



STATE OF MISSOURI
 DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

3315 WEST TRUMAN BLVD, P.O. BOX 58, JEFFERSON CITY, MO 65102 (573) 751-4231

FEBRUARY 19, 2010

07-061566

ANDREW H MARTY
 5500 MEXICO RD STE 200
 ST PETERS, MO 63376

Injury No : 07-061566
 Injury Date : 07-10-2007
 Insurance No. : C7251901

*Employee : MICHAEL BUSKEN
 00890112 2 516 STATE ST
 MONTGOMERY CITY, MO 63361
 *Employer : WAL MART ASSOCIATES INC
 00890113 9 702 SW 8TH STREET
 BENTONVILLE, AR 72716-8008

*Employee Attorney: JAMES LAW GROUP LLC
 14 RICHMOND CENTER COURT
 ST PETERS, MO 63376
 *Insurer : AMERICAN HOME ASSURANCE
 00890114 6 c/o CLAIMS MANAGEMENT INC
 P O BOX 1288
 BENTONVILLE, AR 72712-9989

*Insurer Attorney : AMANDA L MIRANDA
 720 OLIVE ST
 STE 700
 ST LOUIS, MO 63101

*Insurer Attorney : MAURICE D EARLY
 720 OLIVE STREET
 SUITE 700
 ST LOUIS, MO 63101

Enclosed is a copy of the Award on Hearing made in the above case.

Under the provisions of the Missouri Workers' Compensation Law, an Application for Review of the decision of the Administrative Law Judge may be made to the Missouri Labor and Industrial Relations Commission within twenty (20) calendar days of the date of the award. If you wish to request a review by the Commission, application may be made by completing an Application for Review Form (MOIC-2567). The Application for Review should be sent directly to the Commission at the following address.

Labor and Industrial Relations Commission
 PO Box 599
 Jefferson City, MO 65102-0599

If an Application for Review (MOIC-2567) is not postmarked or received within twenty (20) calendar days of the date of the award, the enclosed award becomes final and no appeal may be made to the Commission or to the courts.

Please reference the above Injury Number in any correspondence with the Division or Commission.

DIVISION OF WORKERS' COMPENSATION

Please visit our website at www.labor.mo.gov/wc

WC-142(01-06)
 AWARD ON HEARING
 NLP

AWARD

Employee: Michael Busken

Injury No. 07-061566

Dependents:

Employer: Wal-Mart Associates, Inc.

Additional Party: Second Injury Fund (Deferred)

Insurer: American Home Assurance Company

Hearing Date: January 11, 2010

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

Checked by: RJD/cs

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: July 10, 2007.
5. State location where accident occurred or occupational disease was contracted: Warrenton, Warren 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: Employee was putting product into a freezer when he tripped on a pallet. He extended his left arm to catch himself, injuring his left shoulder.
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: Left shoulder.
14. Nature and extent of any permanent disability: 55% permanent partial disability of the left shoulder.
15. Compensation paid to-date for temporary disability: \$563.29.
16. Value necessary medical aid paid to date by employer/insurer? \$10,056.38.

- 17. Value necessary medical aid not furnished by employer/insurer? None.
- 18. Employee's average weekly wages: \$311.28.
- 19. Weekly compensation rate: \$207.52
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:
 - 127.6 weeks of permanent partial disability benefits: \$26,479.55
 - TOTAL: \$26,479.55
- 22. Second Injury Fund liability: (Deferred)
- 23. Future requirements awarded: None.

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:

Andrew Marty

Employee: Michael Busken

Injury No. 07-061566

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Michael Busken

Injury No: 07-061566

Dependents:

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Wal-Mart Associates, Inc.

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund (Deferred)

Insurer: American Home Assurance Company

Checked by: RJD/cs

ISSUES DECIDED

An evidentiary hearing was held in this case on January 11, 2010 in Warrenton. The parties requested leave to file post-hearing memoranda, which leave was granted, and the case was submitted on January 25, 2010. The hearing was held to determine the nature and extent of Claimant's permanent partial disability.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue is proper in Warren County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That the rate of compensation for all purposes is \$207.52, based on an average weekly wage of \$311.28;
6. That Claimant sustained an accident arising out of and in the course of his employment with Wal-Mart Associates, Inc. on July 10, 2007;
7. That the notice requirement of Section 287.420 is not a bar to Claimant's Claim for Compensation herein;

Employee: Michael Busken

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8. That Employer-Insurer paid medical benefits of \$10,056.38;
9. That Employer-Insurer paid temporary benefits of \$563.29; and
10. That Wal-Mart Associates, Inc. was fully insured for Missouri Workers' Compensation purposes at all relevant times by American Home Assurance Company.

EVIDENCE

The evidence consisted of the testimony of Claimant, Michael Busken; the deposition testimony, reports and records of Dr. James Patrick Emanuel; the deposition testimony and medical reports of Dr. David T. Volarich; and additional medical and physical therapy records.

FINDINGS OF FACT AND RULINGS OF LAW

Claimant was born on August 28, 1954, and was 52 years of age at the time of the work-related accident which is the subject of this case. Claimant began working for Employer in June or July of 2004. Claimant worked for Employer in the freezer department. His job entailed breaking down pallets of frozen foods and putting the foods in the freezer. The heaviest boxes Claimant would be required to lift were fifty to sixty pounds. The evidence was that Claimant was able to perform all of his job duties prior to July 10, 2007.

As stipulated, Claimant sustained a work accident on July 10, 2007. The accident occurred as Claimant was putting product into a freezer and tripped on a pallet; Claimant had to extend his left arm to catch himself or his face would have struck a concrete barrier. Claimant, who had suffered a right rotator cuff tear while working at Warrenton Copper in November 2004 (Claimant worked concurrently at Wal-Mart and at Warrenton Copper for several months), realized immediately that he had suffered a similar injury to his left shoulder. He could not lift his left arm and he had a burning pain in his left shoulder.

Claimant was treated with physical therapy and eventually underwent surgery by Dr. Emanuel. Although Claimant had a previous reported work injury to his left shoulder (which had been treated conservatively and had resulted in no permanent partial disability payment), Dr. Emanuel was unaware of any previous injury. Dr. Emanuel performed an arthroscopy of Claimant's left shoulder on September 26, 2007. Dr. Emanuel found a massive tear of the rotator cuff, some tearing of the labrum, synovitis in the joint and significant bursitis. Dr. Emanuel believed that Claimant had a chronic tear of the rotator cuff which was re-torn, or further torn, in the July 10, 2007 accident. In this regard, Dr. Emanuel testified:

Employee: Michael Busken

Injury No. 07-061566

Q. Okay. And are you saying that (the 7/10/07 accident) did not cause an additional tear; is that what you were saying?

A. No, I am saying that it did but I am saying that the findings on the MRI scan showed significant amount of retraction and atrophy and fatty infiltration that could not have occurred over the course of two months.

Q. Okay. I understand. What I'm saying is he didn't have two full thickness tears prior to that fall; isn't that right?

A. He had probably a massive tear of the rotator cuff which he had assimilated to over the course of the years, meaning that he probably wasn't that symptomatic and could actually use it. And then the injury he had, which is the fall on the outstretched hand, most likely propagated that tear to the extent I don't know but enough to make him symptomatic and enough to make it so he couldn't immediately actively raise his arm. So that in itself demonstrates an acute process. (Exhibit 2, Emanuel deposition, pages 15-16).

A. Well, the best analogy is if you had a rip in your pants and you bent over and you extended the rip, you know, twice the size. That's an acute on chronic problem. So he had a tear in his rotator cuff and it was chronic and he had assimilated to it over the years, which I've seen in thousands of patients, and he was capable of working without any problems lifting weight that you are describing, but this injury probably caused most likely the edges, the anterior posterior edges of this massive tear to tear a little bit more, and it's just that amount more that rendered his shoulder symptomatic.

Q. So prior to the fall, irrespective of what preexisted, it was the fall that is the cause of your restrictions, that additional injury is what caused the restrictions that you gave him?

A. The fall is the cause of the patient's surgical treatment and ultimate restrictions. (Exhibit 2, page 20).

Dr. Emanuel placed permanent restrictions on Claimant as follows: lifting no more than ten pounds from floor to waist; no lifting of any weight above waist height or away from his body; no overhead reaching or lifting. Dr. Emanuel also stated that Claimant was capable of pushing or pulling 100 pounds on a four-wheel cart, or ten pounds without a cart.

Dr. Emanuel opined that Claimant has a total disability of 20% with half attributable to the work injury of 7/10/07 and half attributable to pre-existing conditions.

Dr. Volarich evaluated Claimant on April 28, 2008 at the request of Claimant's attorney. Dr. Volarich had also evaluated Claimant on September 6, 2005 for Claimant's November 2004 *right* shoulder injury. Dr. Volarich agreed with the restrictions given by Dr. Emanuel. Dr. Volarich testified that Claimant told him "that prior to the accident he had no difficulties with his left shoulder. He admitted to me he had some weakness in the shoulder that I found on my first examination when I saw him on September 6, 2005, but he had that his left shoulder was,

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quote/unquote 'my good shoulder' leading up to the injury of 7/10/07." (Exhibit C, Volarich depo, page 12.)

Dr. Volarich testified that, in his examination of Claimant's left shoulder in 2005, the impingement, apprehension, clunk and Adson's tests were all negative, indicating no impingement, dislocating shoulder, or labral tears. Dr. Volarich did find, in 2005, that Claimant had a prior left biceps tendon rupture. Dr. Volarich testified that Claimant's atrophy of the deltoid and rotator cuff in 2005 was "trace", as opposed to "severe" in the April 2008 examination.

Dr. Volarich opined that Claimant has a total permanent partial disability of 80% of the left shoulder, with 15% attributable to crepitus and weakness as well as the biceps tendon injury that preexisted the injury of 7/10/07, and 65% attributable to the 7/10/07 accident.

Claimant was a credible witness. He cannot raise his left arm to chest height. His shoulder "locks" when he tries to raise it. He has left shoulder pain and burning on a regular basis, which awakens him at night. He can't do any yard work or gardening. He is working as a greeter at Wal-Mart.

It is quite apparent to me from the evidence, as it was apparent to Drs. Emanuel and Volarich, that Claimant's left shoulder was functioning quite well in a heavy lifting position prior to the July 10, 2007 accident. The restrictions that have been placed on Claimant due to the work accident of 7/10/07 are profound.

I believe that Claimant has very little function left in his left shoulder. While Dr. Emanuel is an excellent surgeon, it is difficult to fathom how the profound restrictions he has placed on Claimant warrant a disability determination of only 20%. I find that Claimant's total disability of his left shoulder is 70%. I find that 15% thereof is preexisting, due to the biceps tendon tear and the degenerative condition of the rotator cuff musculature, although both physicians agree that these preexisting conditions only minimally affected Claimant's strength and functioning. I find, therefore, that Claimant has sustained a permanent partial disability of 55% of the left shoulder as a direct result of the July 10, 2007 accident and injury. This results in 127.6 weeks of benefits at the stipulated weekly rate of \$207.52, totaling \$26,479.55.

ORDER

Employer and Insurer are ordered to pay Claimant the sum of \$26,479.55 for permanent partial disability benefits.

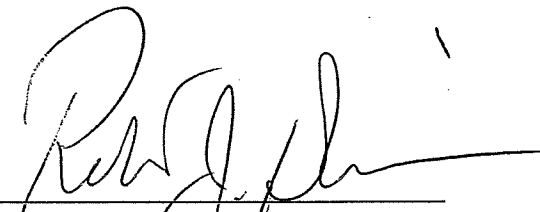
Claimant's attorney, Andrew Marty, is awarded 25% of the permanent partial disability benefits awarded herein as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon, until paid.

Issued by DIVISION OF WORKERS' COMPENSATION

Employee: Michael Busken

Injury No. 07-061566

Date: February 19, 2010

Made by: 

ROBERT J. DIERKES
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:



Naomi Pearson
Division of Workers' Compensation