APPEAL NO. 950157

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was originally held in (city), Texas, on July 21, 1994, with (hearing officer) presiding as hearing officer. In Texas Workers' Compensation Commission Appeal No. 941351, decided November 28, 1994, the Appeals Panel reversed the decision of the hearing officer because it had requested the exhibits admitted at the hearing but did not receive them and remanded so that a complete record could be reconstructed. On remand the exhibits were located and made a part of the record. The hearing officer did not conduct another hearing. The issues at the hearing conducted on July 21, 1994, were: (1) whether the respondent's (claimant) compensable injury of (date of injury), is a producing cause of his right sinus problems and tonsillitis; (2) whether claimant is entitled to temporary income benefits (TIBS) including "partial TIBS" from July 23, 1992, until September 29, 1993; and (3) what is the correct average weekly wage (AWW). The hearing officer determined that (1) the claimant's compensable injury of (date of injury), is a producing cause of his right sinus problems and tonsillitis; (2) the claimant is entitled to TIBS including "partial TIBS" from July 23, 1992, until September 29, 1993; and (3) claimant's AWW is $586.05. The appellant (carrier) argues that the evidence is not sufficient to support the determination that the claimant's compensable injury is a producing cause of his sinus problem and tonsillitis; that the evidence is not sufficient to support the determination that the claimant sustained disability from July 23, 1992, until September 29, 1993; and that the claimant's AWW is $537.18. The claimant responded urging that the carrier did not timely file its appeal and that the determinations of the hearing officer are supported by sufficient evidence.

DECISION

We affirm in part and reverse and render in part.

Before summarizing the evidence, we first address the issue of timely appeal. Section 410.202 of the 1989 Act provides that a party desiring to appeal the decision of the hearing officer shall file a written appeal with the Appeals Panel not later than the 15th day after the date the decision of the hearing officer is received from the Texas Workers' Compensation Commission's (Commission) hearings division. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)) provides that a request shall be presumed to be timely filed if it is mailed on or before the 15th day after the date of receipt of the hearing officer's decision and is received by the Commission not later than the 20th day after such date. The hearing officer's decision in this case was signed on December 20, 1994, and was distributed by the Commission's hearings division on January 10, 1995, under a cover latter dated January 9, 1995. The carrier does not indicate the date it received the decision; therefore, we apply Rule 102.5(h) which provides, in part, that "the commission shall deem the received date to be five days after the date mailed." Accordingly, the carrier is deemed to have received the decision on January 15, 1995, and its appeal was required to be filed with the Appeals Panel not later than January 30, 1995. The carrier's appeal is dated

January 20, 1995, is postmarked January 27, 1995, and was received on January 30, 1995. The appeal by the carrier was timely filed.

The claimant was employed as a new car salesman for (Employer 1). On (date of injury), while seated in the drivers seat of a vehicle, the claimant was struck in the face by a coworker. The parties agree that the claimant was struck on the left side of his face. The claimant testified that he was struck all over his face including the right side of his face. The claimant went to an emergency room for treatment. Claimant testified that he told the doctor that he was hit on both sides of his face and does not know why the doctor did not write that he was hit on the right side. He said that he did not have money to go to the doctor and was buying antibiotics for his sinus infection in (state). He said that (Dr. C) told him that his sinus problems and tonsillitis were caused by his injury on (date of injury). Records from (Dr. A) on the day of the injury do not mention the right side of the face. The claimant then began treatment with (Dr. N). On July 30, 1992 (Dr. G-P) reported the results of a CT Scan to Dr. N. In addition to comments concerning the left side, Dr. G-P reported "[r]ight nasoseptal and turbinate displacement is present with minimal hypertrophy of the nasal mucosa, mostly on the left side" and "[h]owever, a small incomplete fracture could easily be missed, especially along the medial wall of the left maxillary antrum. This is associated with right nasoseptum displacement, as well as the turbinates on the left side." In a letter dated June 28, 1993, Dr. N wrote "I have therefore referred [claimant] to see [Dr. C] for his sinus and nasal surgery resulting from the injury of (date of injury)." On July 9, 1993, Dr. C reported that because of the injury of (date of injury), and aftermath infection, claimant needed septoplasty and functional endoscopic sinus surgery. On September 30, 1993, Dr. C performed outpatient surgery consisting of septoplasty and turbinate reduction. In a post-operative report Dr. C wrote "[n]asal cavity was found to be totally obstructed on the patient's right side because of deviation of the septum" and "[e]xamination showed this patient has a markedly deviated nasal septum creating a 95 to 98 percent blockage of the right nostril." In letters written in October 1993, February 1994, and March 1994, Dr. C reported that the claimant needs additional surgery. In a letter dated March 25, 1994, Dr. C wrote:

> [Claimant] was injured on (date of injury), and has been continuously having medical problems due to the initial injury on that date. As you know, he sustained trauma to his head and face resulting in the deviated nasal septum which blocked his upper airway respiratory obstruction. Subsequently, this created the blockage of the natural sinus drainage creating the sinus infections. That has created a chronic and recurrent sinusitis. As you know, the obstruction of the sinus drainage and subsequent inflammation leads to the anaerobic bacterial growth in the sinus cavity, which creates the ostemeatal complex blockage, immotile cilia syndrome, and recurrent sinus infections. Because of this, the patient requires bilateral functional endoscopic sinus surgery.

Because of his sinus condition, this patient has profuse purulent post nasal drainage which has been carried from the sinus to the nasopharynx and into the oropharynx. Palatine tonsils are located in the oropharynx which subsequently become infected and creates the recurrent tonsillitis. This patient may have been suffering because of the purulent post nasal drainage. That is why a palatine tonsillectomy also has been recommended at the same time.

The patient has been on several courses of antibiotics, antihistaminics, anti-inflammatories, and various other conservative treatment to keep the sinus infections and tonsillar infections under control. The medicine is for prophylactic purposes and will never eliminate the process.

The carrier introduced a letter dated April 28, 1994, from (Dr. B). The carrier had Dr. B review the medical records of the claimant, and Dr. B did not examine the claimant. Dr. B reported:

As far as a causal relationship between the patient's present symptoms and his original injury, it is possible to have a nasal fracture or a septal fracture impinge on the osteomeatal complex, causing the problem of recurrent and/or chronic sinusitis; however, as noted above, the patient had undergone corrective surgery for these in September 1993.

* * * * *

[Dr. C] cleared him to return to work on light duty status as of December 1, 1993. There is no documentation after this date until a letter dated March 25, 1994, in which it is explained that the patient has been suffering from chronic and recurrent sinusitis and also tonsillitis secondary to postnasal drainage. It is uncertain if the process has continued since the injury and/or the original surgery, if the process is a new problem, or even if the process is a pre-existing condition.

* * * * *

Another question is related to clarifying the relationship between the original injury and the proposed surgery of bilateral functional endoscopic sinus surgery and tonsillectomy. I am uncertain what the relationship would be, based on the records provided.

* * * * *

I am not sure why this second surgical procedure is being recommended. It seems to me that, if the patient had a persistent sinusitis related to the injury, endoscopic sinus surgery should have been performed at the time of the septoplasty and the turbinate reduction. This is not a procedure that should be staged. I see no relationship of tonsillitis to this type of sinus problem. Tonsillitis certainly has nothing to do with a nasal injury. A nasal or septal fracture could have blocked the sinus osteal but he underwent surgery to treat this problem. The only documentation provided to me of any sinus process is the CT scan showing a left-sided maxillary sinus problem, so I am not sure why a bilateral procedure would be entertained.

* * * * *

In summary, I agree that the patient suffered blunt trauma to the face and probably had a deviated nasal septum, either as a pre-existing condition or as a result of this trauma, and this was repaired appropriately in September of 1993. A comprehensive endoscopic nasal examination also was performed at that time, with no sinus intervention procedure being performed. The patient was then cleared to go back to work. There is no documentation of any antibiotic treatment or sinus therapy having been given to this individual until March of 1994, in the form of prescription receipts. I therefore feel there is no basis for any further surgical intervention at this time.

The claimant testified that he was off work for one week after he was injured. He said that when the doctor returned him to duty he was told not to go outside and not to deal with the elements, and that he does not know why the doctor did not put this in the records. Claimant testified that he worked only on commission, that after the injury he could not stand outside to meet people to sell cars and that he would become tired, that other salesmen let him complete paperwork and shared commissions with him, that he tried hard, but that he did not make as much money as he did before he was injured. Claimant said that he continued to receive the health insurance benefit while working for Employer 1. He testified that he was terminated by Employer 1 on December 15, 1992. The claimant said that he started working for (Employer 2) in January 1993, and worked until March 1993. He testified that his earnings at Employer 2 were less than they were at Employer 1 prior to his injury because of his injury. The claimant introduced documents that he prepared showing lost wages which he summarized to be $4,296.07 from Employer 1, $5,101.10 from Employer 2, and $7,760.27 from not working from March 28, 1993 to September 30, 1993. He also testified that he was paid unemployment compensation when he did not work. On October 26, 1993, Dr. N wrote "[claimant] was seen here today. He had been released to full duty on 8/25/92 but he was not able to carry out his usual work. He resumed light duties. He is to continue on light duty for the present time." In a letter dated December 10, 1993, Dr. N continued the claimant "on light duty, less hours, indoors, and no heavy work."

The claimant introduced an Employer's Wage Statement (TWCC-3) showing that the claimant's gross pay for the 13 weeks prior to the injury was $6,258.39 and that the fringe benefits included $140.00 per month for health insurance. Ms. Jones (Ms. J), the personnel director for Employer 1 testified that employees are paid two times a month and that the claimant continued to receive the health insurance benefit until he was terminated in December 1992. The TWCC-3 shows the same gross pay for two weeks indicating that pay for a two week period was divided in half. The different weekly amounts of gross pay on the TWCC-3 are $377.27, $345.34, $1,178.39, $261.39, $304.94, $401.00, and $791.73. The total gross pay on the TWCC-3 is $6,528.39 plus $455 for health insurance for a total of $6,986.39. The claimant testified that the TWCC-3 does not include all of the commission that he earned during the 13 weeks prior to his injury. He introduced check stubs and said that his gross pay for the period is $8,453.92 and that his AWW should be $650.00. The additional commission that the claimant showed that he was paid concerns the weeks beginning June 4, 1992, and June 11, 1992. The TWCC-3 shows $261.39 for each week, and the claimant says that $566.33 is the correct number.

Concerning the issue of whether the claimant's injury of (date of injury), is a producing cause of his right sinus problems and his tonsillitis, the burden of proof is on the claimant to prove by a preponderance of the evidence the extent of the injury. Texas Workers' Compensation Commission Appeal No. 94851, decided August 15, 1994. To defeat a claim of a compensable injury because of a pre-existing injury or condition, the carrier has the burden of showing that the prior injury or condition was the sole cause of the employee's present incapacity. Texas Employer's Insurance Association v. Page, 553 S.W.2d 98 (Tex 1977); Texas Workers' Compensation commission Appeal No. 92211, decided July 10, 1992; Texas Workers' Compensation Commission Appeal No. 94090, decided March 4, 1994. Injury is defined as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm. Section 401.011(26). The concept of infections and diseases naturally resulting from the damage or harm was included in the workers' compensation law prior to the 1989 Act. In construing the meaning of the word "naturally," the Court of Civil Appeals in Amarillo in Maryland Casualty Co. v. Rogers, 86 S.W.2d 867 (Tex. Civ. App.-Amarillo 1935, writ ref'd) at page 871 wrote:

> By the word "naturally", as used in the statute, it is not meant that the disease which is shown to have attacked the victim of the accident is such disease as usually and ordinarily follows the accident; but it was only meant that the injury or damage caused by the accident is shown to be such that it is natural for the disease to follow therefrom, considering the human anatomy and the structural portions of the body in their relations to each other. [Quoting Travelers' Ins. Co. v. Smith, 266 S.W. 574, 576 (Tex. Civ. App.-Beaumont 1924, no writ.]

However, the fact that an injury may affect a person's resistance will not mean that a subsequent injury outside the work place is compensable, where the subsequent disease or infection is not one which flowed naturally from the compensable injury. Traders & General Insurance Co. v. Keahey, 119 S.W.2d 618 (Tex. Civ. App-Amarillo 1938, writ dism'd); Texas Workers' Compensation Commission Appeal No. 92553, decided November 30, 1992. Where the subject of an injury is not so scientific or technical in nature as to require expert testimony, lay testimony and circumstantial evidence may suffice to establish causation. However, in cases such as the one before us where the matter of causation is not an area of common knowledge or experience, expert evidence may be essential to satisfactory establish the link or causation between the condition and the employment. Texas Workers' Compensation Commission Appeal No. 92187, decided June 29, 1992. 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). The trier of fact may believe all, part, or none of any witness's testimony because the finder of fact judges the credibility of each and every witness, the weight to assign to their testimony, and resolves conflicts and inconsistencies in the 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). In a case such as the one before us where both parties presented evidence on the extent of the injury, the hearing officer must look to all of the relevant evidence to make a factual determination and the Appeals Panel must consider all of the relevant evidence to determine whether a factual finding of the hearing officer is so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. Texas Workers' Compensation Commission Appeal Panel 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 judgment for that of the finder 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). Even though the evidence could support inferences different from those deemed most reasonable by the fact finder, this is not a legal basis to disturb her decision where there is sufficient evidence to support it. Salazar v. Hill, 551 S.W.2d 518 (Tex. Civ. App.-Corpus Christi 1977, writ ref'd n.r.e.).

The hearing officer made the following findings of fact and conclusions of law concerning the extent of the injury:

FINDINGS OF FACT

(4)On (date of injury), Claimant was attacked by a co-worker on the job who hit him in the face with his fists, causing injuries to his face requiring immediate medical attention.

(5)Subsequently, Claimant developed a chronic sinus problem with associated tonsillitis necessitating surgery.

(6)The report of [Dr. C], Claimant's treating doctor, associates the sinus problem with the original attack.

(7)The report of [Dr. C] associates the tonsillitis with the original attack and resultant infections.

(8)Claimant is in need of additional medical treatment including surgery.

CONCLUSIONS OF LAW

(4)Claimant's compensable injury of (date of injury) is a producing cause of his right sinus problems and tonsillitis.

The carrier took exception to Findings of Fact Nos. 5, 6, 7, and 8 and Conclusion of Law No. 4. While the complained of findings of fact could have been worded differently, they are sufficient to support the complained of conclusion of law that the claimant's compensable injury of (date of injury), is a producing cause of his right sinus problems and tonsillitis. In Findings of Fact No. 6 and 7, the hearing officer states what Dr. C reported rather than finding things in his report to be facts. The medical report of Dr. B contains evidence to the contrary, and the hearing officer does not make any findings of fact mentioning his report. It is apparent that the hearing officer accorded greater weight to the reports of Dr. C than to the reports of Dr. B. While the hearing officer should make ultimate finding of fact rather than find what a doctor reported, under the circumstances of this case and considering all of the findings of fact related to the extent of the injury, the findings of fact are sufficient. Findings of Fact No. 5 and 8 mention additional medical treatment and including surgery. While these findings of fact were considered in determining whether the findings of fact are sufficient to support Conclusion of Law No. 4, they are not determinative of the need for specific treatment or specific surgery which are the subject of another dispute resolution process under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 94326, decided May 2, 1994.

We next address the issue of disability. The hearing officer made the following findings of fact and conclusions of law related to disability:

FINDINGS OF FACT

(9)Claimant did not work from July 23rd to July 30th, the week following the injury. He returned to work on July 31st on light duty status.

(10)Employer had no light duty work defined for new car salesmen. Claimant was unable to remain competitive and secure new car sales as he had prior to the injury due to medical restrictions.

(11)Claimant's weekly wages include the insurance benefits of $35 per week bringing his total [AWW] to $586.05.

(12)Claimant was unable to earn his preinjury wages from July 23, 1992 to September 29, 1993.

CONCLUSIONS OF LAW

(5)Claimant's [AWW] is $586.05.

(6)Claimant is entitled to [TIBS] including partial [TIBS] from July 23, 1992 until September 29, 1993.

The carrier took exception to these findings of fact and conclusions of law. The carrier points out that the claimant was paid by commission only, that much of the time he was not receiving medical treatment and was not taking medication, that the record does not indicate that he was unable to work because an any type of sickness or injury, and that the claimant received unemployment benefits from April 4, 1993, to September 4, 1993. Section 408.101 provides that "[a]n employee is entitled to [TIBS] if the employee has disability and has not attained maximum medical improvement." Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage. Section 401.011(16). Section 408.103 provides that subject to maximum and minimum weekly income benefits, "the amount of a temporary income benefit is equal to (1) 70 percent of the amount computed by subtracting the employee's weekly earnings after the injury from the employee's [AWW]; . . . " Rule 129.4(a) provides "[t]he insurance carrier shall adjust the weekly amount of [TIBS] paid to the injured employee as necessary to match the fluctuations in the employee's weekly earnings after the injury." We have said that it is axiomatic that in a workers' compensation case the claimant has the burden of proving by a preponderance of the evidence that he or she sustained disability as a result of a compensable injury. Texas Workers' Compensation Commission Appeal No. 93142, decided April 7, 1993. The claimant has the burden of proving when a period of disability begins. Since disability is not necessarily a continuing status, a claimant may have intermittent or recurring periods of disability. In such a case, the claimant has the burden of proving when each period of recurring disability is reestablished. Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993. The Appeals Panel has also held that when the employee is no longer employed by the employer, the employee has the burden to show that disability continues

after the termination of employment. Texas Workers' Compensation Commission Appeal No. 92030, decided March 12, 1992. Finding of Fact No. 10 states "[e]mployer had no light duty work for new car salesmen. Claimant was unable to remain competitive and secure new car sales as he had prior to the injury due to medical restrictions." Finding of Fact No. 12 states "[c]laimant was unable to earn his preinjury wages from July 23, 1992 to September 29, 1993." The evidence shows that the pay of the claimant based on commissions from the sale of cars fluctuated before and after his injury. A review of Claimant's Exhibit No. 9, which was prepared by the claimant, shows that for the week beginning on September 24, 1992, the claimant earned $1,041.22 in commissions and for the week beginning November 20, 1992, the claimant earned $758.46 in commissions both of which exceed his AWW. Even though Conclusion of Law No. 6 used the phrase "partial temporary income benefits," there does not appear to have been a week by week comparison of AWW and weekly post injury earnings. Clearly, the claimant did not sustain disability during those two weeks. There is no evidence concerning what fluctuation in pay is due to the work of a car salesman on a commission and what fluctuation in pay is due to the compensable injury. The claimant was terminated from employment and had one brief period and one extensive period of unemployment. The evidence on work status is conflicting. The hearing officer found that the claimant returned to work on July 31, 1992, on light duty status, that Employer 1 had no light duty work, and that the claimant was unable to secure new car sales as he had prior to the injury due to medical restrictions. She then found that the claimant was unable to earn his pre-injury wages from July 23, 1992, to September 29, 1993. There is not a finding of fact that the inability of the claimant to earn his pre-injury wage was because of the compensable injury as is required by the statutory definition of disability. There is not a finding of fact concerning why the claimant did not work after he was terminated. The findings of fact are not sufficient to support the part of the conclusion of law that the claimant is entitled to TIBS from December 16, 1992, until September 29, 1993. We reverse that determination of the hearing officer in Conclusion of Law No. 6 that the claimant is entitled to TIBS from July 23, 1992 until September 29, 1993, and render a new Conclusion of Law No. 6 as follows: "The claimant sustained disability from July 23, 1992, through December 15, 1992, except for the weeks beginning September 24, 1992, and November 20, 1992." Under the circumstances of this case with more than one factor that could influence the pay of the claimant, it would have been preferable for the hearing officer to have made findings that include the TIBS benefit for each week rather than using the phrase "partial TIBS" that is not found in the 1989 Act or the Commission rules. The parties are left with the difficult task of determining the weekly TIBS.

We find the evidence to be sufficient to support Finding of Fact No. 11 that "[c]laimant's weekly wages include the insurance benefits of $35 per week bringing his total [AWW] to $586.05."

The Decision of the hearing officer states that the benefit review officer's (BRO) interlocutory order is reversed and superseded by this decision and order. The report of

the BRO does not indicate that she issued an interlocutory order, and we did not find an interlocutory order in the record.

We reverse the Decision of the hearing officer and render a new Decision as follows:

The claimant's compensable injury of (date of injury), is a producing cause of his right sinus problems and his tonsillitis. The claimant sustained disability from July 23, 1992, through December 15, 1992, except for the weeks beginning September 24, 1992, and November 20, 1992. The claimant's average weekly wage is $586.05.

Tommy W. Lueders
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Alan C. Ernst
Appeals Judge