

APPEAL NO. 94945

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 2, 1994, in (city), Texas, with (hearing officer) presiding as hearing officer. The only issue at the hearing was does medical treatment for which appellant (carrier) is responsible as a result of the respondent's (claimant) (date of injury), injury to her right breast include replacement of her left breast implant. The hearing officer determined that the carrier is responsible for the replacement of the left breast implant. The carrier appealed urging that the hearing officer erred in concluding that the left breast implant is a responsibility of the carrier. The claimant requests that we affirm the decision of the hearing officer.

DECISION

We affirm.

On (date of injury), the claimant tripped, fell against a desk, and ruptured the scar tissue which encapsulated the implant in her right breast. After the injury, the claimant obtained an appointment with (Dr. J). Dr. J referred her to (Dr. B). The claimant testified that Dr. B told her that he needed to remove both implants and that he was not allowed to remove only one implant. She further testified that Dr. B told her that she had to have all of the surgery, the only question was whether all of the surgery would be covered by workers' compensation. An entry in the records of Dr. B dated January 13, 1993, contains the following: "The patient now has considerable breast asymmetry with the right breast being lower and softer than the left. . . . My recommendations for the patient is bilateral capsulectomy and exchange of the implants." An entry dated January 19, 1993, contains the following: "The patient is in today and had decided she would like the problem remedied. This will require fibrous capsulectomy and replacement of the breast implants." The following questions and answers are from a letter dated January 28, 1994, in which Dr. B responded to questions asked by a Commission benefit review officer:

3.What treatment of surgery did you provide to [claimant] which was elective in nature and not directly related to, or required as a direct result of, her injury?

All surgery performed on 02-04-93 was designed to improve the condition resulting from her trauma.

4.Of the charges reflected on the attached bills from your office and Hospital, which were incurred as a result of treatment from the effects of [claimant's] injury as opposed to being incurred for elective procedures?

Had the patient not sustained her fall, no surgery would have been performed. The surgery was performed to explore the injured side and remove the breast prosthesis. In order for the patient to have symmetry and a normal post operative appearance, it was necessary to explore and remove both breasts implants and surrounding capsules and replace these with new implants which match. To only remove the right side

(injured side), the patient would have had considerable asymmetry, distortion, and abnormal appearance.

The claimant testified that Dr. B told her that since she had a big frame, she should have larger implants. She testified that she is now larger than she was in 1977 when the first implants were inserted. She also testified that she told Dr. B she wanted to look like a normal woman. The claimant testified that her job requires that she make presentations to people and her appearance must be neat. After the surgery, (Dr. L) reviewed the medical records for the carrier and opined that surgery was not required. Nevertheless, the carrier did not dispute that the implant in her right breast had to be replaced because of the fall. The parties agreed that the left breast implant was replaced for cosmetic reasons.

We note that the parties elected to resolve the dispute by using the benefits dispute resolution system established under the provisions of Chapter 410 of the 1989 Act to resolve compensability issues rather than the dispute resolution system established under the provisions of Chapter 413 to resolve medical disputes.

In Section 401.001(26) injury is defined as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.001(31) defines medical benefit as:

payment for health care reasonably required by the nature of a compensable injury and intended to:

- (a) cure or relieve the effects naturally resulting from the compensable injury, . . . ;
- (b) promote recovery; or
- (c) enhance the ability of the employee to return to or retain employment.

Section 408.021 provides:

ENTITLEMENT TO MEDICAL BENEFITS. (a) An employee who sustains a compensable injury is entitled to all health care reasonably required by the nature of the injury as and when needed. 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.

Disease is not defined in the 1989 Act; however, the definitions found in medical references are broad. Nine and one-half pages of Dorland's Illustrated Medical Dictionary, Twenty-sixth Edition, W. B. Saunders Company, 1981, contain comments on disease. The same dictionary defines macromastia as oversize of the breasts or mamma and micromastia as abnormal smallness of the mamma.

The burden of proof is on the claimant to prove the extent of her injury. Texas Workers' Compensation Commission Appeal No. 94248, decided April 12, 1994. Also the employer takes the claimant as he finds her. Texas Workers' Compensation Commission Appeal No. 92040, decided March 16, 1992. The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). The trier of fact can believe all, part, or none of any witness's testimony. Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. As the finder of fact, the hearing officer must resolve all conflicts and inconsistencies in the evidence and make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993. This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). An appellate body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Where sufficient evidence supports the findings and they are not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The hearing officer determined that it was not possible to match the two breasts without replacing the left breast implant and that the carrier is responsible for the replacement of the claimant's left breast implant as well as her right breast implant as a result of her (date of injury), compensable injury. Both the definition of medical benefit and the section on entitlement to medical benefits in the 1989 Act provide that an injured employee is entitled to payment for health care reasonably required to cure or relieve the effects naturally resulting from the compensable injury. The definition of injury includes a disease naturally resulting from the damage or harm to the physical structure of the body. In his discussion, the hearing officer stated that both breasts have been damaged directly or indirectly, which implies that there is a disease naturally resulting from the damage or harm to the body or that the health care is reasonably required to relieve the effects naturally resulting from the compensable injury. It would have been better for the hearing officer to use phrases from the 1989 Act such as "disease naturally resulting" or "health care reasonably required to relieve effects naturally resulting;" however, the results are the same. Only were we to conclude, which we do not in this case, that the hearing officer's determinations were so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, would there be a sound basis to disturb those determinations. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Since there is sufficient evidence to support

the determinations of the hearing officer, we will not substitute our judgment for his. Texas Workers' Compensation Commission Appeal No. 94044, decided February 17, 1994. Accordingly, the decision and order of the hearing officer are affirmed.

Tommy W. Lueders
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge