, 2007, and worked there until July, 2010. His duties included delivery, warehouse and installation. He worked 40 hours per week at a rate of \$12.07 per hour and he made \$482.75 per week. He lost his job in July of 2010 after the accident when he could no longer perform the essential duties of his job.

The employee has worked as a compensated volunteer fireman for the City of Farmington since about 2004. (Exhibit 3) Upon accepting a call, he performed the essential duties of a full-time fireman for the City of Farmington for the period of time he worked. He was paid \$8.00 per hour from the time of the call until he finished the work. He worked irregular hours. He was part of a 25 member compensated volunteer force. If called, he did not have to show up. If he failed to answer the call, there were no consequences, no demotions, suspensions or terminations.

Before June 27, 2010, the employee suffered a minor separation of his right shoulder while playing high school football. He received treatment including consultation with Dr. William K. Harris, D.O. and some physical therapy. The injury was at the beginning of the football season and he did not miss any games. He has also had minor surgery of his buttocks of insignificance. He has no other significant pre-existing medical history.

He is right-hand dominant.

Leading up to June 27, 2010, the employee described his health as good with an active lifestyle. He ran on a routine basis, played softball, baseball, football, basketball and soccer. He golfed. He also enjoyed fishing. He was unaware of any limitations or restrictions to the use of his body. He worked full-time for Schaefer Water System and volunteered as a fireman for the City of Farmington. He had no history of headaches, memory loss, mood disorder or depression. He was socially involved with his spouse, family and friends.

He became a volunteer fireman for the City of Farmington because of friends who were already members of the force. He took training at Mineral Area College. He worked irregular hours.

His employment as a compensated volunteer fireman for the 13 weeks before the week of injury reflects the following employment with the City of Farmington: (Exhibit 7)

<u>Week</u>	<u>Beginning and Ending Date of Week</u>	<u>Dates Worked</u>	<u>Hours Worked</u>
13	06/19 – 06/25	06/24/10	2 Hours
12	06/12 – 06/18	No Work	No Hours
11	06/05 – 06/11	No Work	No Hours
10	05/29 – 06/04	06/04/10	2 Hours
9	05/22 – 05/28	No Work	No Hours
8	05/15 – 05/21	No Work	No Hours
7	05/08 – 05/14	No Work	No Hours
6	05/01 – 05/07	No Work	No Hours
5	04/24 – 04/30	04/26/10	3 Hours
4	04/17 – 04/23	04/19/10	4 Hours
3	04/10 – 04/16	04/12/10	3 Hours
2	04/03 – 04/09	04/05/10	3 Hours
1	03/27 – 04/02	03/29/10 04/01/10	3 Hours 12 Hours

On June 27, 2010, the employee was called at his home after midnight by the Farmington Fire Department. He accepted the call and reported to the fire station for a first alarm fire, a building fire. He arrived at the fire station, got dressed and boarded the fire truck. He was a front seat passenger. The fire was outside the City of Farmington and the call took the fire truck down Rural Route F. While proceeding down Route F, a vehicle traveling in the opposite direction came at the fire truck. The driver of the fire truck attempted to avoid a collision by

steering to the right. Unfortunately, the driver of the fire truck lost control; it turned over and the employee was ejected.

The employee landed approximately 75 feet away from the fire truck. His helmet, which was displayed at the hearing, was cracked in various places and destroyed by the impact. The employee's memory is impaired from his injuries; he recalls part of what happened, but not all of it. He remembers being outside the fire truck and walking around. He went to the assistance of his fellow firemen. One fireman was missing, although later found in the fire truck.

Initially he recalls feeling no symptoms and spent his time helping other firemen. Eventually EMS arrived at the scene. The employee was placed on a backboard, strapped to it and transported to the emergency room at Parkland Health Center. At some point the employee realized that he was having pain in his low back, his right shoulder, as well as in his head and neck. He also had a cut on the top of his head. At the emergency room, x-rays were ordered of his right shoulder and a CT scan of his head and neck were performed. He was released and told to follow-up with a physician. Subsequent treatment was by physicians employed by employer/insurer.

The employee's initial treatment was with Dr. Matthew Collard, D.O., an orthopedic surgeon, with an initial office visit on June 30, 2010. By that time the employee was symptomatic with pain in his right shoulder, low back pain and headaches. His memory was impaired and he could not remember everything that had happened.

His first round of treatment with Dr. Collard covered the period of 6-30-10 to 10-13-10. Treatment consisted of office visits, physical therapy and an MRI of the right shoulder. Initial diagnosis was right shoulder arthralgia and low back strain. The MRI of July 2, 2010, of the right shoulder revealed a tear of the rotator cuff. Treatment was conservative and during this time, Dr. Collard provided the following work status directive: (Exhibit 8)

<u>Date</u>	<u>Provider</u>	<u>Description</u>
06-30-10	Collard, D.O.	Limited Duty
07-07-10	Collard, D.O.	Limited Duty
07-28-10	Collard, D.O.	Full Duty
08-12-10	Collard, D.O.	Limited Duty
08-18-10	Collard, D.O.	Limited Duty
09-08-10	Collard, D.O.	Full Duty
09-29-10	Collard, D.O.	Full Duty
10-13-10	Collard, D.O.	Full Duty/Referral to spinal surgeon

On October 13, 2010, Dr. Collard released the employee from his care, but referred him to a spine specialist for his low back pain. At the time he was released by Dr. Collard, he gave a final diagnosis as follows:

1. Resolve right shoulder rotator cuff strain
2. Continued low back pain despite conservative treatment

Among other symptoms the employee continued to suffer severe low back pain and headaches including migraines. He was moody, irritable, having problems with his memory. He was forgetful of the task he was engaged in. He recalls that he could not do anything due to his ongoing symptoms. In October, 2010, he was not working.

The initial office visit with Dr. deGrange on October 18, 2010, the employee continued to complain of low back pain, especially with bending. Dr. deGrange ordered an MRI and placed the employee on limited duty. After the MRI he was diagnosed with an annular tear at L5-S1.

Epidural steroids were ordered, as well as physical therapy. Dr. deGrange treated the employee from October 18, 2010, through February 7, 2011. On November 18, 2010, Dr. deGrange recommended referral treatment for depression caused by the June 27, 2010, accident. During the course of treatment by Dr. deGrange, he provided the following work status directives: Exhibit 8.

10-18-10	deGrange, M.D.	Limited Duty
11-18-10	deGrange, M.D.	Full Duty
02-07-11	deGrange, M.D.	Full Duty/MMI--Referred to Dr. Stillings

On February 7, 2011, Dr. deGrange released the employee, noting that he still suffered from back soreness. According to the employee he was still hurting and he was given home exercises. His pain remained the same. Although the epidural steroid injections provided temporary relief, his pain returned to its same level which averaged a 5 to 6 on a pain scale of 0 to 10.

His right shoulder continued to hurt and he lacked range of motion. He had pain with activity. His right shoulder symptoms remained the same.

Eventually based on Dr. deGrange's recommendation of November 18, 2010, the employer-insurer sent the employee to a psychiatrist, Dr. Wayne Stillings, with an initial office visit on March 15, 2010. At that time the employee complained of low back pain, dizziness and problems with balance. He also complained of recurrent dreams about the accident, as well as insomnia, and intrusive recollections of the accident.

Dr. Stillings diagnosed mood disorder due to medical conditions from the June 27, 2010, accident with post traumatic factors. He ordered counseling, but released the employee to full duty.

Counseling was provided on six separate occasions by two separate counselors. He eventually finished counseling on July 5, 2011. On September 29, 2011, he returned to Dr. Stillings who opined that the mood disorder had resolved and released him from his care.

By September 29, 2011, the employee remained depressed, irritable, withdrawn. He still did not want to engage with others. He did not want to leave his house. He was also affected by the financial stress from the loss of his job and his inability to pay debts. He eventually filed bankruptcy.

According to the employee he could not work due to the pain in his low back, right shoulder, headaches and the fact that he remained depressed and did not want to be around people. His nightmares continued, albeit infrequently as before. The primary theme of his nightmares was the accident on June 27, 2010, or other accidents similar to the one he had experienced.

On November 20, 2010, the employee returned to his status as a compensated volunteer fireman for the City of Farmington. From that point forward until November 7, 2011, he received calls and worked for the City of Farmington, typically two or three hours. At times he was given more hours. When asked to explain why he accepted these jobs, or this work, given his medical condition, he explained that he had to work. He had to have money to save his house and to put food on the table. Even so he did not believe he could work full time, i.e., 40 hours per week performing manual labor.

Additionally during this same period of time, he had applied for unemployment compensation. Eventually this was denied and what benefits he received had to be paid back. The employee applied for work at various employers who required physical labor. No employer ever hired the employee or offered him a job.

After the employee was released by Dr. Stillings, his back pain remained severe and his right shoulder pain remained severe. Activity at the waist or activity of the right shoulder made his symptoms worse. He described the pain in his shoulder on a scale of 0 to 10, as a 4 escalating to 8 with activities. He coped by resting and by taking Aleve. His headache continued and his short term memory remained poor. He could not remember things and was required to write them down or call his wife for instructions. The relationship with his wife suffered from his irritability and personality changes.

Due to the lack of improvement to his right shoulder, the employee was eventually allowed to return to Dr. Matthew Collard, D.O., orthopedic surgeon. He complained of too much pain and inability to use his right arm. The employee said he could not get back to his normal life with the severity of the pain in his shoulder.

He returned to see Dr. Collard on February 15, 2012. Dr. Collard ordered an MRI/Arthrogram, which was interpreted as follows: (Exhibit 2)

1. *There is a full thickness tear of the distal anterior supraspinatus tendon with a centimeter or less gap between the torn tendon end and the greater tuberosity.*
2. *There is questionably some mild flattening of the posterior lateral humeral head that could be related to an old Hill-Sachs impaction injury. There is though no definite labral tear evident.*
3. *The remaining rotator cuff tendons and the biceps tendon have a normal appearance.*

On March 1, 2012, Dr. Collard took the employee to surgery described as follows:

1. Right shoulder arthroscopy, rotator cuff repair with Speer Bridge technique
2. SLAP lesion repair

From February 15, 2012, to July 20, 2012, the employee was treated by Dr. Collard. During this time, he provided the following work status directives: (Exhibit 8)

02-15-12	Collard, D.O. Full Duty
02-20-12	Collard, D.O. Full Duty
03-01-12	Collard, D.O. Surgery Cannot Work
03-07-12	Collard, D.O. Limited Duty
03-28-12	Collard, D.O. Limited Duty
05-16-12	Collard, D.O. Limited Duty
06-06-12	Collard, D.O. Limited Duty
06-27-12	Collard, D.O. Full Duty
07-20-12	Collard, D.O. MMI/Released

When the employee was asked why, from June 27, 2010, to June 27, 2012, he was unemployable in the open labor market, he stated the following;

1. Activity made his pain worse;
2. He could not work overhead;
3. He could not do any heavy lifting with either his right arm or his back;
4. He looked for work but nobody would hire him.

The shoulder surgery on March 1, 2012, improved his right shoulder pain. In July of 2012, he was able to return to work; even so, he took a job that was primarily sedentary and less physically demanding.

Presently the employee still suffers from his right shoulder injury with the following symptoms:

1. Shoulder pain, especially with full range of motion;
2. Limited range of motion with his right arm, especially overhead or putting his arm behind his back;
3. Loss of strength in his right arm, especially above shoulder level;
4. He can no longer perform duties of heavy lifting due to pain;
5. He has stopped playing sports which involved the use of his right arm;
6. He has stopped running and exercising due to the fact that it causes pain in his right shoulder.

Presently the employee still suffers from his low back injury with the following symptoms:

1. Pain on a scale of 0 to 10: his average pain is 4 but at times it can go to 8 or 9 with activity; he avoids heavy lifting, as well as bending or carrying heavy objects;
2. His back tightens up if he stands for longer than 30 minutes;
3. Bending or squatting causes increased pain;
4. While working on a vehicle, he often must stop and rest before continuing to complete the task due to back pain.

Presently the employee still suffers from his neck injury and post concussion syndrome, with the following symptoms:

1. Stiffness in his neck. While lying in bed, his neck tightens and makes it difficult to sleep;
2. His memory is poor. As an example, often when he takes his son to day care, he forgets to make the turn. He now must make notes, especially for appointment dates, times and phone numbers.
3. His personality has changed. He is more irritable, he is more argumentative, he is more vocal.
4. He still has headaches, but they have been reduced to about one time per week.
5. Nightmares have stopped, but he still has flashbacks, especially when he starts talking about the accident. He often finds himself ruminating about what happened, seeking answers as to why this happened to him.
6. His dizziness has resolved, but he still has problems with balance.
7. The employee said that he stills takes Aleve for pain, two to four tablets per day, especially if he is hurting from activities.

Upon cross-examination by the employer-insurer's attorney, the employee admitted that he worked some hours from November 20, 2010, to November 17, 2011, but it was approximately less than 200 hours over a one year period. Although still having symptoms, he worked as a firefighter. He said he was desperate for the money.

When asked whether or not he was laid off in September, 2010, he said he was but he had not actually worked since July, 2010.

He had applied for numerous jobs, but no one would hire him.

Throughout the hearing, the employee requested to take breaks and also had difficulty remembering things. He had a long list of notes and from time-to-time would have to refer to them, being unable to answer the questions without refreshing his memory.

The employee admitted that during the period of June 27, 2010 to June 27, 2012 he sought full- time work that he could not have actually performed.

Testimony of Cathy Holmes

Employee's wife, Cathy Holmes, was called to the stand. She testified that since the accident, the employee's personality has changed. He is more irritable, argumentative, he becomes frustrated easier and at times he is withdrawn.

He remains depressed, in part, because of the financial distress the accident and loss of his job caused him. He is better than he was before, but he is frustrated from working at a job he does not like. He is not proud of his job.

His memory is a problem. He forgets things. As an example, today he forgot to take their son's backpack with him to day care.

In talking about the employee seeking employment, Mrs. Holmes said it was directly the result of pressure she put upon him. They desperately needed the money and she thought he must do something to help. Even so during this time, his back hurt and his shoulder was painful. The effect of the injury substantially harmed their marriage relationship.

Opinions on the Extent and Nature of Permanent Disability

Matthew D. Collard, D.O., treated the employee for his low back injury and his right shoulder injury, and also performed rotator cuff repair, as well as a SLAP lesion repair, opined that the employee sustained a 4 percent permanent partial disability of the right shoulder.

Donald A. deGrange, M.D., who determined that the employee's low back symptoms were due to an L5-S1 annular tear, provided an opinion that the employee sustained a 2 percent permanent partial disability of the body as a whole.

David M. Peeples, M.D., who did not treat the employee, did a medical evaluation on August 27, 2013. At that time Dr. Peeples interviewed the employee who gave a history of headaches, right shoulder and low back pain, with current symptoms including headaches, which occurred on average once a week and were described as aching and pressure-like, as well as increased irritability and decrease in short-term memory. For headaches he was taking Aleve. In summary Dr. Peeples found that the employee sustained a concussion with loss of consciousness as a result of the June 27, 2010 incident. Dr. Peeples opined that in spite of the employee's subjective symptoms of cognitive dysfunction and headaches, for which the June 27, 2010, incident was a prevailing factor, he provided 0 percent of disability caused by the work injury of June 27, 2010.

At the request of employee's attorney, Raymond F. Cohen, D.O., a neurologist and certified independent medical evaluator, examined the employee on November 10, 2012. Excerpts from that report include the following:

"In November 2010 he was referred to Dr. DeGrange for orthopedic treatment of his low back pain. He was seen by Dr. DeGrange on several occasions... He was referred to Dr. Smith. Dr. Smith did several lumbar epidural steroid injections. These helped minimally with his low back pain. The low back pain returned to its baseline after the injections."

"He states that he continues to have headaches. The frequency has been less often for approximately the past one year. He has been having the headaches approximately 1-3 per month. At times he does have more than 3 per month. He will take Aleve and he is

able to obtain relief of the headaches with Aleve. He relates that he is able to do what he wants when he has the headaches. They are not associated with any neurological symptoms. They are described as not a severe pain but more of an aching pain.”

“In regard to his memory, he states that he forgets phone numbers. He will misplace items and he cannot remember where he puts them. He has to get a list from his wife if there is something important that he is to do or he will forget to do it. He will have a list to the store in order to remember what he is supposed to bring home. He does use a Smart Phone which does help him. He states that he continues to become lost at times. He will forget where he is going. He does have some problems controlling certain things that he normally would not say. He further states that he has had some irritability and that his “fuse is shorter”. He denies any symptoms of depression such as hopelessness, loss of interest in regular activities, sleeping too much or too little or any change in appetite.”

“In regard to his right shoulder, he has pain with reaching overhead. When he throws a ball this is particularly painful. He has difficulty sleeping on his right side. If he does want to sleep on the right, he tries to let the right arm hang over the bed. He does do his stretching exercises that were shown to him by the physical therapist. He has weakness with his right arm with overhead movements. He does have good strength if whatever he is lifting is below chest level. If he has to use his right arm more than normal, he has a deep soreness and aching feeling in the right shoulder joint. He states that he has to take quite a bit of Aleve for the shoulder.”

Dr. Cohen, after reviewing the medical records, including the surgery report of Dr. Collard documenting a right shoulder rotator cuff repair and Grade II SLAP lesion repair and having performed a physical examination, opined on permanency as follows: (Exhibit 1-A)

1. 40 percent permanent partial disability of the right shoulder, which prevents him from returning to his prior occupation as a firefighter.
2. 20 percent permanent partial disability of the body as a whole, attributable to the post traumatic headaches and mild cognitive dysfunction characterized by short term memory loss.
3. 20 percent permanent partial disability of the body as a whole, attributable to the low back spine due to the June 27, 2010, accident.

Dr. Cohen, in his supplemental report of March 19, 2013, also opined that the employee was temporarily and totally disabled from June 27, 2010, through June 27, 2012, based on his examination of the employee, his review of the medical records, and specifically the work-related injury of June 27, 2010. (Exhibit 1-B)

RULINGS OF LAW:

Issue 1. Average Weekly Wage and Disability Rates

RSMo. 287.250 provides as follows:

Compensation, computation of--average weekly wage, division or commission may determine, when--additional compensation for persons under twenty-one, when--multiple employers, computation of coverage--weekly wage--compromise settlement.

1. Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:

(1) If the wages are fixed by the week, the amount so fixed shall be the average weekly wage;

(2) If the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve and divided by fifty-two;

(3) If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two;

(4) 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;

(5) If the employee has been employed less than two calendar weeks immediately preceding the injury, the employee's weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury, except if the employer has agreed to a certain hourly wage, then the hourly wage agreed upon multiplied by the number of weekly hours scheduled shall be the employee's average weekly wage;

(6) 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;

(7) In computing the average weekly wage pursuant to subdivisions (1) to (6) of this subsection, an employee shall be considered to have been actually employed for only those weeks in which labor is actually performed by the employee for the employer and wages are actually paid by the employer as compensation for such labor.

2. For purposes of this section, the term "gross wages" includes, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging or similar advance received from the employer, except if such benefits continue to be provided during the period of the disability, then the value of such benefits shall not be considered in calculating the average weekly wage of the employee. The term "wages", as used in this section, includes the value of any gratuities received in the course of employment from persons other than the employer to the extent that such gratuities are reported for income tax purposes. "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. Any wages paid to helpers or any money paid by the employer to the employee to cover any special expenses incurred by the employee because of the nature of his employment shall not be included in wages.

3. If an employee is hired by the employer for less than the number of hours per week needed to be classified as a full-time or regular employee, benefits computed for purposes of this chapter for permanent partial disability, permanent total disability and death benefits shall be based upon the average weekly wage of a full-time or regular employee engaged by the employer to perform work of the same or similar nature and at the number of hours per week required by the employer to classify the employee as a full-time or regular employee, but such computation shall not be based on less than thirty hours per week.

4. If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.

The employee worked for the City of Farmington, Fire Department, as a fire fighter on an irregular basis, without any predictability or consistency. His work week for purposes of pay started on Saturday and ended on Friday. His date of injury was June 27, 2007, which is a Sunday. His employment records for thirteen weeks before the week of injury document the following:

<u>Week</u>	<u>Beginning and Ending Date of Week</u>	<u>Dates Worked</u>	<u>Hours Worked</u>
13	06/19 – 06/25	06/24/10	2 Hours
12	06/12 – 06/18	No Work	No Hours
11	06/05 – 06/11	No Work	No Hours
10	05/29 – 06/04	06/04/10	2 Hours
9	05/22 – 05/28	No Work	No Hours
8	05/15 – 05/21	No Work	No Hours
7	05/08 – 05/14	No Work	No Hours
6	05/01 – 05/07	No Work	No Hours
5	04/24 – 04/30	04/26/10	3 Hours
4	04/17 – 04/23	04/19/10	4 Hours

3	04/10 – 04/16	04/12/10	3 Hours
2	04/03 – 04/09	04/05/10	3 Hours
1	03/27 – 04/02	03/29/10	3 Hours
		04/01/10	12 Hours

In applying RSMo. 287.250, emphasis is placed upon “actually employed” and what periods claimant was employed.

RSMo. 287.250.1(7) states:

“In computing the average weekly wage pursuant to subdivisions (1) to (6) of this subsection, an employee shall be considered to have been actually employed for only those weeks in which labor is actually performed by the employee for the employer and wages are actually paid by the employer as compensation for such labor.”

The employee had actually been employed less than two calendar weeks immediately preceding the injury of 06/27/10. RSMo. 287.250.1(5), is applicable to determining average weekly wage. RSMo. 287.250.1(5) provides as follows:

“If the employee has been employed less than two calendar weeks immediately preceding the injury, the employee’s weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury, *except if the employer has agreed to a certain hourly wage, then the hourly wage agreed upon multiplied by the number of weekly hours scheduled shall be the employee’s average weekly wage;*”

In reviewing RSMo. 287.250.1(5), the *exception* does not apply because there were no weekly hours scheduled. Therefore, we must look to the average weekly wage prevailing the same or similar employment at the time of the injury, i.e., a full-time fire fighter for the City of Farmington.

The employee performed the essential duties of a full-time City of Farmington fireman when on duty.

By application of either RSMo. 287.250.1(5) or RSMo. 287.250.4, the employee’s average weekly wage can be determined to be what a full-time firefighter made as an employee of the City of Farmington Fire Department.

An average weekly wage can be determined by the annual income of the six full-time firemen, Exhibit 9. It is appropriate to determine the employee's average weekly wage in this matter. Accordingly, I find that the employee’s average weekly wage should be calculated as follows:

<u>Fireman</u>	<u>2010 Annual Income</u>
1	\$ 36,162.34

Employee: Justin Holmes

Injury No. 10-049057

2	\$ 36,284.10
3	\$ 35,196.78
4	\$ 36,742.66
5	\$ 36,414.21
6	<u>\$ 36,707.40</u>
Total:	\$217,507.49

$$\$217,507.49 \div 6 = \$36,251.25^*$$

*Average annual income of full-time fire fighter for the City of Farmington in 2010.

$$\$36,251.25 \div 52 \text{ weeks} = \$697.14 \text{ per week average weekly wage}$$

For temporary total disability benefits, the employer’s responsibility was to pay to the employee two-thirds of his average weekly wage as determined by RSMo. 287.250.1(5) or 287.250.4, which are both the same. **His temporary total disability rate is then equivalent to \$464.76 per week** (two-thirds of \$697.14). RSMo. 287.170.

Permanent partial disability benefits are determined under §287.250.3:

If an employee is hired by employer for less than the number of hours per week needed to be classified as a full-time or regular employee, benefits computed for purposes of this chapter for permanent partial disability... shall be based upon the average weekly wage for a full-time or regular employee engaged by the employer to perform work of the same or similar nature and at the number of hours per week required by the employer to classify the employee as a full-time or regular employee, but such computation shall not be based on less than thirty hours per week.

Average weekly wage of a full-time fireman for the City of Farmington \$697.14.

For permanent partial disability benefits, the employee’s average weekly wage is considered to be \$697.14. Two-thirds of \$697.14 is \$464.76 per week. The maximum per month permanent partial disability weekly benefit rate on the date of injury, which was 06-27-10, is \$422.97 per week. Accordingly, **the employee’s permanent partial disability benefit rate is \$422.97 per week.**

Issue 2. Temporary Total Disability

RSMo. 287.170.1(4). Temporary “Total Disability” is defined by RSMo. 287.020.6:

“The term “total disability” as used in this chapter shall mean the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.”

The employee had multiple injuries that included neck strain and post concussion syndrome resulting in headaches and change in personality, an annular tear at L5-S1, and a rotator cuff and labral tear of the right shoulder. The employer's designated treating physician, Dr. Matthew Collard, D.O., chose a conservative route of treatment rather than aggressively treating the right shoulder by MRI/arthrogram followed by surgery. Upon the employee returning to Collard approximately a year and three months after he was released, that MRI/arthrogram was performed and the need for surgery was determined.

The testimony of the employee was credible as to his ongoing symptoms and problems from June 27, 2010 through June 27, 2012. It is supported by the treatment he received including diagnostic tests as well as the surgery performed by Dr. Collard.

The employee's unemployment benefits were eventually denied and any benefits he received he had to repay. In addition, although employee did work for the City of Farmington as established by Exhibits 11 and Exhibits E and F, this does not necessarily disqualify him from temporary total disability benefits. Employee was working minimum hours with some minor exceptions. Just as importantly, during the period of two years, the employee looked for work and made numerous applications attempting to find a manual labor job which he believed he could perform based on his past work history but not based on his present medical symptoms and problems. He was not successful. He had attempted to compete for employment, but was unsuccessful. Based on all the evidence presented, I find that despite employee's intermittent work for the City of Farmington, the employee was temporarily totally disabled for the time period of June 28, 2010 through June 27, 2012. This ruling is also supported by the opinions of Dr. Raymond Cohen, D.O., neurologist, Exhibit 1-A and 1-B.

Therefore, I award the employee temporary total disability benefits covering the period of June 28, 2010 through June 27, 2012 for a period of 730 days, which is equivalent to 104 and 2/7 weeks. Having previously determined his temporary total disability rate equivalent to \$464.76, the employee is entitled to gross benefits of \$48,467.96. However, deducted from this amount are the temporary total disability benefits paid by the employer/insurer in the amount of \$1,422.94, as well as an additional credit for the hours worked by the employee for the City of Farmington between November 20, 2010 and December 9, 2011.

Issue 3: Permanent partial disability

Based on all of the evidence presented, I find that from the work accident on June 27, 2010, the employee sustained 35% permanent partial disability to his right shoulder at the 232 week level (81.2 weeks). I also find that the employee sustained 10% permanent partial disability to the body as a whole referable to the low back (40 weeks). I further find that the employee sustained 10% permanent partial disability to the body as a whole referable to post traumatic headaches and mild cognitive dysfunction (40 weeks). This is a total of 161.2 weeks. Employee's permanent partial disability rate is \$422.97. Therefore, Employer-Insurer is directed to pay the employee \$68,182.76.

ATTORNEY'S FEE

Kenneth Seufert, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

INTEREST

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation

Employee: Justin Holmes

Injury No. 10-049057

CASE SUMMARY			
INJURY NUMBER 10-049057		ALJ Maureen Tilley	
EMPLOYEE Justin Holmes		EE'S ATTORNEY Kenneth Seufert	
EMPLOYER City of Farmington		ER'S ATTORNEY	
INSURER Missouri Employers Mutual Insurance		INS ATTORNEY Patrick McHugh	
Second Injury Fund		SIF ATTORNEY Left open	
DATE OF INJURY 6-27-2010	HEARING DATE August 25, 2014	DATE AWARD WRITTEN November 17, 2014	TYPE OF AWARD Final
RULING EE was a volunteer fire fighter. ALJ used evidence on what the other fire fighter earned to determine the AWW. ALJ determined that EE was awarded the max PPD rate and a TTD rate of 464.76 ALJ awarded past TTD.			
STATEMENT OF FACTS Employee was ejected from a fire truck. He sustained injuries to his right shoulder and low back. He also sustained injuries to the body as a whole referable to post traumatic headaches and mild cognitive dysfunction.			
POINTS OF INTEREST			
KEY WORDS FOR INDEX TOPICS AWW, TTD rate, PPD rate, PPD, TTD			