APPEAL NO. 950438

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 January 30, 1995, in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue at the CCH was whether the appellant (claimant herein) sustained a compensable injury in the form of an occupational disease on or about (date of injury). The hearing officer concluded that he suffered an injury in 1983, which was not compensable under the 1989 Act. The claimant appeals challenging the determinations of the hearing officer. The respondent (carrier herein) argues that there is sufficient evidence to support the decision of the hearing officer.

DECISION

The decision of the hearing officer is affirmed in part and reversed and rendered in part.

The claimant testified that he went to work for the employer in 1969. Later that year the claimant went into the Marine Corps, but upon his discharge from the service in 1973 returned to work for the employer and continued to work for them at the time of the CCH. The claimant testified that over the years of his employment he was exposed to a great deal of noise on the job. The claimant testified that the employer tested the hearing of all employees annually. In September 1993 tests of some employees, including the claimant, indicated hearing loss. The employer sent these employees in (month year) to a doctor's office for further testing. Some of the employees, but not the claimant, showed hearing loss in the second test. The employer filed workers' compensation claims for those employees who showed hearing loss in the second test, but did not file for those that did not.

The claimant filed his own workers' compensation claim. The claimant and the carrier agreed that the claimant would be examined by (Dr. C) to see if he had sustained hearing loss. As part of her review, Dr. C examined the records of the claimant's earlier annual hearing tests. Dr. C expressed the opinion that the claimant suffered hearing loss between being tested in 1983 and 1984, but had not shown any significant hearing decline since 1984. Dr. C stated that the claimant had high frequency hearing loss and ringing in the ears. Dr. C certified on a Report of Medical Evaluation (TWCC-69) that the claimant has a four percent impairment rating (IR) as a result of this hearing loss. The claimant testified that he had constant ringing in his ears which had started 10 to 12 years prior to the CCH.

First there is evidence to support the decision of the hearing officer that the claimant's occupational injury is not compensable under the 1989 Act. The claimant testified that he realized he had suffered hearing loss due to his employment in the 1980s. Dr. C stated that the claimant suffered hearing loss from 1983 to 1984, but had not suffered significant hearing loss after 1984. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as

well as of 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, 702 (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, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would 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 the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard of review we would uphold the determination of the hearing officer that the claimant did not suffer an injury under the 1989 Act. 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. Whether or not an injury occurred after January 1, 1991, is a question of fact.

However, once the hearing officer determined that there was no injury under the 1989 Act, we are confronted with a question of whether the hearing officer had jurisdiction to make any additional determinations. In the present case the hearing officer made a determination that the claimant suffered an occupational injury to both ears in January 1983 which continued to worsen to 1984. The hearing officer also made a finding that a reasonable and prudent person in claimant's position would have known in January 1983 that the loud and constant noises of his work place were damaging the hearing in both ears. Since the hearing officer neither found nor concluded that the claimant sustained an injury on or after the effective date of the 1989 Act, this claim must be adjudicated under the prior workers' compensation laws. Texas Workers' Compensation Commission Appeal No. 93054, decided March 8, 1993.

Accordingly we affirm the hearing officer's decision that the claimant's injury is not compensable under the 1989 Act, but 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 1967) (repealed 1989).

Gary L. Kilgore
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge