APPEAL NO. 93438

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). At a contested case hearing held in (city), Texas, on April 12, 1993, the hearing officer, Hearing officer, considered the three disputed issues unresolved at the Benefit Review Conference (BRC) and concluded that the respondent (claimant) sustained a hearing loss in the course and scope of his employment with (employer), that employer had actual knowledge of the hearing loss within 30 days of the date claimant knew or should have known that the condition was causally related to his occupation, and that claimant filed his claim for workers' compensation benefits with the Texas Workers' Compensation Commission (Commission) within one year of the date he knew or should have known that his hearing loss was causally related to his employment. The appellant (carrier) challenges the sufficiency of the evidence to support these conclusions as well as the underlying factual findings. The carrier also asserts that the hearing officer abused his discretion in refusing to consider an additional disputed issue which it proposed, namely, whether claimant should be paid impairment income benefits (IIBS) if he prevails on the three aforementioned disputed issues. Claimant's response urges the sufficiency of the evidence in support of the challenged findings and conclusions and the correctness of the ruling on the additional issue.

DECISION

Finding no reversible error and the evidence sufficient to support the challenged findings and conclusions, we affirm.

Claimant testified that he worked from February 1983 until (date), as an operator of a gasoline processing unit at employer's oil refinery; that his work environment was always noisy with certain areas and certain operations being extremely noisy; that he was required to wear hearing protection devices at work; that employer's medical department periodically checked his hearing and the reports he received all indicated mild or moderate hearing losses but did not relate such to his employment; that he did not notice having any hearing loss when he received those reports and did not associate the reported mild and moderate losses with his job; that in August 1991 he first noticed significant hearing problems and reported such to his supervisor, (Mr. J), that month; and that he asked Mr. J several times thereafter to transfer him to a more quiet work environment because of his hearing problems, but such action was not taken. Claimant signed his claim for benefits under the 1989 Act on May 1, 1992, and it was received by the Commission on May 8, 1992.

Claimant also testified that he was called and informed that an appointment had been arranged for him to be seen by (Dr. S), an assistant professor of otolaryngology. Dr. S's September 25, 1992, report noted that claimant had a gradual progression of hearing loss and stated: "[Claimant's] history and audiometric findings are consistent with a noise induced hearing loss that was present on the pre-employment audiogram but has progressed while employed. He complains of the high-pitched types of noises that he experienced even with

the wearing of earplugs and earmuffs while at the refinery." Claimant testified that he told Dr. S that the unit where he worked had many high-pitched noises audible with ear plugs in place and that Dr. S told him that high-pitched noise caused his hearing loss. While the claimant was asked about his exposure to noise while in the Army and when hunting and boating, no evidence of other noise exposure was adduced which refuted his evidence that it was the workplace noise that resulted in his progressive loss of hearing.

A "Hearing Summary Matrix" introduced by the carrier purported to show claimant's annual hearing test results from January 1982 through May 1991 with an apparent substantial change between October 18, 1989, and May 16, 1991. Employer performed noise level monitoring during the summer of 1991 and reported the results to Mr. J in November 1991 in a report which stated that the OSHA Permissible Exposure Limit for noise was 87 dBA (12-hours shifts), that the unit where claimant worked averaged between 85-95 dBA throughout, and that certain of the areas in that unit had readings of 99 dBA, 99.6 dBA, and 106 dBA.

Mr. J's testimony was quite complimentary of the claimant as an employee and he described claimant as "honest and forthright." However, Mr. J denied that claimant told him of the hearing loss problem in August 1991 or any time thereafter and denied that claimant requested a job transfer because of his hearing problem. The hearing officer specifically commented that he found the claimant to be credible. Given that Dr. S's report established that claimant had a noise induced hearing loss and that both claimant and Mr. J testified to the noisy work environment, we are satisfied the evidence supports the determination that claimant sustained a compensable hearing loss injury. *Compare* Texas Workers' Compensation Commission Appeal No. 92443, decided September 28, 1992, and Texas Workers' Compensation Commission Appeal No. 92638, decided January 6, 1993, where were considered similar noise induced hearing loss cases.

Having carefully scrutinized the testimony and exhibits, we are satisfied the evidence sufficiently supports the challenged findings and conclusions as to the timely notice and timely claim issues as well, but we do need to comment on two discrepancies. In Finding of Fact No. 8, the hearing officer stated that Dr. S's examination was accomplished on November 25, 1992. However, the report is dated September 25, 1992. This inadvertence, not commented upon by the carrier, is harmless error.

Article 8308-4.14 provides that "the date of injury of an occupational disease [defined in Article 8308-1.03(36)] is the date on which the employee knew or should have known that the disease may be related to the employment." Articles 8308-5.01(a) and (b) provide that an employee shall notify the employer of an injury not later than the 30th day and file a claim not later than one year after the date the injury occurs; and that if the injury is an occupational disease, not later than the 30th day after the date the employee knew or should have known the injury may be related to the employment. Article 8308-5.02 provides, in part, that an

employee's failure to notify the employer as required by Article 8308-5.01(a) relieves the employer and the insurance carrier of liability unless, among other things, the employer <u>or the insurance carrier</u> has actual knowledge of the injury.

The hearing officer found in Finding of Fact No. 8 that it was not until claimant was examined by Dr. S that "claimant or [employer]" had such knowledge of claimant's occupational disease as is contemplated by the 1989 Act, and that it was not until he visited Dr. S that claimant knew or should have known that he had an occupational disease." The hearing officer concluded in Conclusion of Law No. 3 that "the employer" had actual knowledge of the hearing loss within 30 days of the date claimant knew or should have known that his condition was causally related to his occupation, in other words upon his examination by Dr. S. However, Dr. S's report was addressed not to the employer but to the carrier, and the record discloses no other evidence that the employer had such actual knowledge within 30 days of the date of Dr. S's examination. Mr. J testified he was unaware of claimant's claim until a few weeks before the hearing. Accordingly, we imply a finding that the carrier had knowledge of claimant's occupational disease from Dr. S's report and reform Finding of Fact No. 8 to delete the words "or [employer]" and substitute the words "or carrier." Similarly, Conclusion of Law No. 3 is reformed to substitute the word "carrier" for "employer." Since Dr. S's report was addressed to the carrier, it is clear the carrier had actual knowledge of claimant's occupational disease at nearly the same time as the claimant who said Dr. S so advised him at the examination. That being the case, the exception in Article 8308-5.02(1) is established by the evidence. Since the claim was filed in May 1992, before the date the hearing officer found claimant to have known of his occupational disease, it was obviously not untimely. In this regard, the evidence would have supported a finding that claimant knew or should have known of his injury in August 1991, or on the date he filed his claim in May 1992. While the hearing officer's findings seem to put the cart before the horse so to speak, we cannot say such findings are irreconcilable as a matter of law.

We find no abuse of discretion in the hearing officer's denial of the carrier's request at the hearing to consider an additional disputed issue regarding the carrier's obligation to pay IIBS should the hearing officer resolve the disputed issues against the carrier. Apparently, the carrier felt that because the evidence would show that claimant had not worked for employer since (date), because of a heart attack and lost no time because of his hearing injury, claimant had no disability and therefore no income benefits, including IIBS, would be due him pursuant to Article 8308-4.22. In evidence was a Report of Medical Evaluation (TWCC-69) from Dr. S which stated that claimant reached maximum medical improvement on September 22, 1992, with a six percent impairment rating for his binaural hearing impairment. The claimant opposed the addition of the issue arguing that it was waived and, alternatively, should be first considered at a BRC. The hearing officer stated that the carrier failed to show good cause pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.7 (Rule 142.7) for adding the proposed disputed issue, and we do not disagree. As the hearing officer noted, that potential issue antedated the BRC. Also, Rule 142.7(e)

provides that a request to add a disputed issue will be made in writing, sent to the Commission no later than 15 days before the hearing, and be delivered to the other party. The record does not indicate this procedure was followed. We find no basis to conclude that the hearing officer abused his discretion in refusing to consider this additional issue. *See* Texas Workers' Compensation Commission Appeal No. 92054, decided March 2, 1992.

The hearing officer is the sole judge of the weight and credibility of the evidence. Article 8308-6.34(3). We do not substitute our judgement for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence. Texas Employers Insurance Association v. Alcantara, 764 S.W.2d 865 (Tex. App.-Texarkana 1989, no writ). The challenged findings and conclusions of the hearing officer are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Pool v. Ford Motor Co., 751 S.W.2d 629 (Tex. 1986).

The decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge