APPEAL NO. 91001
FILED AUGUST 1, 1991

On May 28, 1991, a contested case hearing was held. The hearing officer determined that the respondent (requestor at the hearing), while in the course and scope of his employment, suffered an injury to the stump of his natural leg and major damage to his artificial leg. The appellant (respondent at the hearing) paid medical costs other than those associated with the replacement of the respondent's artificial leg. The hearing officer decided that the appellant was liable for these expenses and awarded the respondent the sum of $3,719.00 and ordered (employer) to pay that amount. On this appeal, the appellant urges that the weight of legal authority is that damage to an artificial limb is not compensable and asks us to set aside the decision and order of the hearing officer.

DECISION

Under the particular circumstances of this case we do not find merit in the contentions of the appellant. The appellant is determined to be liable for the expenses related to the replacement of the respondent's artificial leg. The decision and order of the hearing officer are affirmed.

The basic facts established by the evidence in this case are not in dispute. The respondent worked as a mechanics instructor in the automobile shop at (employer). Given the nature of the work on cars, the floor of the shop generally had a film of grease or cooling fluid on it. While at work on _____, the respondent slipped on the floor and fell. As he fell, his artificial leg spun around and hit a hoist and he landed on the stump of his right leg resulting in a contusion to the stump. His right leg had been previously amputated below the knee. The result of respondent's falling on the stump of his right leg and the artificial leg's hitting the hoist split the artificial leg vertically and broke its straps. After the fall, the stump swelled and turned black and was painful. Whenever the respondent wore the artificial leg, thereby putting pressure on the socket of the artificial leg, the socket would open up and allow the stump to slide down into the artificial leg which would then squeeze on the stump and scrape it. Also, the respondent experienced considerable pain when he put his weight on the artificial leg and the pressure point at the lower part of his stump abraded as it came in contact with the bottom of the socket. His mobility was also limited as he could not put weight on the artificial leg. As a result, he fell twice. The bruises on the stump disappeared after about two weeks, but the pain continued. The respondent's doctor prescribed new attachment straps and replacement of the upper socket of the artificial leg. The respondent attempted to have the leg repaired but the cost was greater (would require setting up the "jig" for the old model artificial leg) than obtaining a new basic artificial leg from a prosthetics manufacturer.

The new artificial leg had different weight bearing surfaces since the injury to the stump resulted in the respondent going from weight bearing directly below the knee (where the knob is) to spreading weight bearing surfaces out. The knob below the knee is where he hit his stump in the fall. The respondent considers the artificial leg an integral part of his

body and he cannot adequately function without it. He wears it except when sleeping.

In pertinent part, the Texas Workers' Compensation Act of 1989 (1989 Act) defines the term "injury" as "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm." Tex. Rev. Stat. Ann., art. 8308-1.03(27) (Vernon Supp. 1991). Once there is an injury meeting this definition, and if the injury arose "out of and in the course and scope of employment for which compensation is payable under this Act," a compensable injury exists. Tex. Rev. Civ. Stat. Ann., art. 8308-1.03(10). (Vernon Supp. 1991).

The 1989 Act provides broad health care in instances of compensable injuries. Health care is defined to include:

> all reasonable and necessary medical aid, medical examinations, medical treatment, medical diagnosis, medical evaluations, and medical services . . . . The term includes . . . . (f) medical and surgical supplies, appliances, braces, artificial members, and prostheses . . . Tex. Rev. Civ. Stat. Ann., art. 8308-1.03(20) (Vernon Supp. 1991).

Further, the 1989 Act provides in the article concerning entitlement to medical benefits:

> (a) An injured employee is entitled to all health care reasonably required by the nature of the compensable injury as and when needed. Medical benefits are payable from the date of injury arising out of and in the course and scope of employment. The employee is specifically entitled to health care that: (1) cures or relieves the effects naturally resulting from the compensable injury; (2) promotes recovery; or (3) enhances the ability of the employee to return to or retain employment . . . . Tex. Rev. Civ. Stat. Ann., art. 8308-4.61 (Vernon Supp. 1991).

The appellant takes issue with the hearing officer's first conclusion of law that "The Texas Workers' Compensation Act of 1989, when read as a whole, permits recovery for an injury to artificial members." We do not endorse this conclusion as stated, particularly insofar as it suggests that the Texas legislature has expressed an intent to include injury to an artificial member as a compensable injury in all instances, even where such is the sole "injury" experienced by a claimant.

Although our research found limited Texas case authority on the issue of damage or injury to an artificial member, it was discussed at some length in National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Janes, 687 S.W.2d 822 (Tex. App.-El Paso 1985, writ ref'd n.r.e.). In Janes, the court held that the breaking of a temporary metal plate used to repair a previously (not related to workers' compensation) fractured right femur did not fit into the categories of "injury" as defined by the Texas Supreme Court in

Bailey v. American General Insurance Co., 154 Tex. 430, 279 S.W.2d 315 (1955). In Bailey, the court stated:

> The phrase "physical structure of the body," as it is used in the statute, must refer to the entire body, not simply to skeletal structure or to the circulatory system or to the digestive system. It refers to the whole, to the complex of perfectly integrated and interdependent bones, tissues and organs which function together by means of electrical, chemical and mechanical processes in a living, breathing, functioning individual. To determine what is meant by "physical structure of the body," the structure should be considered that of a living person - not as a static, inanimate thing. (279 S.W.2d at 318).

The court in Bailey was clearly not attempting to be restrictive in construing the term "injury" or "physical structure." Rather, the terms were given a liberal construction so as to include a situation where neurosis, which resulted in malfunctioning of the physical structure, qualified as a compensable injury. A structural steel worker suffered neurosis as a result of fright occasioned by the collapse of a scaffold eight stories above the ground which resulted in a co-worker falling to his death and the steel worker narrowly escaping with slight injury.

Of importance, the decision in Janes was predicated upon the court's finding of insufficient evidence to support any injury to the claimant other than the breaking of the temporary metal plate itself. The court found particularly pertinent the testimony of a doctor that "Mr. Janes' condition was the same after the accident as it was before the accident, the only difference is the plate broke." 687 S.W.2d at 825. In deciding that the breaking of the temporary metal plate did not constitute damage or harm to the claimant's physical structure, the court, noting that Texas courts have not ruled on whether artificial members are covered under workers' compensation statutes, opined that Texas courts should not allow recovery for injuries to artificial members absent an expression of legislative intent.

The factual situation in the case sub judice is markedly different from that in Janes. Here there was a distinct injury to the respondent other than the damage or injury to the artificial leg. The evidence convincingly supports the hearing officer's finding of injury to the stump of the respondent's natural leg. Indeed, there is unrebutted evidence in the record to support a conclusion that the contusion or bruising to the stump from the fall directly related to a necessary change in the weight distribution or pressure points on the stump in fitting it to the replacement of the artificial leg. In Janes, there was no physical change before and after the accident; here there clearly was.

The hearing officer in his second conclusion of law stated that "[t]he nature of the injury suffered by (respondent/claimant) to his stump and his artificial leg falls within the scope of the definition of injury in finding of fact nine above, and repair or replacement of the artificial leg is reasonably required by the nature of his injury." Finding of fact nine sets

forth the definition of injury under the 1989 Act.

Under the circumstances presented in this case, we agree with the second conclusion of the hearing officer and find no merit to the appellant's challenge thereto. As we view the evidence, the virtually concomitant injuries experienced in this case fall within the definition of injury under the 1989 Act. It seems clear to us that there is a direct, causal connection or nexus between the injury to the respondent's stump and the need for replacement of the artificial leg damaged in the fall. Where there is injury or damage to an artificial member accompanied by other physical bodily injury, recovery for the damage or injury to the artificial member has been upheld. See generally, Larson, Workmen's Compensation Law, Vol. 1B, Sec. 42.13, (Matthew Bender, NY, 1990).

A line of cases we find persuasive holds that recovery for damage or injury to an artificial member or prostheses is warranted where such is related to other physical injury to the body arising out of the same incident or accident. Agostinho v. Kaiser Aluminum and Chemical Corp., 94 RI 51, 177 A.2d 630 (1962); Baker v. Pittsburgh Forgings Co., 189 Pa. Super. 469, 151 A.2d 180 (1959); Teague v. Graning Hardwood Manufacturing Co., 238 Miss. 48, 117 So.2d 342 (1960); Romano v. South Range Construction Co., 8 Mich. App. 533, 154 N.W.2d 560 (1967). Other cases have denied recovery for damages or injury to artificial members or prostheses where no related physical bodily injury was involved. Behl v. General Motors Corp., 25 Mich. App. 490, 181 N.W.2d 600 (1970); a case where damage to a hearing aid was denied, the court stating: "[we] agree with the courts of other jurisdictions that damage to a hearing aid when no bodily injury is either suffered or threatened is not a "personal injury"); Geiger v. Bell Aerosystems Co. Division, 54 Misc. 2d 1049, 283 N.Y.S.2d 906 (1967); Lail v. Richland Wrecking Co., 280 S.C. 532, 313 S.E.2d 342 (1984); Newberry v. Youngs, 163 Neb. 397, 80 N.W.2d (1965).

The early case, London Guaranty and Accident Co. v. Industrial Commission of Colorado, 80 Colo. 162, 249 P. 642 (1926), held, in a single paragraph decision without any statutory language included, that a wooden leg is a man's personal property and no compensation can be awarded for its injury. While this decision has been cited in cases denying recovery for damage or injury to an artificial member, we believe the comments of the Rhode Island Supreme Court in Agostinho are noteworthy:

> Another factor to be taken into account is that the Colorado case was decided in 1926. At that time workmen's compensation in this country was in its infancy and courts generally were disinclined to depart from the literal language of the statute. Since then in order to give effect to the underlying policy of the legislation there has been an increasingly liberal construction of it whenever reasonably possible rather than a rigid adherence to its letter. 117 A.2d at 631.

Over the years, a significant number of states have amended their workers' compensation statutes to specifically include damage or injury to an artificial member in and

of itself as a compensable injury. See generally, Larson, supra, Sec. 42.12 at page 7-807. We do not find such a broad amendment by the Texas legislature nor do we see a legislative intent of that nature in the 1989 Act. However, that does not detract from our affirmance of the hearing officer under the facts of this case nor is it incompatible with Janes. The respondent here did suffer an injury to his body which was directly and causally related to the damage to his artificial leg and that injury was a producing cause necessitating its replacement.

Appellate also challenges the hearing officer's third conclusion of law which is:

> "The health care to which (respondent/claimant) is entitled by virtue of the nature of his injury encompasses the repair or replacement of a prosthetic device because such replacement would relieve the effects naturally resulting from his compensable injury and enhance his ability to return to and retain employment."

The thrust of appellant's position is that the respondent is not entitled to repair or replacement of the artificial leg under the health care provision of the 1989 Act since damage to the artificial leg is not in and of itself a compensable injury and the replacement of the leg is not required for relieving the effects naturally resulting from the injury to the stump. Claiming there is no evidence that replacement of the leg would relieve the effects of the injury to the stump, appellant concludes that the stump would heal equally well if there were no artificial leg at all.

We do not agree with the appellant's assessment of the evidence nor with the stilted view of the requirements of health care under the 1989 Act. The unrebutted testimony of the respondent at the contested case hearing established that the injury to his stump resulted in his not being able to sustain weight bearing on the knob directly below the knee where it was prior to the accident. The replacement leg required changed weight bearing surfaces to disperse the weight. The respondent testified that the previously weight bearing knob is where he took the brunt of the fall.

This factual setting, we believe, comes well within the language and meaning of the 1989 Act as set forth above. Further, the replacement of the artificial leg was, under these circumstances, reasonable and necessary to relieve the effects naturally resulting from the compensable injury as concluded by the hearing officer. The respondent's unchallenged testimony related that he had fallen twice using crutches following the incident and that he had to have an artificial leg to perform his job. In sum, the replacement artificial leg enhanced his employment capabilities and, in his words, put him back to where he started from. Peebles v. Home Indem. Co., 617 S.W.2d 274 (Tex. App.-San Antonio 1981, no writ). The hearing officer also found the $3,719.00 cost of the new artificial leg was a reasonable and necessary price for the member. The respondent testified that when he attempted to have the old artificial leg repaired at the Prosthetics Center, he was advised it would cost more than a basic new leg because of having to set up the jig for the old model

leg. In our view, the evidence sufficiently supports the findings and conclusions. Romano v. South Range Construction Company, supra; Teague v. Graning Hardware Manufacturing Co., supra.

Finally, the appellant takes issue with the hearing officer's fifth finding of fact insofar as it finds that "(Respondent/claimant)'s artificial leg is a . . . permanent part of (Respondent/claimant)'s physical body . . . ." We need not concern ourselves with this issue as it is not pivotal in our disposition of this case. However, it seems to us that whether the artificial leg is merely temporary because it can be and is taken off when the respondent retires does not, in and of itself, provide a meaningful basis on which to assess compensability. There is also some authority that where an artificial member is a full time replacement or substitute for the amputated natural member, as opposed to merely an aid to the body, a basis for recovery may be made out. The artificial leg here is not temporary in the sense that the natural member will grow back or heal so that the artificial leg would no longer be needed for normal mobility. See California Casualty Indemnity Exchange v. Industrial Accident Commission of California, 13 Cal.2d 529, 90 P.2d 289 (1939), where the court distinguishes between a substitute for and not merely an aid to, a natural part, organ, limb, or other separable part of the body. Behl v. General Motors Corporation, 25 Mich. App. 490, 181 N.W.2 660 (1970).

Common sense would indicate to us that this substitute leg is more of a permanent nature to the respondent's body than it is temporary. Janes, supra. Pacific Indemnity Co. v. Industrial Acc. Commission, 215 Cal. 461, 11 P.2d 1 (1932). However, we need not decide this issue in the instant case.

The decision and order of the hearing officer are affirmed.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge