

APPEAL NO. 980169
FILED MARCH 11, 1998

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 January 8, 1998. With respect to the issues before her, the hearing officer determined that the date of injury of the appellant's (claimant) alleged hearing loss injury was _____, and that, therefore, the Texas Workers' Compensation Commission (Commission) does not have jurisdiction to hear this case under the 1989 Act. The hearing officer also made findings of fact that the claimant's employment with (employer) did not cause him to sustain a noise-induced hearing loss injury; that the claimant did not timely notify his employer of his alleged injury within 30 days of _____; that good cause did not exist to excuse the claimant's failure to give timely notice of his injury; and that the respondent (carrier) is not liable for workers' compensation benefits because any hearing loss injury that the claimant sustained did not occur while he was employed by the employer who had its workers' compensation insurance coverage with the carrier. In addition, the hearing officer made conclusions of law that the claimant did not sustain a compensable hearing loss injury on or about (injury date 2); that he did not give timely notice of his alleged (injury date 2); that he did not have good cause for his failure to give timely notice; and that the carrier is not the correct carrier for the alleged hearing loss injury of (injury date 2), or of _____. In his appeal, the claimant essentially argues that the hearing officer's determinations are against the great weight and preponderance of the evidence. In its response, the carrier urges affirmation.

DECISION

Affirmed, as modified.

The claimant testified that he worked for the employer from 1968 to 1983, as a machine operator and an assembly technician. He stated that during his 15-year employment with the employer, he was exposed to constant noise from the machines and that he did not wear any ear protection because none was provided by the employer. He stated that in (month) (year), he developed an ear infection and sought treatment. The claimant was given a hearing test in (month) (year), where it was discovered that he had some hearing loss. He stated that the doctor asked him if he had been exposed to noise for an extended period and the claimant told the doctor about his employment with the employer. The claimant testified that the doctor advised him that the prolonged exposure to noise with the employer had caused his hearing loss. On cross-examination, the claimant acknowledged that after he left his employment with the employer, he worked for a period as a boilermaker at an oil refinery and that he had not told the doctor about that employment. He stated that he wore ear plugs at that job, although he also maintained that he was not exposed to noise in that position. In addition, he stated that he developed earaches in 1984 but that he was not aware of what was causing the problems at that time

and that his ear problems got progressively worse until (year) when his hearing loss was discovered.

In a report dated August 15, 1997, (Dr. C) gave a history that the claimant's "problems with his right ear began in 1975 at which time he had noise injury to that side (bleeding in the ear with fullness). He states that the hearing loss has been constant in that ear, as well as the ringing." The claimant stated that he did not recall telling Dr. C that he had had a noise injury to his right ear in (year 1) and that he does not think he had an ear injury caused by noise in (year 1). Dr. C's July 18, 1997, report states that the claimant "relates the onset of his problem to a noise injury which he states he had in (date)." In a letter of August 29, 1997, Dr. C concluded that the claimant's "high frequency hearing loss may well be the result of noise exposure which could explain the tinnitus the patient experiences."

As we noted above, the hearing officer determined that the date of injury of the claimant's alleged hearing loss injury was _____. Thus, she further determined that the Commission was without jurisdiction to hear the case under the 1989 Act. The date of injury of an occupational disease is defined in Section 408.007 as "the date on which the employee knew or should have known that the disease may be related to the employment." In Texas Workers' Compensation Commission Appeal No. 941374, decided November 23, 1994, we noted that the date of injury of an occupational disease is a question of fact for the hearing officer to resolve. In this instance, the hearing officer determined that the claimant was aware that he may have sustained a hearing loss injury as a result of exposure to noise at work in (year 1), as Dr. C noted in one of his reports. The hearing officer was acting within her province as the sole judge of the weight and credibility of the evidence under Section 410.165(a), in making that determination. She obviously gave more weight to the history as reported by Dr. C than to the claimant's testimony and she was free to do so as the fact finder. Our review of the record does not demonstrate that the hearing officer's date of injury determination of the claimant's alleged occupational disease 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 our reversing the date of 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). Because the hearing officer determined that the date of injury was _____, she also properly determined that the Commission was without jurisdiction to consider the claimant's claim under the 1989 Act. However, given her determination that she did not have jurisdiction to consider the claimant's claim for a date of injury prior to 1989, we are puzzled by her findings of fact, that the claimant did not sustain a work-related hearing loss injury in (year 1), that he did not timely report the (year 1) injury, that he did not have good cause for his failure to report the (year 1) injury, that the carrier is not liable for benefits because the claimant did not sustain an injury as a result of his employment with employer, and by her conclusion of law that the carrier is "not the correct carrier for Claimant's alleged hearing loss injury of (injury date 2) or _____." Once the hearing officer determined that the date of injury of the claimant's alleged occupational disease injury was _____, she was without the authority to make any further

determinations relating to that date of injury. Therefore, we strike Findings of Fact Nos. 4, 6, 7 and 8. In addition, Conclusion of Law No. 6, is modified to read, as follows:

CONCLUSIONS OF LAW

6. [Carrier] is not the correct carrier for Claimant's alleged hearing loss injury of (injury date 2).

In addition, the decision section is modified to state:

DECISION

Since it has been determined that Claimant's alleged injury, if any, occurred prior to the effective date of the 1989 Act, the Commission has no jurisdiction to address this matter under the 1989 Act.

As modified, the hearing officer's decision and order are affirmed.

Elaine M. Chaney
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Alan C. Ernst
Appeals Judge