APPEAL NO. 950379

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing was held in (city), Texas, on February 15, 1995, (hearing officer) presiding as hearing officer. He determined that the appellant (claimant) did not sustain a compensable injury in the form of an occupational disease on or about (date of injury). The claimant appeals urging the that great weight of the evidence established that the claimant sustained a compensable injury and that the hearing officer misapplied the law to the facts. The respondent (carrier) argues that there is sufficient evidence to support the decision of the hearing officer.

DECISION

The decision and order of the hearing officer are affirmed.

Since 1989, the claimant worked at the information desk at the Visitors Pavilion at the (Center). During January through May 1994, the Center hosted a special dinosaur exhibit which attracted a larger number of visitors than usual, particularly school children. Although the claimant was not in the area of the display, there were functions in her building attended by school children. According to her testimony, the noise level of the unusually large number of school children was much greater than her usual working conditions. There were also affidavits attesting to the considerably higher noise level during that particular exhibit. In any event, in late March or early (month year), the claimant started experiencing a ringing and swelling sensation in her ears. She stated she was fatigued earlier in the day, was irritable, had difficulty sleeping, and had muscle tension. She told her supervisor that her nerves were "shot" and about the problem with her ears. According to the claimant some modification was made in her duties, although she did continue working at the Center. She went to her doctor who subsequently referred her to (Dr. T). Hearing tests were accomplished in (month) which, according to Dr. T, showed "normal hearing, but a small dip at 4,000 cycles compared to the rest of the frequencies." A later audiogram test on August 18, 1994, showed some additional "hearing loss on the right side dropping to 35dB at 4,000 cycles" which Dr. T states is typical of a noise induced type hearing loss. He further states that her "discrimination is excellent, but she is sensitive to loud noises."In a November 14, 1994, report, Dr. T states that "I cannot say that her position with the [center] caused her current symptoms." In a later letter dated January 9, 1995, Dr. T states that based upon the history given by the claimant, "I am of the opinion to a reasonable degree of medical probability that the exposure to noise during the dinosaur exhibit was a producing cause of the hearing loss." The claimant also introduced articles and papers on hearing loss and noise levels.

The carrier introduced prior medical records of the claimant which showed that the claimant had an ear infection in 1993 and was under treatment for that condition including antibiotics and acupuncture. The claimant indicated that she did not disclose this information to Dr. T, and that he was not aware of it when he wrote his January 9, 1995, letter.

Based upon this state of the evidence, the hearing officer determined that the claimant did not sustain a compensable injury in the form of an occupational disease on or about (date). He found that the claimant's exposure to noise at her work place did not cause her to sustain a hearing loss and that her hearing loss was an ordinary disease of life to which the general public is exposed. The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Section 410.165(a). He resolves conflicts and inconsistencies in the evidence and determines the facts of the case. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This includes resolving any conflicts of inconsistency in medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). Given the apparent inconsistency in the reports of Dr. T, together with the fact that the claimant never disclosed her 1993 ear problems to Dr. T, the hearing officer could reasonable determine that a sufficient basis to connect any hearing loss to the claimant's work had not been shown by a preponderance of the evidence. Given this state of the evidence, we cannot conclude that his findings were so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. *See* Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Further, the evidence showing a greater number of children visiting the Center during the particular exhibit and the concomitant increase in the number of voices and noise level, is not such compelling evidence that would necessarily remove this case from the specific exclusion to occupational diseases found in the definition of occupational disease. Section 401.011(34) provides that the "term does not include an ordinary disease of life to which the general public is exposed outside of employment. . . ." This, of course, does not exclude the compensability of all hearing loss cases and we have upheld compensability where loud industrial noise resulted in hearing loss. *See* Texas Workers' Compensation Commission Appeal No. 94995, decided September 6, 1994; Texas Workers' Compensation Commission Appeal No. 92638, decided January 6, 1993.

Finding sufficient support in the evidence for the hearing officer's determinations, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Tommy W. Lueders
Appeals Judge