APPEAL NO. 001256

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 May 3, 2000. The hearing officer determined that the respondent (claimant) sustained a compensable injury in the form of an occupational disease, described as profound bilateral hearing loss, and that the date of injury was _____. The appellant (carrier) appealed, urging the hearing officer's decision that the claimant sustained a compensable injury in the form of an occupational disease and that the injury date of _____, is against the great weight and preponderance of the evidence. The carrier also contended that the hearing officer did not have jurisdiction to adjudicate a pre-1991 claim when it falls outside the effective date of the 1989 Act. The carrier contended the date of injury preceded January 1, 1991, the effective date of the 1989 Act. The claimant responded that the Appeals Panel should affirm the hearing officer's decision and order.

DECISION

Reversed and rendered as to the date of injury and jurisdiction.

The claimant testified that she began working for the employer on May 20, 1986, as a filler/machine operator and that prior to her employment she did not have any problems with her hearing. The claimant testified that the working conditions were extremely noisy due to the bottles hitting together and the loudness of the motors. The claimant explained that she was given an annual hearing examination, the first in 1987 or 1988, but that the results of the tests were not given to her. Records reflect the claimant was administered a hearing test on May 6, 1987. A second test was administered on March 30, 1989.

The claimant testified that she first learned that she might have a hearing loss in late 1988 or early 1989 when the company nurse called her to the office to discuss her hearing test results. The hearing tests administered on May 6, 1987, and March 30, 1989, indicate that the claimant had severe hearing difficulty in both ears as to both speech frequency and high frequency testing. The claimant testified that when she was notified of the results in 1989 she asked the nurse whether she "was going to send me to the doctor or was she going to buy me hearing aids or was she going to file a claim or whatever." The claimant testified that in response to her question, the nurse denied the noise had caused her hearing loss but did not give her any indication of what was causing the impairment. The claimant did not follow up with this hearing test information and continued working.

Ms. D testified on behalf of the claimant. Ms. D testified that she had worked for the employer since June 11, 1985, as a filler/machine operator and had trained the claimant when she began employment with the employer. Ms. D testified that the claimant did not appear to have any hearing problems when the claimant initially began working, but she noticed that about three years later the claimant had sustained a hearing loss. Ms. D acknowledged that both she and the claimant wore earplugs at work to help reduce the

noise and that she had also experienced a hearing loss. Ms. D testified that she and the claimant had discussed the claimant's hearing loss in 1989. The following question was asked:

> Q: In 1989 did [the claimant] ever tell you [employer] was causing her hearing loss?
>
> A: Yes, she did. She said it's the noise.

The claimant testified her fiancee obtained some hearing aids for her because she was bothered by people complaining that she could not hear. The claimant testified she used the hearing aids at work. The claimant also admitted that her daughter obtained hearing aids for her in 1989 or 1990 which she later took to the (_____ Center) to inquire as to whether they could adapt them for her use. The claimant denied participating in any hobbies or activities which exposed her to loud noises. The claimant testified that in 1988 (she subsequently testified it could have been around the time her daughter gave her hearing aids but she did not know the exact year), she discussed her hearing loss with her sisters and told them about her noisy environment at work. The claimant stated her sisters believed that the noise at work could have caused her hearing loss. The claimant, in her recorded conversation of August 3, 1999, stated that she treated with Dr. R in 1989 at the suggestion of her sister (she also stated she began seeing Dr. R about seven to eight years ago); he performed multiple tests to rule out other causes of her hearing loss.

The claimant was specifically asked by the adjuster during the recording of the conversation on August 3, 1999, when she realized that her condition was work related. The claimant responded that she knew about six years ago because "I wasn't sick, wasn't nothing wrong with me, and all of that noise. . . ." The claimant also stated, "I always said that, I always said it was work related, but this is the first time (after _____) [sic] I was taken up on it." The claimant, in response to the following question: "who have you in the past told that you, that this hearing loss is due to your employment" replied, "the nurse, . . . and she said it wasn't work related, my nurse." The claimant was asked when she had this conversation and she answered that it was years ago and she could not remember the date or time. The claimant also stated that "like, I said, my hearing test reports are here. They knew, we talked about it every year when I take my hearing test. They knew and I knew."

Medical records reflect that the claimant was examined at the _____ Center on February 15, 1995, and was found to have a bilateral moderately severe to severe sensorineural hearing loss which confirmed the hearing test results of May 6, 1987, and March 30, 1989. The claimant subsequently returned to the _____ Center on _____, to undergo additional testing and was found to still have a bilateral moderately severe to severe sensorineural hearing loss. Upon her return to work after the testing in 1999, the claimant testified that she again asked the nurse whether she was going to file a claim for her. The claimant testified that the nurse still insisted that the

hearing loss was not work related and would not file a claim for her. The claimant subsequently initiated her claim for workers' compensation benefits.

The hearing officer is the trier of fact and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Section 410.165(a). While a claimant's testimony alone may be sufficient to prove an injury, the testimony of a claimant is not conclusive but only raises a factual issue for the trier of fact. Texas Workers' Compensation Commission Appeal No. 91065, decided December 16, 1991. The trier of fact may believe all, part, or none of any witness's testimony. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993. 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). Whether or not an injury occurred after January 1, 1991, is a question of fact. Texas Workers' Compensation Commission Appeal No. 94415, decided May 23, 1994.

The date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. Section 408.007. We stated in Texas Workers' Compensation Commission Appeal No. 992783, decided January 26, 2000, "[t]he date is somewhat of a 'moving target,' but need not be as early as the first symptoms nor as late as a definitive diagnosis." We have noted that the date of injury is when the injured employee, as a reasonable person, could have been expected to understand the nature, seriousness, and work-related nature of the disease; and that while a definite diagnosis from a doctor is not required, neither is the employee held to the standard of a doctor's knowledge of causation. Texas Workers' Compensation Commission Appeal No. 94534, decided June 13, 1994.

In a case such as the one before us where both parties presented evidence on the date of injury, the hearing officer must look at all of the relevant evidence to make factual determinations and the Appeals Panel must consider all of the relevant evidence to determine whether the factual determinations of the hearing officer are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal No. 941291, decided November 8, 1994. An appeals level body is not a fact finder, and it does not normally pass upon the credibility of witnesses or substitute its own judgement for that of the trier of fact even if the evidence could support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard of review we conclude that the hearing officer's findings as to a date of injury of _____, are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain, *supra*. Accordingly, we

reverse the hearing officer's findings regarding the date of injury as not being supported by the evidence and render a new decision that the claimant knew or should have known that her hearing loss was work related no later than the last day of 1989.

We have held that the 1989 Act applies only to injuries occurring on or after January 1, 1991. Texas Workers' Compensation Commission Appeal No. 92168, decided June 12, 1992. Since we have rendered a decision that the date of injury was prior to the effective date of the 1989 Act, this claim must be adjudicated under the prior workers' compensation law. Texas Workers' Compensation Commission Appeal No. 93054, decided March 8, 1993. Accordingly, we reverse all other determinations of the hearing officer and render a decision that the claimant's claim should be adjudicated as an "old law" claim under the prior workers' compensation law, TEX. REV. CIV. STAT. ANN., art. 8306 *et seq.* (Vernon Supp. 1967) (repealed 1989).

Kathleen C. Decker
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Alan C. Ernst
Appeals Judge