APPEAL NO. 92443

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp 1992). On August 4, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He found that claimant, respondent herein, has a compensable hearing loss. Appellant asserts that the finding and conclusion that show respondent did not know of the hearing loss until (date of injury), were against the great weight and preponderance of the evidence.

DECISION

Finding that the decision is sufficiently supported by evidence of record, we affirm.

Respondent stated that he is 52 years old and was born in 1935 (emphasis added). He has worked for his employer since 1969. He operates a press that stamps out aluminum can tops for containers. He has operated some type press for the last 15 years with employer and started using a different press six years ago. The noise is louder with the new press partially because of a siren that goes off right by his head when the machine starts. The company from time to time gave employees hearing tests after which the results would be handed out without discussion or advice. No doctor was employed to explain the result of any test given at the plant. The employer's representative acknowledged that the results of these tests were delivered in a cursory manner.

Respondent had tests in 1982, 1983, 1987, and 1988. These tests showed high frequency hearing loss but little loss in the speech range of sound in 1982 and 1983. The speech range increased to "moderate" loss in the latter two tests. Respondent testified that he did not really notice the loss until Christmas of 1991 when he had a hard time understanding his visiting grandchildren. He made a doctor's appointment and saw Dr. M on (date of injury). Dr. M gave him a test and explained the extent of the hearing loss from the graph he prepared and said he needed a hearing aid. Respondent had also talked "recently" with others in the plant about the fact that they have lost hearing at work. He acknowledged that he knew he had some hearing loss prior to seeing Dr. M and knew that the noise at the plant was loud. He maintained, though, that he did not read the results of the hearing tests done over the years by the company and could not understand the graphs without explanation.

The hearing officer in his "Statement of Evidence" says that there was no dispute that respondent's job could produce "noise induced hearing loss." On appeal, appellant did not dispute this assertion or the failure of the hearing officer to make a finding of fact that the work environment caused the hearing loss. With no appellate issue before us, causation will not be considered. Although the procedure is different, we note that in Commercial Ins. Co. of Newark v. Smith, 596 S.W.2d 661 (Tex. Civ. App.- Fort Worth 1980, writ ref'd n.r.e.) the court said there was no need to submit an issue on a question about which there is no controversy. That reasoning is consistent with the absence of a finding of causation by the

hearing officer in this case. The hearing officer did find, "(t)he claimant was a press operator and was exposed to an increased incidence of repetitious physically traumatic noise over a period of years."

While the issue as recited by the hearing officer at the hearing was "[d]id the claimant sustain a compensable repetitive trauma injury, hearing loss on (date of injury)?", the question actually in dispute at the hearing was "did respondent know or should he have known that the hearing loss may be related to the job?" The results of hearing tests performed over the years by the company provided evidence upon which the hearing officer could have found that respondent knew of the injury long before the date alleged. On the other hand, respondent's own testimony that he did not read these reports raised a question of credibility for the hearing officer to decide. The hearing officer is the sole judge of weight and credibility of the evidence. Article 8308-6.34(e) 1989 Act. The hearing officer did set out in bold face under "Statement of Evidence" in his decision the following, which was introduced by the appellant:

NOISE INDUCED HEARING LOSS (NIHL)

At noise levels typical in industry, NIHL occurs slowly over years of daily exposure, and most victims of NIHL don't know that they are losing hearing.

In addition, respondent was steadfast in testifying that he did not know how bad the hearing had become until Christmas 1991, although he acknowledged that his wife had griped about him not listening to her. The Appeals Panel, in Texas Workers' Compensation Commission Appeal No 91124 (Docket No redacted) decided February 12, 1992, has upheld a hearing officer's decision that said an employee knew of an occupational disease when initially told by a doctor. Smith, *supra*, also says that under prior law, TEX. REV. CIV. STAT. ANN. art. 8306, § 20 (repealed 1989), the time for notice in an occupational disease case began to run when it was reasonable to recognize the "nature, seriousness and . . . the work-related nature of the disease." (emphasis added). Texas Workers' Compensation Commission Appeal No 91002 (Docket No redacted) decided August 7, 1991, stated that the 1989 Act, in defining "occupational disease" and in setting the date of injury, was substantially the same as the prior law. Finding of Fact No. 4, which reads "[t]he claimant did not know that his hearing loss may have been related to his employment prior to seeing Dr. [M] on (date of injury).", is sufficiently supported by the evidence. The Appeals Panel in Texas Workers' Compensation Commission Appeal No 92370 (Docket No redacted) decided September 10, 1992, in looking at when a claimant knew her injury was work related, quoted from Bocanegra v. Aetna Life Ins. Co., 605 S.W.2d 848 (Tex. 1980), which said:

Uncertainty in many complex areas of medicine and law is more the rule than the exception. It would be a harsh rule that charges a layman with knowledge of medical causes when, as in this case, physicians and lawyers do not know them.

Appeal No. 91002, *supra*, also pointed out, quoting from Daylin, Inc. v. Juarez, 766

S.W.2d 347 (Tex. App.-El Paso 1989, writ denied), that a decision must be affirmed if it can be sustained on any reasonable theory supported by the evidence. While the hearing officer found that respondent did not know the injury was work related until he saw Dr. M, he could also have found that respondent did not know the seriousness of the injury until he saw Dr. M.

The findings and conclusions are sufficiently supported by the evidence and address the disputed issue. The order of the hearing officer is affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Susan M. Kelley
Appeals Judge