APPEAL NUMBER 94995

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On June 24, 1994, a contested case hearing was held in (City), Texas, with (hearing officer) presiding. The issue was whether the respondent, who is the claimant herein, sustained a compensable occupational disease on or about (date of injury).

The hearing officer determined that the claimant had sustained an occupational hearing loss; that he became aware it was job related on(date of injury) that he was last injuriously exposed to high levels of noise while employed by (employer); and that the carrier was liable.

The carrier has appealed, arguing that the hearing officer erred by shifting the burden of proof to the carrier to prove sole cause; by finding that claimant was exposed to high levels of noise while working for the employer or that such exposure was injurious; "as a matter of law" by finding that claimant was injured on or about (date of injury) ; and by finding that claimant's date of injury was (date of injury). The claimant responds by reciting the evidence in favor of affirmance, and points out that any erroneous allocation of burden of proof did not lead to reversible error.

DECISION

We affirm the decision and order of the hearing officer.

The claimant had been employed working as a jet aircraft mechanic since September 1968. He worked at (Base), and the employer took over the contract under which he worked in December 1986. He said that except for the identity of the contractor for whom he worked, the job duties remained essentially the same, until around August 1992, when another contractor took over, and claimant began to work more in the office, away from the direct impact of aircraft noise. Claimant said that during his period of employment with employer, he was directly exposed to the impact of aircraft noise, at least eight hours a day, five days a week.

Claimant alleged that he sustained a work-related hearing loss. He stated that for his previous employer and this employer, he wore protective gear over his ears; nevertheless, working close to aircraft engines, he stated that it was still possible to hear the engines through the protective gear.

In September 1987, claimant said he was given a hearing test which indicated he had some hearing loss. However, this test was only administered to one ear. He said that he had annual hearing tests, and was told that he had high frequency hearing loss in both ears both in 1987 and in some subsequent years. He stated that in (month and year of injury), he was given a hearing test and advised to see a doctor about the hearing loss he had. Claimant said he had never previously been advised to see a doctor, and he identified this as the point at which he realized his hearing had worsened. He asked his

employer if they would pay for him to see a doctor, and was told he was not insured for hearing loss and they would not pay. Claimant then filed a workers' compensation claim and was sent to Dr. R. Claimant purchased hearing aids for himself which he was wearing at the contested case hearing.

The benefit review conference report indicated that carrier's position was that claimant's hearing loss existed prior to his date of hire by the employer. It was not part of the carrier's articulated position set forth in the report that claimant "knew or should have known" that he had a work-related injury prior to (date of injury).

Dr. R wrote on October 6, 1993, that he reviewed audiograms submitted by claimant for 1987 and 1988, and compared them with one he performed on March 27, 1992, and found no "significant" difference between them. He did connect claimant's hearing loss to 25 years of exposure to ambient noise related to his work. Dr. R wrote on February 4, 1994, that he did not believe that claimant's hearing loss was "solely attributable" to his work for employer. Dr. R stated that the testing indicated "essentially" no additional hearing loss, and he stated his disbelief that claimant was injured during the first nine months of employment with employer for which there were no tests available. Dr. R also completed a TWCC-69 Report of Medical Evaluation on June 18, 1993, showing that claimant reached maximum medical improvement on March 27, 1992, with a six percent impairment rating. Dr. R noted in his report that claimant had experienced "significant occupational noise exposure."

Other medical evidence submitted by the claimant was a June 1994 letter from Dr. S, a board certified otolaryngologist, written to claimant's attorney. Dr. S points out that he did not examine the claimant, but had reviewed his records. Dr. S based his opinion concerning whether claimant had a hearing loss from work with the employer, as demonstrated by his various hearing tests from 1987 through March 1992, and he explained his reasoning. Dr. S concluded that the overall hearing loss was consistent with 25 years of occupational noise exposure, and that claimant had a slight progression of hearing loss in his left ear between September 1987 and March 1992, and "no" progression in his right ear. However, in the body of his letter, Dr. S noted that over 4½ years, claimant's "pure tone average" had decreased in both ears, albeit only one decibel in the right ear compared to five in the left ear. He noted his further opinion that less than a two decibel decrease would be accounted for by the aging process.

At the beginning of the hearing, there was discussion about the carrier's position, which was not that claimant did not have a work-related hearing loss, but that his hearing had been substantially damaged while working for previous employers. The carrier stated that they believed the issue to be last injurious exposure. The hearing officer stated that he believed that carrier was really articulating a "sole cause" defense. The claimant's attorney stated that he was not comfortable with arguing that he did not have a burden of proof to show an injurious exposure, although carrier had the burden of proof on its

defense. The hearing officer agreed, and stated on the record: (First to claimant's attorney) "I agree that it will not relieve you totally of your burden of proof. I think that it is incumbent upon the claimant to prove injury in the course and scope of employment, notwithstanding a defense of sole cause . . ." The hearing officer then stated that he would make the determination after the evidence as to whether carrier had the burden of proof all along.

Although the carrier argues in its appellate brief certain provisions from what it represents is a "standard" insurance contract, there is no contract in the record of this case nor was the hearing officer asked to take official notice of any rules or documents of the Texas Department of Insurance.

In response to the carrier's first point of appeal, we must frankly state that the case was not lost for the carrier because of any allocation of a burden of proof. The fact that one party may, or may not, have a burden of proof does not alter the necessity that there be a preponderance of evidence to support the hearing officer's decision. We would agree that the fact that a carrier has a burden to prove sole cause does not absolve a claimant from at least a showing that there was injury and a last injurious exposure. Once there is such a showing, a carrier that wishes to assert that a pre-existing condition is the sole cause of an incapacity has the burden of proving this. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98, 100 (Tex. 1977); Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

An occupational disease may be progressive in nature, due to cumulative trauma over a period of time, and that time may span more than one employer. In attempting to sort out liability for such a claim, the legislature has stated that the employer "in whose employ the employee was last injuriously exposed to the hazards of the disease is considered to be the employer of the employee . . ." Section 406.031(b). The key is not whether an employee is exposed to hazards of a disease (in this case, loud noise), but whether he is injuriously exposed. We believe that this means that the hazards in turn caused "injury," as defined in Section 401.011. If injurious exposure is established, then it is not relevant, for purposes of liability for workers' compensation, if most of a disease or most of the injurious exposures occurred on someone else's watch. *See* Texas Workers' Compensation Commission Appeal No. 92032, decided March 16, 1992. The legislature has not provided for apportionment of responsibility for an occupational disease among the employers where exposures or traumas occurred.

There is conflicting medical opinion, but it appears to support that claimant had a measurable loss of hearing in both ears, albeit much less in his right than left. While Dr. R views any change as not significant, this does not equate to "nonexistent." Although Dr. S offered his opinion that the aging process would account for the loss in the right ear, the hearing officer evidently did not give this explanation pre-eminent weight in determining whether claimant had a work-related hearing loss in both ears. We also could not fault

the hearing officer if he gave scant weight to the letter of a registered nurse which purportedly quotes from the opinion of an unidentified doctor.

We are unwilling to hold, as the carrier argues, that loss of hearing when exposed to loud noises is so beyond common experience that it must be established through medical evidence in every case. Even were we to agree that it was required here, there is sufficient medical evidence linking claimant's loss of hearing directly to his occupational activities. Claimant's testimony about his exposure to jet noise in his job being substantially similar before and after the date he was first employed by the employer was uncontroverted. The fallacy in the carrier's argument is to ask the trier of fact to believe that the same activity that caused injury prior to December 1986 somehow ceased to be injurious as of claimant's date of hire by the employer. It is the etiology and mechanics of such a proposition that would seem to require supporting medical evidence.

In considering the carrier's argument that the evidence showed that claimant knew or should have known prior to (date of injury), that his injury was related to his employment, we would note that it was not the carrier's position or theory of defense that claimant's date of injury (as defined by Section 408.007) was at an earlier point than (date of injury) ; in short, the date of the disputed compensable injury was not itself put into dispute. Timely notice to the employer or timely filing of a claim were not in issue. This does not, however, preclude the hearing officer from making basic findings concerning the date of an injury, just as he has made findings concerning the identity of the employer and carrier. We agree that the date of injury would not necessarily determine liability for coverage of an occupational disease, but it does not appear that the hearing officer equated the two. There is sufficient evidence to support a finding that (date of injury) , is the date of injury in this case.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, N.J., 508 S.W.2d 701, 702 (Tex. Civ. App.- Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers' Insurance Ass'n v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate , 244 S.W.2d 660 (Tex. 1951).

The decision and order of the hearing officer are affirmed.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge