

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

Injury No.: 08-076338

Employee: Herbert Robbins
Employer: Webco, Inc.
Insurer: American International Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 13, 2011, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge L. Timothy Wilson, issued January 13, 2011, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 30th day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Herbert Robbins

Injury No. 08-076338

Dependents: N/A

Employer: Webco, Inc.

Insurer: American International Insurance Co.

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

Hearing Date: October 21, 2010 (Evidentiary Record Closed November 19, 2010)

Checked by: LTW

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: Alleged June 9, 2008
5. State location where accident occurred or occupational disease was contracted: Greene County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While engaged in his employment with Employer, Employee proceeded to the supply area to obtain an electrical trough. He bent over to grab an electrical trough, stood up, and took a step and proceeded to carry the trough back to his workstation. However, as he proceeded to take a step, while carrying this electrical trough, the hydraulic pump unit snapped in half and began to leak oil. The work activity of the Employee was not the prevailing factor in causing Employee to suffer a prosthetic failure.
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Alleged right lower extremity
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Herbert Robbins

Injury No. 08-076338

17. Value necessary medical aid not furnished by employer/insurer? None

18. Employee's average weekly wages: \$504.19

19. Weekly compensation rate: \$336.13 / \$336.13

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None

The employee failed to sustain his burden of proof relative to establishing Employer / Insurer liability. The Claim for Compensation filed against Employer and Insurer is denied.

22. Second Injury Fund liability: No

The employee failed to sustain his burden of proof relative to establishing Second Injury Fund liability. The Claim for Compensation filed against the Second Injury Fund is denied.

TOTAL: NONE

23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Herbert Robbins

Injury No. 08-076338

Dependents: N/A

Employer: Webco, Inc.

Insurer: American International Insurance Co.

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

The above-referenced workers' compensation claim, which involved the joining of two workers' compensation cases, was heard before the undersigned administrative law judge on October 21, 2010.¹ The parties were afforded an opportunity to submit additional evidence, resulting in the evidentiary record being closed on November 19, 2010. Also, the parties were afforded an opportunity to submit proposed awards or briefs, resulting in the record being completed and submitted to the undersigned on or about November 24, 2010.

The employee, Herbert Robbins, appeared personally and through his attorney, Randy Alberhasky, Esq. The employer, Webco, Inc., and its insurer, American International Insurance Co., appeared through their attorney, William Love, Esq. The Second Injury Fund appeared through its attorney, Susan Colburn, Assistant Attorney General.

The parties entered into a stipulation of facts in Injury No. 08-076338. The stipulation is as follows:

- (1) On or about June 9, 2008, Webco, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by American International Insurance Co. (TPA: Constitution States Service Company)
- (2) On the alleged injury date of June 9, 2008, Herbert Robbins, was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The contract of employment between Herbert Robbins and Webco, Inc. was made in Missouri; the alleged accident or incident of occupational disease occurred in Greene County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.
- (4) The employee notified the employer of his injury as required by Section, 287.420, RSMo.

¹ The workers' compensation cases that were joined for hearing include Injury Nos. 08-076338 and 08-121779.

- (5) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (6) At the time of the alleged accident the employee's average weekly wage was \$504.19, which is sufficient to allow a compensation rate of \$336.13 for temporary total disability compensation and permanent partial disability compensation / permanent total disability compensation.
- (7) Temporary disability benefits have not been provided to the employee.
- (8) The employer and insurer have not provided medical treatment to the employee.

In Injury No. 08-76338 the parties further stipulated that the sole issues to be resolved by hearing include:

- (1) Whether the claimant sustained an accident or incident of occupational disease on or about June 9, 2008; and, if so, whether the accident or occupational disease arose out of and in the course of employment?
- (2) Whether the alleged accident or incident of occupational disease caused the injuries and disabilities for which benefits are now being claimed?
- (3) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee from the effects of the injuries?
- (4) Whether the employee is entitled to temporary total disability compensation? (The employee seeks payment of temporary total disability compensation for the period of December 5, 2008 to the present, and continuing indefinitely into the future.)
- (5) Whether the employee sustained any permanent disability as a consequence of the alleged accident or occupational disease; and, if so, what is the nature and extent of the disability?
- (6) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

In Injury No. 08-121779, the parties entered into a stipulation of facts, which is as follows:

- (1) On or about December 1, 2008, Webco, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Travelers Casualty & Surety Co. (TPA: Constitution States Service Company)

- (2) On the alleged injury date of December 1, 2008, Herbert Robbins, was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The contract of employment between Herbert Robbins and Webco, Inc. was made in Missouri; the alleged accident or incident of occupational disease occurred in Greene County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.
- (4) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (5) At the time of the alleged accident or incident of occupational disease the employee's average weekly wage was \$461.77, which is sufficient to allow a compensation rate of \$307.85 for temporary total disability compensation and permanent partial disability compensation / permanent total disability compensation.
- (6) Temporary disability benefits have not been provided to the employee.
- (7) The employer and insurer have not provided medical treatment to the employee.

In Injury No. 08-121779 the parties further stipulated that the sole issues to be resolved by hearing include:

- (1) Whether the employee sustained an accident or incident of occupational disease on or about December 1, 2008; and, if so, whether the accident or occupational disease arose out of and in the course of employment?
- (2) Whether the employee gave the employer proper notice of the injury?
- (3) Whether the alleged accident or incident of occupational disease caused the injuries and disabilities for which benefits are now being claimed?
- (4) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee from the effects of the injuries?
- (5) Whether the employee is entitled to temporary total disability compensation? (The employee seeks payment of temporary total disability compensation for the period of December 5, 2008 to the present, and continuing indefinitely into the future.)

- (6) Whether the employee sustained any permanent disability as a consequence of the alleged accident or occupational disease; and, if so, what is the nature and extent of the disability?
- (7) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

EVIDENCE PRESENTED

The employee, Herbert Robbins, testified at the hearing in support of his claim. Also, the employee presented at the hearing of this case the testimony of his wife, Kristin Robbins. In addition, the employee offered for admission the following exhibits:

- Exhibit A.....Medical Records from Alpha Omega Prosthetic
- Exhibit B.....Medical Records and Bills from Jubilee Prosthetics
- Exhibit C.....Medical Records from Phelps County Regional Medical Center
- Exhibit D..... Medical Records from St. Louis University Hospital
- Exhibit E Claim for Compensation (Injury No. 08-076338)
- Exhibit F Answer of Second Injury Fund to Claim for Compensation (Injury No. 08-076338)
- Exhibit G.....Answer of Employer / Insurer to Claim for Compensation (Injury No. 08-076338)
- Exhibit H..... Claim for Compensation (Injury No. 08-121779)
- Exhibit I Answer of Second Injury Fund to Claim for Compensation (Injury No. 08-121779)
- Exhibit JAnswer of Employer / Insurer to Claim for Compensation (Injury No. 08-121779)
- Exhibit K.....Amended Claim for Compensation (Injury No. 08-121779)
- Exhibit LAmended Claim for Compensation (Injury No. 08-076338)
- Exhibit M.... Answer of Employer / Insurer to Amended Claim for Compensation (Injury No. 08-121779)
- Exhibit N.....Amended Claim for Compensation (Injury No. 08-121779)
- Exhibit O..... Answer of Employer / Insurer to Amended Claim for Compensation (Injury No. 08-121779)
- Exhibit P Answer of Employer / Insurer to Amended Claim for Compensation (Injury No. 08-076338)
- Exhibit Q..... Answer of Employer / Insurer to Amended Claim for Compensation (Injury No. 08-121779)
- Exhibit R....Answer of Second Injury Fund to Amended Claim for Compensation (Injury No. 08-121779)
- Exhibit SAnswer of Second Injury Fund to Amended Claim for Compensation (Injury No. 08-076338)
- Exhibit T Answer of Employer / Insurer to Amended Claim for Compensation (Injury No. 08-121779)
- Exhibit U... Answer of Second Injury Fund to Amended Claim for Compensation (Injury No. 08-121779)

- Exhibit V..... Medical Records Disclosure Letter Dated March 6, 2009
- Exhibit W Section 287.210, RSMo Letter Dated June 19, 2009
- Exhibit X..... Section 287.210, RSMo Letter Dated July 16, 2009
- Exhibit Y..... Section 287.210, RSMo Letter Dated August 28, 2009
- Exhibit Z Section 287.210, RSMo Letter Dated June 15, 2010
- Exhibit AA..... Medical Records Disclosure Letter Dated June 23, 2010
- Exhibit BB Withdrawn
- Exhibit CC Deposition of P. Brent Koprivica, M.D. (inclusive of attached deposition exhibits)
- Exhibit DD..... Letter Dated July 15, 2009 (with enclosure of recorded statement)

The exhibits were received and admitted into evidence.

The employer and insurer presented one witness at the hearing of this case -- Rod Cowan. In addition, the employer and insurers offered for admission the following exhibits:

- Exhibit 1..... Deposition of Ted Lennard, M.D.
- Exhibit 2.....Deposition of P. Brent Koprivica, M.D. (cross-examination)
- Exhibit 3..... Medical Records from Jubilee Prosthetics
- Exhibit 4.....Deposition of Herbert Robbins
- Exhibit 5.....Deposition of Sherina Wiese - Records Custodian for Adecco (inclusive of attached deposition exhibits)
- Exhibit 6..... Diagram of Wall Build Area of Employer Facility

Exhibits 1, 2, 3, 4 and 6 were received and admitted into evidence at the hearing held on October 21, 2010. Exhibit 5 was received and admitted into evidence subsequent to the hearing on November 19, 2010.

The Second Injury Fund did not present any witnesses or offer any additional exhibits at the hearing of this case.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

Part 1: Injury No. 08-076338

- Notice of Hearing
- Request for Hearing-Hardship Hearing (NOT 203)
- Answer of Second Injury Fund to Amended Claim for Compensation (filed 07-06-09)
- Answer of Employer/Insurer to Amended Claim for Compensation (filed 06-26-09)
- Amended Claim for Compensation (filed 06-18-09)
- Answer of Second Injury Fund to Claim for Compensation (filed 01-30-09)
- Answer of Employer/Insurer to Claim for Compensation (filed 02-20-09)
- Claim for Compensation (filed 01-19-09)
- Report of Injury

Part 2: Injury No. 08-121779

- Notice of Hearing
- Request for Hearing-Hardship Hearing (NOT 203)
- Answer of Second Injury Fund to Amended Claim for Compensation (filed 07-20-09)
- Answer of Employer/Insurer to Amended Claim for Compensation (filed 07-06-09)
- Amended Claim for Compensation (filed 07-01-09)
- Answer of Second Injury Fund to Amended Claim for Compensation (filed 07-06-09)
- Answer of Employer/Insurer to Amended Claim for Compensation (filed 06-26-09)
- Answer of Employer/Insurer to Amended Claim for Compensation (filed 06-24-09)
- Amended Claim for Compensation (filed 06-18-09)
- Answer of Second Injury Fund to Original Claim for Compensation (filed 06-04-09)
- Answer of Employer/Insurer to Original Claim for Compensation (filed 06-12-09)
- Claim for Compensation (filed 05-29-09)
- Claim for Compensation (filed 05-26-09)
- Correspondence of DWC (Inj. No. 02-121864 combined into Inj. No. 08-121779)
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

DISCUSSION

The employee, Herbert Robbins, is 39 years of age, having been born on January 4, 1972. Mr. Robbins is married and resides in Springfield, Missouri with his wife, Kristin Robbins.

Notably, prior to this workers' compensation claim, Mr. Robbins presented with two significant disabilities. In 1991 Mr. Robbins suffered an illness in the nature of osteosarcoma (bone cancer), which resulted in him undergoing an amputation of his right lower extremity above the knee. Additionally, he suffered from blindness in his right eye.

Following the amputation and recovery from the bone cancer, Mr. Robbins was fitted with an above-knee prosthetic leg. He engaged in employment and other activity while utilizing above-knee prosthesis for his right lower extremity. From time to time Mr. Robbins has repaired his prosthesis or replaced it with a new one.

In January 2004 Mr. Robbins presented to Jubilee Prosthetics for complaints of having "shattered the knee frame on his knee unit." The medical records indicate that at this time, the prosthesis (and the hydraulic unit contained in it) was approximately three years old and out of warranty. Further, a determination was made that the Flex Foot needed the two heels to be replaced, as well as the knee unit being replaced. In light of this damage, and taking into consideration Mr. Robbins providing a history of using the prosthesis at work while "frequently carrying heavy loads at work, up to 75 pounds, Jubilee Prosthetics provided Mr. Robbins with a stronger knee unit.

Shortly thereafter, Jubilee Prosthetics replaced the hydraulic knee unit and the two heel springs on the Flex Foot with a Black Max Activity Knee Frame and a Catech Swing and Stance Hydraulic Unit. The Foot Springs were replaced with the appropriate weight category and size for Mr. Robbins' Flex Foot. Additionally, it is noted that this prosthesis was the "most heavy duty knee-componentry available with a weight limit of 350 pounds." This weight capacity is based upon Mr. Robbins weight, plus the weight he would be carrying or lifting.

Employment with Employer

In or around November 2004 Mr. Robbins began working for the employer, Webco, Inc. Initially, Mr. Robbins worked through a temporary employment agency. Later, following a few months of employment with the temporary employment agency involving work for Webco, Inc., Mr. Robbins became a direct employee of Webco, Inc. In this employment, Mr. Robbins worked as a welder, and was part of a production assembly, building walls and electrical troughs for industrial heating and air conditioning units, built according to specifications provided by customers.

In this production assembly, materials are assembled from pieces of sheet metal or galvanized steel. In his deposition, Mr. Robbins indicated that if the panel involved an aluminum wall, the panel might weigh 10 to 15 pounds. However, if the panel involved a stainless steel wall, the panel would weigh more, depending on the length and width of the panel. Mr. Robbins noted that a stainless steel panel, eight to nine feet in length and one-half foot wide, might weigh as much as 50 pounds.

According to Mr. Robbins, he worked at a large table workstation and was responsible for securing and carrying the panels situated in a supply area to his workstation. Mr. Robbins would carry one panel at a time, from the supply area to his workstation. Depending on the various histories given, the distance between the supply area and Mr. Robbins' workstation varied, being as close as 10 feet and as far as 100 feet. Mr. Robbins noted that when he first began working for Webco, Inc. the distance between his workstation and the supply area was approximately 100 feet; later the supplies were moved to a closer bin, resulting in the distance between his workstation and the supply area being approximately 10 feet.

This activity occurred several times a day. The carrying of a panel from the supply area to his workstation varied, depending on the assignment. Building electrical troughs required Mr. Robbins to carry 9 to 12 panels per day; while building stainless steel walls required Mr. Robbins to carry 40 to 60 panels; and each carrying activity involved a single panel. Upon carrying the panel to the workstation, Mr. Robbins would assemble the parts on a bench at the workstation. Rod Cowan, who testified in behalf of the employer and insurer, indicated that ordinarily there would be up to two assemblies a day that would involve either part of one to three pieces per trough or five to seven pieces per enclosure.

In providing a history to Dr. Koprivica, Mr. Robbins informed Dr. Koprivica that in his employment with Webco, Inc. he carried panels weighing up to 70 pounds, carrying them 70 to 100 feet. He further indicated that he regularly carried electrical troughs weighing 50 to 60 pounds from a one foot high cart. And in providing a history to Dr. Lennard, Mr. Robbins informed Dr. Lennard that in his employment with Webco, Inc. he carried panels weighing up to

35 to 40 pounds, carrying them 70 to 100 feet. Additionally, Mr. Robbins reported that he carried parts from up to two products per day. And with respect to other lifting, he reported lifting between 10 and 80 pounds per day.

In contrast, Rod Cowan testified that he weighed the heaviest panel or item that Mr. Robbins would have carried in his employment with Webco, Inc., and it weighed 49 pounds. Mr. Cowan further testified that the other items carried by Mr. Robbins were substantially less than 49 pounds.

Injury No. 08-076338 (1st Claim of Injury)

On June 9, 2008, while engaged in his employment with Webco, Inc., Mr. Robbins proceeded to the supply area to obtain an electrical trough. He bent over to grab an electrical trough, stood up, and took a step and proceeded to carry the trough back to his workstation; however, as he proceeded to take a step while carrying this electrical trough, the hydraulic pump unit snapped in half and began to leak oil.

It is not readily apparent or certain that this incident involved a twisting or turning of the prosthetic knee. In his deposition, Mr. Robbins indicated that the snap happened when he picked it up; however, in providing a history to Dr. Koprivica, he indicated that the prosthetic snapped as he “pivoted.”

Reportedly, Mr. Robbins was carrying a panel that was approximately 100 to 102 inches in length. This measurement is based on a statement provided by Mr. Robbins to the insurance company following the filing of the Claim for Compensation. In his deposition, Mr. Robbins indicated that he did not know the weight of this electrical trough. However, he informed Dr. Koprivica that the trough weighed between 50 to 60 pounds. And Rod Cowan, who measured the items being lifted by Mr. Robbins, testified that the panel weighed no more than 49 pounds.

Following the failure of the prosthetic, Mr. Robbins took the prosthesis to Alpha Omega Orthotics and Prosthetics for evaluation and repair. In taking a history from Mr. Robbins, the attending health care provider propounded the following comments:

Mr. Robbins complains of breaking his hydraulic knee unit while at work, and is now using crutches as an ambulatory aid. He related that at age 18 he developed Osteosarcoma. Mr. Robbins' right leg was amputated at the above knee level in 1991. He noted that he uses his left leg for primary support while at work, where he is lifting 50 to 100 pounds. He is not currently undergoing home physical therapy. He had his AK socket replaced 3-4 years ago by Jubilee Prosthetics, but the entire AK prosthesis was originally built at Ozark Prosthetics 5 years ago. Mr. Robbins is currently using crutches as an ambulatory aid. He is currently working at Webco Inc., and stays active despite his broken prosthesis. His goals are to have the knee unit repaired or replaced, so he can resume near normal work activity and reduce the strain on his “good” leg which is currently being overworked. His reported weight at this time is 210 pounds; with a reported height of 5 feet 10 inches.

In light of the history provided by Mr. Robbins, and the examination of the prosthesis, the attending health care provider determined that the prosthesis would need to be replaced. In rendering this decision the attending health care provider propounded the following comments:

After examining the above knee prosthesis, it is apparent that the hydraulic cylinder cannot be repaired because the entire shaft has sheared off and hydraulic fluid has leaked out. Additionally, it was noted that the high activity titanium frame has wear along the horizontal shaft and bushings that cannot be effectively repaired.

* * *

Functional Status level is 3. This determination is based on current activity level and variable cadence, adequate residual limb length, lack of contractures, good ML stability, and general motivational attitude.

Biomechanical rationale was reviewed with Mr. Robbins and he was informed that even if the hydraulic cylinder on his existing Mauch SNS knee unit was replaced, that the high activity frame and bushings are so worn they would prematurely wear the new hydraulic cylinder out. **Additionally, because of his current weigh and activity level, as well as the amount of weight that he is currently lifting with the prosthesis while at work, he approximates if not exceeds the weight tolerances for the new unit if he lifts in excess of 100 pounds.** It was therefore suggested that the entire hydraulic knee unit, along with the high activity frame be replaced.

Additionally, after examining the fit of his socket, it was noted that the fit of this ischial containment socket is not fitting properly on the residual limb and needs to be replaced due to improper fit. Mr. Robbins agreed that the socket fit was poor, and causes him pain and sores, but at this time is more interested in addressing the immediate concern of having knee unit replaced to allow him to resume normal work activity. [The bold face type is contained in the original record and is noted herein without emphasis.]

Mr. Robbins testified that the lifting and carrying of troughs and walls occurred before and after the prosthesis broke; and he used the prosthesis more during his employment activity, including work activity in previous occupations, than he did with activity outside of work. According to Mr. Robbins, the lifting and carrying of troughs and walls at Webco, Inc. accounted for the majority of the lifting and carrying of items while using his prosthesis since obtaining it in 2004; however, Mr. Robbins admitted in his deposition that he wore the prosthesis all the time. And in a statement provided to the insurance carrier, Mr. Robbins noted that he used the prosthesis while mowing his yard, and while coaching his son's baseball team. Further, in providing a history to Dr. Koprivica, Mr. Robbins noted that he used the prosthesis while fishing and hunting.

Notably, the breakage of the prosthesis did not cause Mr. Robbins to suffer any physical injury. Yet, he argues, the loss of his lower extremity created a condition necessitating receipt of

additional medical care – namely, replacement of the prosthesis; and this condition caused Mr. Robbins to suffer a period of temporary total disability for which he seeks compensation.

Mr. Robbins engaged in discussions with his supervisor about having the prosthesis replaced through workers' compensation, but was informed that the prosthesis would not be covered under workers' compensation.

Injury No. 08-121779 (2nd Claim of Injury)

The failure of the prosthesis on June 9, 2008, rendered Mr. Robbins unable to move or walk, and required several co-workers to carry him to his car. He then went home and returned to work on the same day without use of his prosthesis, but with crutches. Through the use of his crutches Mr. Robbins was physically able to move about and walk from one location to another location. Additionally, through utilization of a crutch, Mr. Robbins continued to engage in his employment.

Mr. Robbins continued to work five days a week for 8 hours a day performing the same work, but in order to carry the troughs and walls without a prosthesis, Mr. Robbins was required to forgo use of his left sided crutch, while creatively utilizing his right sided crutch to serve the purpose of a limb. In this regard, Mr. Robbins would hook the nub of his right lower extremity into the right-sided crutch handle, and then position the crutch in such a way to allow it to fit in his armpit.

The utilization of the right sided crutch allowed Mr. Robbins to have sufficient stability to walk. Additionally, he utilized the right sided crutch in a way that allowed him to use his right upper extremity to provide certain support in carrying panels. The nonuse of the left-sided crutch allowed Mr. Robbins to utilize his left upper extremity to provide sufficient support and the primary means of obtaining stability to carry the panels, while walking to and from his workstation and the supply area. At the hearing, Mr. Robbins demonstrated the mechanism of this procedure, which illustrated how he made it work effectively for him.

Unfortunately, this process of walking while lifting and carrying panels put stress on the right shoulder, and Mr. Robbins began to experience pain in his right shoulder. Additionally, subsequent to engaging in this activity, Mr. Robbins developed two bulges in his right abdominal wall area. Mr. Robbins contends that this condition is causally related to his work, and has requested the employer and insurer to provide him with medical treatment for this concern. The employer and insurer, however, have declined to provide medical treatment, contending the alleged work injury is not compensable. As a consequence, Mr. Robbins has not received medical care for this condition.

Mr. Robbins continued to engage in employment with Webco, Inc. until being terminated on December 4, 2008. Subsequent to his employment termination, Mr. Robbins began to collect unemployment compensation and to seek other employment. Mr. Robbins continues to receive unemployment compensation.

Medical Opinion

P. Brent Koprivica, M.D. testified by deposition and through the submission of medical reports on behalf of the employee. Dr. Koprivica performed an independent medical examination of Mr. Robbins on May 30, 2009. At the time of this examination, Dr. Koprivica took a history from Mr. Robbins, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Robbins, Dr. Koprivica opined that the lifting performed by Mr. Robbins in his employment with Webco, Inc., which he assumed included lifting and carrying panels weighing in excess of 50 pounds, exceeded the weight capacity of the prosthesis and was the prevailing factor in causing the prosthetic failure on June 9, 2008.

Yet, in the taking of his deposition, Dr. Koprivica admitted that he reviewed no records indicating the specific limitations of the prosthetic device (total combined weight of 350 pounds per records of Jubilee). Similarly, Dr. Koprivica admitted that if Mr. Robbins was regularly carrying less than 50 pounds as opposed to 70 pounds, the risk would be the same as the kind of lifting involved away from work. Dr. Koprivica further agreed that if the weight was less than 50 pounds, then such lifting was within the design standards of the prosthetic device as reported to him by Mr. Robbins.

In addition, Dr. Koprivica did not take into consideration the age of the prosthesis and did not have any understanding of the length of time such prosthesis would normally last. And Dr. Koprivica agreed that it was possible that the failure of the prosthesis could be related to "ordinary wear and tear and break down in the aging of the components." Additionally, Dr. Koprivica noted that initially he assumed a history of Mr. Robbins utilizing the prosthesis in all activities in and outside of work including hunting, fishing, coaching baseball, basketball, canoeing and camping. Yet, in a subsequent report and deposition, Dr. Koprivica assumed that Mr. Robbins utilized the prosthesis only at work, and opined that the weight load and repetition of the load occurring at work were a greater significance to causing stress on the prosthesis than the activity outside of work.

Further, Dr. Koprivica testified that the use of the prosthesis by Mr. Robbins at Webco, Inc. was something that was "individual to him and is not something that you generally see in the general population." And Dr. Koprivica admitted that if frequency of use of the prosthesis outside of work is an issue, he needed to get more information from Mr. Robbins in order to provide accurate opinions. In this context, Dr. Koprivica acknowledged that lifting and carrying weight is an important variable to be considered, as well as the actual weight capacity the prosthesis is designed to handle.

In discussing the medical concerns pertaining to the right shoulder and abdominal wall, Dr. Koprivica diagnosed Mr. Robbins with a right shoulder pain and abdominal wall strain, which he opined was caused by Mr. Robbins' work at Webco, Inc., which involved lifting and carrying of panels while walking with crutches. Additionally, Dr. Koprivica indicated that the abdominal wall strain and bulges were possibly hernias, and both the shoulder pain and abdominal wall strain needed medical attention.

Finally, Dr. Koprivica admitted that while he has a few patients with prosthetics, he never had "direct involvement in the prosthetic." Additionally, he acknowledged that while the specific

lifting incident occurring on June 9, 2010, might have served as a triggering or precipitating event, it was not the prevailing factor in causing the prosthetic failure.

Ted Lennard, M.D. testified by deposition on behalf of the employer and insurer. Dr. Lennard is board certified by the American Board of Physical Medicine and Rehabilitation. And his medical practice includes working with and providing medical care to amputees, and treating such individuals with prosthetics. Notably, Dr. Lennard works specifically with the prosthetic providers on the details of the prosthesis itself.

Dr. Lennard performed an independent medical examination of Mr. Robbins on or about April 7, 2010. At the time of this examination, Dr. Lennard took a history from Mr. Robbins, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Robbins, Dr. Lennard opined that the work activity performed by Mr. Robbins in his employment with Webco, Inc. was not the prevailing factor in the cause of the prosthetic failure. In rendering this opinion Dr. Lennard noted that the lifting and carrying of panels involved a weight of less than 50 pounds, and combining this weight with Mr. Robbins body weight, the weight upon the prosthesis was below and within the 300 to 350 pound capacity of the prosthetic knee.

Additionally, Dr. Lennard noted that the prosthesis utilized by Mr. Robbins, and which failed on June 9, 2008, was evaluated by a prosthetic provider, who identified significant wear and tear in its components. In this regard, Dr. Lennard described the excessive wear and tear noted in the medical records, which indicated to him that the prosthesis was "wearing out." According to Dr. Lennard, Mr. Robbins began wearing this prosthesis in January 2004, and the failure of this prosthesis in June 2008 reflected the "end of its life span."

Further, Dr. Lennard noted that the records of Jubilee indicate that the maximum load capacity for the prosthetic knee utilized by Mr. Robbins on June 9, 2008, enjoyed a maximum load capacity of 350 pounds. Also, the medical records indicate that at the time of the June 9, 2008, prosthetic failure, Mr. Robbins weighed between 210 and 228 pounds, which would provide available lifting capacity of additional weight between 112 and 130 pounds.

Taking into consideration the weight capacity of the hydraulic knee, Mr. Robbins' weight and the weight lifting at work, and the age of the prosthesis, Dr. Lennard testified that the prosthesis failure was not related to Mr. Robbins' work activity and employment with Webco, Inc. Rather, according to Dr. Lennard, the failure was caused by the age and condition of the prosthesis – the prosthesis experienced a mechanical failure caused by normal wear and tear.

In addition, Dr. Lennard examined the nature and cause of Mr. Robbins' right shoulder pain and abdominal wall concern. In this regard, Dr. Lennard diagnosed the shoulder pain to involve rotator cuff tendinitis; and he felt that the abdominal pain might relate to a hernia. Further, while Dr. Lennard opined that the shoulder pain and alleged abdominal mass (bulges) were not related to any specific work incident, and he could not identify any specific cause for the abdominal mass, he agreed that the rotator cuff tendinitis related to Mr. Robbins use of his crutches.

FINDINGS AND CONCLUSIONS

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

I.

Nature of Injury

In 1991 Mr. Robbins suffered an illness in the nature of osteosarcoma (bone cancer), which resulted in him undergoing an amputation of his right lower extremity above the knee. Following the amputation and recovery from this illness, Ms. Robbins was fitted with an above knee prosthetic leg. Subsequent to being fitted with this prosthetic leg, Mr. Robbins experienced wear and tear in the prosthesis, and over the years repaired and/or replaced the prosthesis with newer prostheses.

In January 2004 Mr. Robbins experienced a shattering of the knee frame in the prosthesis he was utilizing, which resulted in the hydraulic knee unit and the two heel springs on the Flex Foot being replaced with a Black Max Activity Knee Frame and a Catech Swing and Stance Hydraulic Unit. The Foot Springs were replaced with the appropriate weight category and size for Mr. Robbins' Flex Foot. Additionally, in light of this replacement, this prosthesis enjoyed the "most heavy duty knee-componentry available with a weight limit of 350 pounds." This weight capacity includes consideration of Mr. Robbins' presenting weight, plus the weight he would be carrying or lifting.

On June 9, 2008, while engaged in his employment with Webco, Inc., Mr. Robbins proceeded to the supply area to obtain an electrical trough. He bent over to grab an electrical trough, stood up, and took a step and proceeded to carry the trough back to his workstation. The electrical trough weighed no more than 49 pounds. As Mr. Robbins proceeded to take a step while carrying this electrical trough, Mr. Robbins experienced a failure in his prosthesis -- the hydraulic pump unit snapped in half and began to leak oil.

It is not readily apparent or certain that this incident involved a twisting or turning of the prosthetic knee. In his deposition, Mr. Robbins indicated that the snap happened when he picked it up. However, in providing a history to Dr. Koprivica, he indicated that the prosthetic snapped as he "pivoted."

After consideration and review of the evidence, I find and conclude that the prosthetic failed without occurrence of a twisting, turning or pivoting of the knee; the prosthetic knee simply failed while Mr. Robbins was engaged in his employment with Webco, Inc.

II.

Accident or Incident of Occupational Disease / Arising Out of & In the Course of Employment

The parties do not dispute that Mr. Robbins suffered a prosthetic device failure while engaged in his employment with the employer. Similarly, the parties do not dispute that because of this prosthetic device failure, Mr. Robbins suffered a loss and is in need of medical care, including repair or replacement of this prosthesis. The parties, however, dispute whether the occurrence of the prosthetic device failure constitutes an accident or incident of occupational disease.

The determination of this issue -- whether the prosthetic device failure constitutes an injury by accident or incident of occupational disease requires consideration of Sections 287.020 and 287.067, RSMo. Notably, Sections 287.020 and 287.067 RSMo were amended in 2005, ostensibly to narrow the definitions of accident and occupational disease. Section 287.020.2, RSMo states:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

Section 287.067.1, RSMo states:

In this chapter the term "occupational disease" is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Also, the definition of "injury" in Sections 287.020.3, and 287.067.2, RSMo were amended in 2005 to require that the accident or occupational disease be the prevailing factor, rather than merely a substantial factor, in causing the resulting medical condition and disability. Section 287.020.3, RSMo states:

(1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Similarly, Section 287.067.2 and 3, RSMo states:

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

3. An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

In addition, the 2005 amendments revised the Act to narrow the scope of injuries deemed to arise out of and in the course of employment, relative to an injury caused by an accident. In this regard, Section 287.020.3(2), RSMo, as amended in 2005, and in pertinent part, states:

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of an unrelated to the employment in normal nonemployment life.

Further, the statute recognizes that an injury may include an incident causing damage to an artificial limb. In this context, Section 287.020.3 (5), RSMo, in pertinent part, states:

(5) The terms "injury" and "personal injuries" shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eye-glasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom.

The employee offers alternative arguments in contending that the prosthetic failure is occupationally related to his employment with the employer, Webco, Inc., and in support of his argument offers the medical opinion of Dr. Koprivica. The employer and insurer counter with the medical opinion of Dr. Lennard, and the medical records of the prosthetic health care providers, which identify the nature of the condition and structure of the prosthesis.

After consideration and review of the evidence, I find and conclude that the prosthesis failed because of the wear and tear it experienced. The prosthesis failure was not related to a single lifting event. Notably, both Dr. Lennard and Dr. Koprivica offer similar opinion that the prosthesis failure was related to wear and tear.

Further, I find and conclude that the work activity performed by Mr. Robbins in his employment with Webco, Inc. was not the prevailing factor in causing this wear and tear. The evidence indicates that in his employment with Webco, Inc., Mr. Robbins did not engage in lifting and carrying of panels (or other work items) in excess of 49 pounds. Thus, considering his weight during the period of his employment, and lifting and/or carrying no more than 49 pounds, Mr. Robbins' employment did not involve or cause him to utilize the prosthesis in excess of its designed weight bearing capacity.

At most, over the course of an eight hour day, Mr. Robbins might have to lift between 10 and 30 pieces to his work station (less than two pieces per hour). The heaviest piece as described by Mr. Robbins was measured to weigh 49 pounds. And Mr. Robbins acknowledged that most of the pieces he carried weighed less than such amount. Additionally, the analysis performed by Alpha Omega indicates that substantial wear and tear existed on all aspects of the prosthetic device. The life expectancy of the ordinary prosthetic device had been reached.

Finally, Mr. Robbins testified that he utilized the prosthesis primarily during his employment, and did not walk, stand or lift with the prosthesis outside of work nearly to the extent he utilized the prosthesis while working. However, he acknowledged that he utilized the prosthesis to mow the lawn and to coach his son's baseball team, as well as engaging in other activity away from work.

Therefore, for the foregoing reasons, the Claim for Compensation, as filed against the employer and insurer, and as filed against the Second Injury Fund, is denied. All other issues not addressed herein are rendered moot.

Made by: /s/ L. Timothy Wilson
 L. Timothy Wilson
 Administrative Law Judge
 Division of Workers' Compensation
 (Signed January 10, 2011)

This award is dated and attested to this 13th day of January, 2011.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation