C1 431/1980

DGR/BP

SOCIAL SECURITY ACTS 1975 TO 1980

CLAIM FOR INDUSTRIAL INJURY BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision C.I. 3/81

1. My decision is that the accident of 2 April 1979 arose out of and in the cause of the claimant's employment and that the damage which ensued therefrom to the claimant's artificial hip joint constituted personal injury, entitling the claimant to injury benefit for the period of her consequential incapacity for work from 31 May 1979 to 29 September 1979 (both dates included).

2. The facts of this case are simple and not in dispute. On 2 April 1979 the claimant in the course of her work slipped on a wet floor. She cracked her head on a metal sink, and in trying to save her right hip she bent her right knee. She attended at Ancoats Hospital, where her head was sutured. At the time of the accident she was not conscious of any effect on her hip. Some 19 years earlier she had had an arthrodesis of the right hip, and this had been replaced by arthroplasty in February 1978. However, the day after the accident she noticed her right hip "clicking" when walking to work. After about a week she felt a "shooting pain" whenever the hip clicked. On 31 May 1979, while she was walking to get her coat, the hip "came out" completely. On 1 June 1979 X-rays showed that the trochanteric wires had broken. She was admitted to hospital on 9 June 1979 and the total hip prosthesis was repaired.

3. A slight complication arises from the fact that in February 1979 the claimant fell on a curb banging her left knee, but the medical evidence establishes that this had no material bearing on the present claim. As a result of the accident of 2 April 1979 the claimant was rendered incapable of work by reason of the damage to her hip joint and she claimed injury benefit for the period set out in paragraph 1. The medical evidence shows that, although the dislocation of the hip did not occur for some 8 weeks after the fall, it arose out of the damage to the synthetic joint occasioned by the fall. No other damage giving rise to incapacity was sustained by the claimant's person.

4. In view of decision R(I)7/56 the insurance officer found the case a difficult one to decide and he referred the matter, as he was empowered to do under section 99(2)(c) of the Social Security Act 1975, to the local tribunal. The tribunal in a carefully reasoned decision ruled in favour of the claimant and found that she suffered incapacity as a result of personal injury occurring by reason of the accident of 2 April 1979. The insurance officer lodged an appeal against that decision and the claimant's association asked for an oral hearing, a request to which I acceded. At that hearing the claimant was represented by Mr P Curran of Counsel, instructed by Mr Jack Thornley, solicitor, and the insurance officer was represented by Mr J P Canlin of the Solicitor's Office of the Department of Health and Social Security.

5. At the hearing Mr Canlin explained that he did not wish to challenge the actual decision of the local tribunal, but was concerned lest the criticism of decision R(I)7/56 and the broad proposition, which the tribunal, under the chairmanship of the distinguished academic Professor Harry Street, had laid down, might find favour generally. He therefore sought guidance from the Commissioner as to the true principles which should apply to cases involving prostheses.

6. Strictly speaking, as Mr Canlin was not any longer appealing against the actual decision of the tribunal, there was nothing for me to decide. The issues referred to by Mr Canlin, which have given the insurance officer cause for uncertainty, have not yet arisen for determination. Moreover, at the hearing, I did not have the benefit of argument in support of the tribunal's approach. Mr Curran was content to deal simply with the claimant's actual case, and insofar as he made any submissions directed to a wider field, they were substantially in support of Mr Canlin's contentions. However, in view of the arguments put forward by Mr Canlin and the obvious concern of insurance officers as to the applicability of decision R(I)7/56, it is, I think, appropriate that I endeavour to lay down some guidelines.

7. In his extremely helpful and lucid medical report Dr D F Rice MB ChB, Principal Medical Officer of the Department of Health and Social Security, has classified prostheses into 3 different groups. The first comprises external appliances, attached to the body so as to replace a member or part which has been removed, or to support a part which has become defective. Examples of these are trusses to control herniae, artificial arms and legs to replace amputated limbs, spectacles, dentures, hearing aids etc. The second category consists of replacements of a diseased part of the body by means of living tissue. Such living tissue may be transferred from one part of a person's body to another part, as in skin grafting or arterial grafting, or be transferred to the recipient from another person altogether as in the case of replacements of a cornea or cardiac or renal transplants. The third category comprises prostheses of synthetic material inserted into the living body. Examples of these are metallic inserts into the skull to replace defects due to trauma, synthetic heart valves or inserts into blood vessels, or replacement joints.

8. In the case of prostheses falling within the first category the appliances in question can never be living matter and as a result, if they are to be regarded as part of the body at all, they can only be so in a very limited sense. However, as regards items falling within the second category these are living tissue which become "absorbed" into the living tissue of the new site (or the recipient, as the case may be) and can be truly said to be part of the claimant's person. However, items falling within the third category - and they include the claimant's synthetic hip joint - whilst they are clearly synthetic material and not tissue, are, nevertheless, inserted into the living body and cannot without surgery or accidental injury be detached therefrom.

9. No one has contended in this case, and in any event I would think it quite unarguable, that items in the second category were not part of the human body. Moreover, although the original insurance officer entertained certain doubts on the point, I do not think there is the slightest difficulty with regard to items falling within the third category. Admittedly the prostheses in question are not themselves living tissue, but are inert. Nevertheless, their insertion into the body renders them an integral part of the anatomy, without which the recipient will be unable to function properly or in some cases even to survive, and any damage thereto must amount to injury to the person.

10. The matter which worried the insurance officer, and caused the local tribunal difficulty was the effect of decision R(I)7/56. In that case it was stated that

> "'personal injury' ... means injury to the living body of a human being. Damage to some artificial appendage of the body - such as spectacles, false teeth, or a wig, or an artificial limb - may well cause incapacity for work, but such damage cannot, in my view,constitute 'personal injury'".

It followed from the above dictum that the claimant in that case, who had as a result of an accident, suffered the breakage of a foot from his artificial leg, had not suffered personal injury, so as to entitle him to injury benefit. The difficulty created by the above decision is that if it is taken literally, any damage which results in injury to something other than "the living body of a human being" cannot constitute "personal injury". In the present instance, the hip joint was not, strictly speaking, a constituent part of the living body, but an artificial joint made of synthetic material which could never become living tissue. However, to apply the legalistic interpretation suggested above is to give a weight to the words "living body of a human being", which in my judgment, the learned Commissioner in that decision never intended them to bear. The tribunal were, in my view, right to distinguish that case from the facts of the present matter before me.

11. It is crucial to realise that replacement surgery, or, as it is often known, "spare parts surgery" has only developed in the last 25 years or so. At the time the decision in R(I)7/56 was given the insertion of synthetic material into the human body was virtually unknown, and manifestly was not within the contemplation of the Commissioner. Prostheses constituted merely external appendages to the body and were inert. Accordingly, there was a natural dichotomy between such artificial appendages on the one hand and the living body on the other. In saying that personal injury meant injury to the living body of a human being, the Commissioner was not trying to exclude from this definition synthetic material inserted into the body. The mere possibility that this could happen was not within his contemplation, and accordingly the words "living body" should not be given an exhaustive and limiting significance. It follows that decision R(I)7/56 is no bar to the actual decision reached by the local tribunal, a decision which, it would seem, no one seeks to disturb. In any event, if there is any doubt, I decide that there was in the present instance a personal injury and that nothing in R(I)7/56, when properly interpretated, conflicts with this conclusion.

12. However, the real matter on which guidance is sought is whether decision R(I)7/56 has been outmoded by the advancement of medical science, and whether damage to <u>any</u> category of prosthesis entitles the claimant, where all the other elements necessary to make up an industrial accident are present, to injury benefit. The tribunal took the view that decision R(I)7/56 had outgrown its usefulness and should, even in its limited application, no longer be followed. In the words of the tribunal

> "A person suffers personal injury by accident when a happening deprives him of, or impairs, a bodily function ....
> The section is designed to protect against personal injury in the sense described in the first sentence of this paragraph. On this view, the section covers all prostheses, damage to which may affect bodily function, whether or not, like artificial limbs, they are detachable, whether or not claimants habitually do detach them, whether or not they are living tissue like corneal replacements or kidneys. This conclusion avoids such absurd conclusions as that the Egon Ronay inspector who breaks a tooth while meal testing can claim, but not if the food dislodges his fillings."

13. I find the above approach not wholly without attraction. The man in the street may not find it altogether easy to understand why it is that someone who, in the course of his work, suffers damage to his artificial leg, so that he is rendered incapable of work until a replacement leg has been obtained or the damage made good, is not entitled to injury benefit, whilst someone else who has suffered damage to his artificial hip is so entitled. However, against that, that same man in the street might be somewhat startled to be told that damage to a person's spectacles or to his deaf-aid constitutes <u>personal</u> injury. The difficulty is to lay down a principle which draws a line which is universally acceptable as distinguishing between what is truly part of the body and what is not. I should state in passing that the

Social Security Act 1975 itself is of no assistance, in that it does not define what constitutes "personal injury." Since 1956 there have been statutory re-enactments of the personal injury provisions, but the material words have not changed.

14. In my judgment, the test should be whether or not the prosthesis in question has become so intimately linked with the body that on any realistic assessment of the situation it can be said to have become part of that body. This test is manifestly satisfied as regards the second and third categories of prostheses referred to earlier, but whether or not it is so satisfied in respect of items falling within the first category must depend upon the circumstances of any given case. The mere fact that a prosthesis is an external appendage should not, in my view, render it incapable of <u>ever</u> being treated as part of the body for the purposes of injury benefit. Each case must be looked at on its merits. It is extremely difficult to see how on any footing anyone could successfully contend that spectacles or, for that matter, contact lenses, or hearing-aids serve to form part of the body. Still more so in the case of crutches or wheelchairs or vehicles to take the wheelchairs. However, in the case of an artificial limb the issue may be more doubtful. In decision R(I)7/56 the Commissioner held that such a prosthesis must be something quite distinct from the person. Doubtless he relied on the present day universal characteristic of an artificial leg that it can be freely attached and detached. In my judgment, such a feature is sufficient to defeat any contention that such a prosthesis must be considered part of the body. The intimate link is sufficiently broken by the detachability of the artificial appendage in question.

15. However, if for any reason artificial limbs are devised which are no longer detachable, but are permanently attached to the human frame, it may well be considered that the connection between the prosthesis (external though it is) and the living body is now so intimate that it must truly be regarded as part of that body. Everything will turn on the facts of the individual case.

16. Accordingly, I do not accept the extended proposition put forward by the tribunal nor do I think that decision R(I)7/56 has become outdated. Properly interpreted R(I)7/56 provides useful guidelines for determining whether or not personal injury has been sustained.

17. I dismiss this appeal.

(Signed) D G Rice
Commissioner

Date: 24 February 1981

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