APPEAL NO. 92638

A contested case hearing was held in (city), Texas, on October 27, 1992, (hearing officer) presiding, to determine whether respondent (claimant) sustained a compensable repetitive trauma injury (hearing loss) on (date of injury). The hearing officer, upon finding that claimant's employment caused his hearing loss and that he did not know his hearing loss may have been related to his employment before seeing (Dr. M) on (date of injury), concluded claimant sustained a compensable repetitive trauma injury on that date. Appellant (carrier) contends that the findings and conclusion are unsupported by the evidence and seeks reversal. Claimant urges our affirmance.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusion, we affirm.

Claimant testified that he worked as a maintenance person for (employer) and its predecessor, (company)., from August 1969 until the plant closed in the summer of (year). Though not mentioned in the evidence, the hearing officer's decision stated that employer made aluminum cans at the plant. Claimant was exposed to what he described as a noisy work environment on a daily basis working among the presses. The noise level in the coral press department where he worked was such that he yelled to be heard on the floor and used an office to discuss problems. He said he always wore the ear protectors provided by employer. He became aware at least as far back as 1988 that he was having "hearing problems" and had the experience of hearing better when away from the plant for a 20 day vacation. However, he had difficulty hearing his grandchildren during the 1991 Christmas season and his wife persuaded him to go to a doctor for a hearing exam. He saw Dr. M on (date of injury) and was then advised he had a hearing loss attributable to his work environment. He filed a notice of injury and claim for compensation that same day. Dr. M's report of April 6, 1992 indicated that testing revealed a profound hearing loss in the high frequencies in both ears and a moderate hearing loss in both ears in a lower range. According to Dr. M, "[t]his type of hearing loss in all probability is secondary to loud noise exposure." In his report of May 21, 1992, Dr. M stated that "[claimant's] hearing loss is secondary to industrial loud noise exposure."

Claimant said employer administered annual hearing exams beginning in 1978 and that he was required to sign for the results which were never explained. He described that process as one of being rushed by the ladies in the office to either "pick up or sign and just leave" the test results, and "just stating that the supervisor wasn't involved." Claimant also stated he understood neither the series of numbers reflected on such test results for each ear nor the hearing level classifications. He said no nurse, doctor, or other employer representative ever interpreted or discussed any such test results with him. Claimant insisted that while he was aware as far back as 1988 that he was having "hearing problems", he did not realize he had sustained a loss of hearing, nor that such was caused by his work environment, until he was so advised by Dr. M on (date of injury). Employer's manager of staff services, (WS), testified that employer had instituted a program of hearing conservation

including the wearing of protective devices and periodic testing. He also stated that a noise level study of the plant showed constant noise levels higher than 100 decibels in the press areas where claimant worked.

In factual finding No. 4, the hearing officer first found that claimant's work environment was capable of producing a noise induced hearing loss and carrier, in its request for review, says it does not challenge that finding. Carrier does, however, challenge the remainder of that finding, namely, that claimant's job caused the hearing loss, as well as the finding that claimant did not know his hearing loss may have been related to his employment prior to seeing Dr. M on (date of injury). The evidence that claimant's hearing loss was caused by the noise at work was ample and not in conflict. In addition to Dr. M's opinions on causation, claimant testified he had no exposure off the job to similar noise levels and believed his hearing loss was caused by the noise at work.

The evidence on when claimant knew or should have known that his hearing loss was caused by his employment was in substantial conflict. Article 8308-4.14 provides that the date of injury in the case of an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. Carrier's position was that claimant had such knowledge in 1988, so testified, and thus failed to prove his date of injury was (date of injury) as he maintained. Carrier points to certain testimony of claimant on cross-examination in which he said he "guessed he would have to say" that in 1988 he knew he had "hearing problems" and knew they involved the plant. Along with that testimony was a hearing test report signed by claimant on January 21, 1988, put in evidence by the hearing officer, which stated that claimant's hearing test results indicated "a severe amount of loss" of high pitched sounds in both ears and mild or moderate loss of low pitched tones in both ears. Those results appear quite similar to those found by Dr. M exactly four years later. However, claimant seemed to distinguish between his awareness since 1988 that he was experiencing "hearing problems"--which he said would improve when he was away from the plant for periods of time--and his having sustained an outright hearing loss which he first learned from Dr. M on (date of injury). He testified that "[he] didn't know [his] hearing was severe until '(year)," that "[he] didn't know [he] had a loss until [he] went to [Dr. M]," and that "he didn't talk to anyone in his union about his hearing problem before (date) because "[he] really didn't know [he] was that hard of hearing."

This case is remarkably similar on the facts to that in Texas Workers' Compensation Commission Appeal No. 92443, decided September 28, 1992, and we refer to that decision for its discussion of the applicable legal principles. We are satisfied the evidence is sufficient to support the hearing officer's determination that claimant met his burden of proving by a preponderance of the evidence that the date of his occupational disease was (date of injury).

It was carrier's contention that because claimant knew or should have known that his hearing loss may be related to his employment as far back as 1988, his notice of injury to employer and his claim for compensation were untimely under the Texas Workers'

Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-5.01 and 8308-5.03 (Vernon Supp. 1992 (1989 Act). However, as the hearing officer so advised the parties at the outset of the hearing, those issues were not specified as separate and discrete disputed issues in the statement of disputes accompanying the benefit review conference report, nor were they added thereto at the contested case hearing. The carrier asked for and received the hearing officer's assurance that carrier had not waived those issues should it decide to raise them in subsequent proceedings. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) which provides, in part, that "a dispute not expressly included in the statement of disputes will not be considered by the hearing officer," and which also provides the methodology for responding to a benefit review conference report and for adding disputed issues for consideration at a contested case hearing.

Finally, carrier contends that claimant failed to prove he sustained a "compensable injury," as defined by Article 8308-1.03(10), because no "compensation" is payable to claimant since he missed no work from the date of his injury until the plant closed. Carrier points to Article 8308-4.22(a) which provides that weekly income benefits may not be paid for an injury that does not result in disability for a period of at least one week. However, income benefits are not the only benefits included in the term "compensation." Article 8308-1.03(11) defines the term "compensation" to mean "payment of medical benefits, income benefits, death benefits, or burial benefits." Not only is claimant entitled to all health care reasonably required by the nature of his compensable injury as and when needed (Article 8308.4.61), but Article 8308-4.22(b) contemplates the payment of income benefits for disability which does not immediately follow an injury but later results. Carrier's contention is without merit.

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge