

APPEAL NO. 990122

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on December 18, 1998. With respect to the issues before her, the hearing officer determined that the respondent (claimant) sustained a compensable injury on _____, and that she had disability as a result of her compensable injury from October 7, 1998, through the date of the hearing. In its appeal, the appellant (carrier) argues that the hearing officer's injury and disability determinations are against the great weight and preponderance of the evidence. In her response, the claimant urges affirmance.

DECISION

Affirmed.

The claimant testified that she is a 15-year employee of (employer), and that she has worked as a sewing machine operator throughout her employment with the employer. She stated that on _____, she was not able to work on the sewing machine where she normally worked because water from the air conditioning system had leaked through the ceiling, causing a ceiling tile to break and a pool of water to form around her machine. She testified that she was moved to a different machine that was higher than her usual machine, which caused her to have to lift her left arm in order to sew the sleeves for the garments. She stated that she was uncomfortable working on the replacement sewing machine. Specifically, she stated that as she took her break at 9:00 a.m., after having started her shift at 6:00 a.m., she noticed that her left shoulder was "pulling" every time she raised her arm. She maintained that during her break, she told her supervisor, Ms. P, that the replacement machine was too high, asked Ms. P if they could lower it or move her machine to a different location so she could work on it, and was later advised by Ms. P that neither action could be taken. She stated that she could not say how much higher the machine she operated on _____, was than the machine she normally operated. She explained that typically she sat higher than her machine such that her arms were at chest level as she put the material into the machine to sew the sleeves; however, she stated that on _____, she sat at eye level to the machine and, therefore, had to constantly reach up in order to put the material into the machine. The claimant testified that she continued to work on the machine and that by the time she went to lunch at noon, she had developed a burning pain in her left shoulder and arm. She stated that she worked until the end of her shift at 2:00 p.m. and that by that time she had constant, severe pain in her left arm and shoulder.

The claimant stated that she called Ms. P at home on the evening of _____ to ask if her machine had been moved or the replacement machine had been lowered. She testified that Ms. P told her that neither action had been taken, and the claimant advised Ms. P that she was going to stay home on October 7th because the pain in her shoulder and arm had not improved. She stated that she again called Ms. P on the evening of October 7th and told her that the pain was not going away and that she thought she would have to go to the

doctor. On Thursday morning, October 8, 1998, the claimant went to the plant and had a meeting with Ms. P and Mr. B, the employer's night manager. The claimant stated that she told Mr. B that she was going to go to the doctor because of her arm/shoulder pain, which she attributed to work she performed on the different machine on _____ and that Mr. B told her that they would not lower the replacement sewing machine or move her machine because it would interfere with production. She testified that it was her intent to go to the doctor and not to work on October 8, 1998, whether or not the employer took any action to move her machine or lower the replacement machine and that Mr. B told her that if she filed a claim for workers' compensation, she would start over in a different position when she came back to work, she would lose her 15 years of seniority, and she would return to being paid minimum wage.

Ms. P testified that the claimant had a choice of several machines to work at on _____, and that she selected the machine she operated that day. In her direct testimony, Ms. P stated that she first learned that the claimant was alleging an injury to her shoulder/arm from working on the replacement machine on October 8, 1998, during the meeting with Mr. B. She stated that the claimant told her on _____ that she was uncomfortable on the machine because it was too high; however, she denied that the claimant had told her she had been injured. On cross-examination, when confronted with a prior statement, Ms. P changed her testimony and stated that the claimant had told her on _____, that her shoulder and arm were hurting from operating the machine. Ms. P testified that in response to a complaint the claimant filed with the Occupational Safety and Health Administration (OSHA), the employer measured the difference in height between the machine the claimant normally used and the machine she operated on _____ and that the difference in the height of the top of machine table was only 3/4 of an inch.

Mr. B testified that he first heard that the claimant was alleging a work-related injury on October 8, 1998. He stated that the claimant did not tell him that she had injured her arm/shoulder until after he advised her that the employer was not going to move her machine as she had requested. Mr. B denied that he told the claimant that anything would happen to her if she filed a claim for workers' compensation. Mr. B also confirmed that he measured the difference in height between the tops of the machine tables of the machines at issue and took pictures of those machines in response to the OSHA complaint. He maintained, as had Ms. P, that the machine the claimant operated on _____, was only 3/4 of an inch higher than her regular machine. He explained that the photographs were sent to OSHA and that the agency still had them.

The claimant first sought medical treatment on October 8, 1998, with Dr. V. The progress notes from her initial visit state that she complained of left shoulder pain when she lifts her arm. They further provide that she gave a history of having "pulled" her shoulder at work, after "switching machines at work that is much higher than her usual machine." Dr. V took the claimant off work at the October 8th appointment. Thereafter, the claimant began treating with Dr. R, with whom she had scheduled her October 8th visit but who was unavailable due to an emergency. In progress notes of October 13, 1998, Dr. R diagnosed a left shoulder strain, and "possible rotator cuff strain vs. tear," noting that "[s]he was reaching up overhead on a machine that was too high for her; strained her left shoulder . . .

.\" Dr. R continued the claimant in an off-work status and had not released her to return to work as of the date of the hearing. In a \"To Whom it May Concern\" letter of October 20, 1998, Dr. R stated:

[Claimant] has been under my care for a left shoulder strain. She has been an employee of [employer] for 15 years and has never filed Worker's Comp.

On _____ when she entered her work place she noted that there were problems with the vent above her work station and the machine was unable to be used. She was directed to another machine which was higher than her machine. This change in height caused her to constantly reach resulting in a pulling in her left shoulder. She states she asked her supervisor to lower the machine which was refused. She states that chair was as high as it could go.

Physical exam does reveal evidence of a shoulder strain and possible rotator cuff tear. She has been treated with anti-inflammatory and muscle relaxer medications without much response. She is starting to experience numbness along the ulnar surface of her left hand and discomfort in her fourth and fifth digits of her left hand. I have referred her to physical therapy for further evaluation and treatment. I do feel an MRI of the left shoulder is needed.

I do believe [claimant's] left shoulder pain is secondary to a work related injury from working at a desk that was too high for her.

The carrier argues that the hearing officer's injury and disability determinations are against the great weight and preponderance of the evidence. Those issues presented questions of fact for the hearing officer to resolve. Generally, injury and disability issues can be established on the basis of the claimant's testimony alone, if it is believed by the hearing officer. Gee v. Liberty Mutual Fire Ins. Co., 765 S.W.2d 394 (Tex. 1989); see also Texas Employers Ins. Ass'n v. Ramirez, 770 S.W.2d 896 (Tex. App.-Corpus Christi 1989, writ denied)(Court of Appeals found claimant's testimony about repetitive bending and twisting she had to perform when she was transferred to a low ironing board was sufficient to establish causal connection between work activities and claimant's back injury.). As noted above, there were conflicts and inconsistencies in the testimony and evidence before the hearing officer. The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence under Section 410.165(a). As such, it was her responsibility to consider the testimony and evidence before her and to determine what facts had been proven. It is apparent that the hearing officer credited the claimant's testimony about the reaching she was required to do in order to perform her work duties on the replacement machine over the testimony of Mr. B and Ms. P that there was little difference between the heights of the machines and, therefore, the claimant was not required to stretch or reach to work on _____. The hearing officer also assigned weight to the causation opinion of Dr. R, which corroborated the claimant's testimony. We cannot agree with the carrier's contention that the discrepancies in the histories given to Drs. R and V were of such significance as to render their opinions of no evidentiary value. To the contrary, those differences and their consequent effect on the weight and credibility of the

doctors' opinions were matters left to the discretion of the hearing officer as the fact finder. The claimant's testimony and the medical evidence from Drs. R and V provide sufficient evidentiary support for the hearing officer's determination that the claimant sustained a compensable injury. Our review of the record does not demonstrate that that determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse the injury determination on appeal. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier's challenge to the disability determination is premised upon the success of its argument that the claimant did not sustain a compensable injury. Given our affirmance of the injury determination, we likewise affirm the disability determination.

The hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge