APPEAL NO. 001163

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 20, 2000. With regard to the issues before her, the hearing officer determined (1) that the appellant (claimant) did not sustain a compensable injury in the form of an occupation disease; (2) that the date of injury was "in the early 1990s"; and (3) that the respondent (carrier) is relieved of liability under Section 409.002 because the claimant failed to timely report his alleged injury to the employer.

The claimant appeals, arguing the date he saw a certain doctor was misstated, repeated his clarification of a remark he made, and generally reiterates his testimony and medical evidence presented at the CCH. The claimant requests that we reverse the hearing officer's decision (and certain statements) and render a decision in his favor. The carrier responds, urging affirmance.

DECISION

Affirmed.

This is a hearing loss case. The claimant had been employed by (employer) for over 32 years in various capacities, many of them being around loud noise. Further, the claimant testified that he was in the military from 1963 to 1967 and was exposed to some weapons firing. In evidence are various "Health Examinetics Hearing Test Results" from 1971 to 1999. Those results would indicate that the claimant had some hearing loss which was noted as early as 1972. Beginning in the early 1980s, the employer instituted yearly hearing examinations. The claimant told the carrier's adjuster that he knew his hearing was getting worse each year based on "those yearly tests" but that he "[n]ever thought nothing of it." There was some discussion about an event in the early 1990s where a coworker (or supervisor) had gotten a check for $5,000.00 for hearing loss and the claimant said, "Hey, I have hearing loss, how come I'm not getting anything."

In evidence are 25 to 30 years of medical reports, hearing tests, and comments of various doctors. The claimant's last hearing test was on August 12, 1999. A copy of that test and a letter dated August 23, 1999, were sent to the claimant. The letter stated that one or more tests were "outside their reference ranges" and the claimant should follow up with his personal physician "within the next six to twelve months." The claimant contacted his regular doctor and, among other things, asked for a referral to Dr. W, an er, nose, and throat specialist, whom the claimant had apparently seen before. The claimant takes issue with the hearing officer's comment that the claimant saw Dr. W on November 8, 1999, stating it should be November 1, 1999. In any event, the claimant saw Dr. W on one of those dates and the claimant testified that Dr. W told him that he needed bilateral hearing aids and this was the first that he knew, or should have known, that his hearing loss was related to his work. The claimant verbally informed his supervisor of his hearing loss claim the following day (either November 2 or 9, 1999, depending on when he saw Dr. W), but

the "paperwork" was not completed until around November 23, 1999. In view of the fact that the hearing officer found the date of injury to be in the "early 1990s," whether the claimant reported the injury to his supervisor on November 2, 19, or 22, 1999, is relatively immaterial.

Dr. W's contemporaneous notes of November 1999 are not in evidence. In a letter dated February 2, 2000, Dr. W writes:

> You have a bilateral sensory neural hearing loss and very bothersome tinnitus. I feel that the hearing aids will help the tinnitus during the day and will also help your hearing. I do feel that noise exposure certainly has had a large part to do with your hearing loss.

There is no evidence whether Dr. W had access to various noise studies done at the employer's premises or was relying solely on the claimant's history. Dr. B, who performed a record review, stated in his December 20, 1999, report that he had not only reviewed the records but also that he had called and spoken with Dr. W about this case and the employer's "hearing conservation program." Dr. B concluded:

> After review of all of the hearing test levels performed on [the claimant], it reveals a severe bilateral high frequency sensorineural hearing loss that is not related to his employment as a shipping operator.

Similarly, Ms. O, an occupational health nurse "certified in audiometrics," testified that she had reviewed the claimant's case and that the claimant "had high frequency hearing loss since 1972 with no major changes." Ms. O said that it was "very unusual for a 30-year-old [the claimant's age in 1972] to have such high frequency hearing loss" and concluded that the claimant's hearing loss was not related to his work with the employer.

The hearing officer found that the claimant knew, or should have known, that his hearing loss may be related to his employment in the "early 1990s" when he was aware that another employee had received $5,000.00 for hearing loss. The hearing officer also found that the claimant had not sustained a compensable injury in the form of an occupational disease, apparently relying on the opinions of Dr. B and Ms. O. With a date of injury of the "early 1990s," the claimant's report to the employer on either November 2nd, 9th, or 23rd of his hearing loss was not timely. The claimant appeals these determinations, explaining that when his supervisor showed him a check for $4,914.00 for hearing loss from "Workmen's Comp," and that "he just made the comment "I would like a check for $5,000 for my hearing." Otherwise, the claimant goes into detail on the various OSHA noise level tests, what his annual physicals showed, and that there was no explanation on his physical examinations regarding the notations of "hearing loss bilateral." An occupational disease is "a disease arising out of and in the course of employment that causes damage or harm to the physical structure of the body, including a repetitive trauma injury. . . ." The term does not include an ordinary disease of life to which the general public is exposed outside of employment, unless that disease is an incident to a

compensable injury or occupational disease." Section 401.011(34). An employee must prove, by a preponderance of the evidence, the compensability of an occupational disease. Texas Workers' Compensation Commission Appeal No. 960582, decided May 2, 1996, citing Schaefer v. Texas Employers' Insurance Association, 612 S.W.2d 199 (Tex. 1980). "[O]ne must not only prove that recurring, physically traumatic activities occurred on the job, but must also prove that a causal link exists between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared to employment generally." Texas Workers' Compensation Commission Appeal No. 950868, decided July 13, 1995, citing Davis v. Employers Insurance of Wausau 694 S.W.2d 105 (Tex. App.-Houston [14th Dist] 1985, writ ref'd n.r.e.).

The hearing officer determined that the claimant did not show that the actions involved in his employment are causally linked to his hearing loss. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. 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, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). In this case, the hearing officer obviously gave more weight, as was her prerogative, to the testimony of Ms. O and the report of Dr. B than to the claimant's testimony and Dr. W's note.

At the CCH, the claimant cited Texas Workers' Compensation Commission Appeal No. 961925, decided November 14, 1996, a case where the Appeals Panel had affirmed a hearing officer's decision on compensable hearing loss. However, we noted in that decision that there "are other cases where the Appeals Panel has affirmed hearing officers who have determined that a claimant had not sustained an occupational hearing loss." In this case, the hearing officer's decision is supported by sufficient evidence and because another fact finder may have reached a different conclusion on the same facts that is not a basis for which we will reverse the hearing officer's decision here.

Upon review of the record submitted, we find no reversible error. We will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King's Estate, 150

Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Tommy W. Lueders
Appeals Judge

Robert W. Potts
Appeals Judge