APPEAL NO. 950399

Pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act), a contested case hearing (CCH) was held in (city), Texas, on February 13, 1995, (hearing officer) presiding as hearing officer. She determined that the respondent (claimant) sustained a compensable hearing loss on (date of injury), that he timely reported the injury, and that he timely filed his claim for compensation. The appellant (carrier) appeals urging error in an evidentiary ruling which was "the most important piece of evidence" regarding issues of date of injury, timely reporting, and timely filing a claim. Carrier also urges that the claimant failed to meet his burden of proof of showing that he sustained a compensable injury in the form of an occupational disease. The claimant urges the decision of the hearing officer is correct and asks that it be upheld.

DECISION

Affirmed.

The claimant worked for employer as a sheet metal worker for some 15 years prior to his release in 1992. He and other witnesses described the high noise level associated with the working environment and indicated it was not until sometime between 1985 and 1990 that hearing protection was required. According to the testimony, apparently other workers had also sustained some hearing loss and it was generally known that there was a certain risk with the high noise level. In any event, the claimant stopped work in 1992 (the record was not clear if this was occasioned by another unrelated injury or a layoff) and, although his wife had mentioned some suspected diminished hearing on the part of the claimant, he did not realize he had any work-related loss of hearing. Sometime around (date of injury), the claimant was visiting a (Mr. S), "the sheet metal business agent local" and Mr. S told the claimant about another person with a hearing problem and asked the claimant if he had had his checked, suggesting that he noticed the claimant was "kindly [sic] hard of hearing." Mr. S recommended that the claimant go and file a "workmen's comp claim." The claimant did so and subsequently had his hearing checked. Tests showed some hearing loss and a doctor's report from (Dr. F) indicated that the claimant's discrimination scores were 88% for the right ear and 84% for the left ear and that he had a whole body impairment of 11%. Dr. F stated:

I feel that a portion of his hearing loss is attributable to his years of noise exposure.
This type of hearing loss is usually insidious and may not be apparent to the patient until the hearing loss becomes more severe.

The claimant testified that he was not exposed to other loud noise although he did shoot a .22 rifle at snakes in his yard. He also testified he was not aware of the work-related hearing loss until (date of injury). He originally put (month) of (year) on his notice of injury but stated he meant that it was his last date of exposure since that is when his employment stopped. In an earlier telephone interview the claimant made some apparent inconsistent statements compared to his testimony at the hearing and was cross-examined

by the carrier on the apparent inconsistencies. The claimant urged that the main reason was that he was hard of hearing and may not have correctly understood all the questions. In the statement he indicated that he knew his hearing loss may have been work related back in 1992 but did not report it as he did not know that hearing loss was compensable as an occupational injury. In his testimony claimant stated he did not know he had a hearing loss until 1994. He also stated in the interview that he "hunted" but testified he was referring to shooting snakes in his yard. In sum, the carrier cross-examined the claimant at some length reciting and referring to the earlier interview. Curiously, the hearing officer sustained an objection to the carrier's attempted introduction of the interview. The claimant objected on the basis that he did not think "that was in good faith to tape an interview of a person that's hard of hearing." The hearing officer apparently felt this was a sufficient ground to refuse the admission of the interview and had concerns about the claimant's understanding of the questions. However, the hearing officer told the carrier that it could repeat any of the interview questions and ask the claimant about the interview. As indicated, this was done by the carrier.

On appeal, the carrier urges error in this exclusion of the interview and states it was key evidence to the issues of date of injury, timeliness of notice, and timeliness of the claim. We agree that the hearing officer's ruling was clearly error. The evidence went directly to the credibility of the claimant and showed inconsistency. We have repeatedly held that the credibility of a witness can be made an issue and that the parties may introduce relevant evidence on that issue. *See* Texas Workers' Compensation Commission Appeal No. 94094, decided March 8, 1994; Texas Workers' Compensation Commission Appeal No. 931004, decided December 14, 1993. We have noted that the claimant's credibility is always relevant. Texas Workers' Compensation Commission Appeal No. 950142, decided March 14, 1995. *See also* Texas Workers' Compensation Commission Appeal No. 92011, decided February 18, 1992. While it is recognized that the Rules of Evidence do not strictly apply to CCHs (Section 410.165), we have also emphasized that they offer sound and valuable guidance for a proper and orderly proceeding. Texas Workers' Compensation Commission Appeal No. 950034, decided February 17, 1995; Texas Workers' Compensation Commission Appeal No. 92040, decided March 16, 1992. At most, the hearing officer's stated concern with the interview went to the weight to be given the exhibit and not to its basis for admissibility. However, under the circumstances present in this case, this finding of error does not end the inquiry. As with most evidentiary issues, we test for prejudice. *See* Texas Workers' Compensation Commission Appeal No. 950056, decided February 21, 1995; Texas Workers' Compensation Commission Appeal No. 92490, decided October 28, 1992. Here, we have reviewed the testimony of the claimant and the interview in question, which is attached to the record. The carrier was allowed to and did extensively cross-examine the claimant on the interview, citing specific questions and the claimant's specific answers. Indeed, given the complete leeway given the carrier in referring directly to the interview, pulling specific matters out of the interview, and emphasizing the apparent inconsistencies, it is a mystery as to why the interview transcription was not accepted. However, since it was effectively used for the purpose it was to serve, any error would appear to be harmless. We cannot, under these

circumstances, conclude that the whole case turns on the rejection of the transcript or that its rejection was reasonably calculated to cause or probably did cause the rendition of an improper decision. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93870, decided November 10, 1993; Texas Workers' Compensation Commission Appeal No. 92068, decided April 6, 1992.

With regard to the hearing officer's findings of a compensable injury, the timely notice thereof, and the finding of a timely filing of a claim, our review of the record does not lead us to the conclusion that the findings are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). As we noted, there were clearly some inconsistencies in the testimony of the claimant particularly viewed against the matters brought out in cross- examination from the interview. The hearing officer as the fact finder resolves inconsistencies and conflicts in the testimony and evidence. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The hearing officer assesses the credibility of witnesses (Section 410.165(a)) and can believe the claimant even though contradicted by other evidence. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ). Although the claimant's testimony is somewhat equivocal, together with the medical report, there is some evidence that can be considered legally sufficient to support the hearing officer's determinations. While we certainly do not find the evidence overwhelming in this case and readily recognize that inferences different from those drawn and found most reasonable by the hearing officer equally find support in the evidence, this is not a sufficient basis for us to substitute our judgment and to reverse the decision. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.); Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Accordingly, the decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Lynda H. Nesenholtz
Appeals Judge

Alan C. Ernst
Appeals Judge