APPEAL NO. 990651

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 March 2, 1999. She (hearing officer) determined that the respondent (claimant) had disability for various discrete periods of time. The appellant (self-insured) appeals this determination, contending that it is against the great weight and preponderance of the evidence. The appeals file contains no response from the claimant.

DECISION

Affirmed.

The claimant sustained a compensable back injury on _____. The parties stipulated the following periods of disability:

October 4, 1997, through May 25, 1998.
October 12, 1998, through January 4, 1999.

At issue is whether the claimant had disability for the following periods:

May 26, 1998, though May 29, 1998.
June 1, 1998, through June 2, 1998.
June 10, 1998, through October 19, 1998.

Effective May 26, 1998, Dr. H, the claimant's treating doctor, released him to return to work with essentially a 50-pound lifting restriction. The claimant testified that he disagreed with this and did not actually return to work until June 3, 1998. He worked until he finished his shift on June 9, 1998. He then began a series of intercostal injections and Dr. H terminated the physician-patient relationship on September 18, 1998. In a letter of November 17, 1998, Dr. H wrote that he returned the claimant to full duties on May 26, 1998, and believed he was able to work since that time.

Meanwhile, on April 24, 1998, Dr. S examined the claimant at the request of the carrier and, in a Report of Medical Evaluation (TWCC-69), concluded that the claimant was able to return to work without restrictions. Dr. S also assigned an impairment rating and date of maximum medical improvement (MMI) which in turn led to the selection of Dr. D as designated doctor. Dr. D examined the claimant on June 18, 1998, and found the claimant not at MMI. He recommended six weeks of work hardening. On July 30, 1998, Dr. H indicated his agreement with Dr. D.

Dr. B, D.C., became the claimant's treating doctor on October 12, 1998. His diagnosis was sprain/strain. On November 23, 1998, Dr. B wrote that, in his opinion, the claimant was not able to return to work from June 10, 1998, until after work hardening. On December 28, 1998, Dr. B released the claimant to return to work with restrictions. The

claimant testified that he returned to light duty on January 4, 1999, and full duty on January 25, 1999. He admitted he had no duty excuses from Dr. H for any of the periods in issue in this case. He said he did not believe he could return to work from June 10, 1998, to January 4, 1999, because of recurrent back pain.

"Disability" is defined as the inability to obtain and retain employment at wages equivalent to the preinjury wage as a result of a compensable injury. Section 401.011(16). Whether disability exists is a question of fact for the hearing officer to decide and can be proved by the testimony of the claimant alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. The hearing officer found that the claimant had disability for each of the periods in issue in this case. The self-insured appeals this determination, asserting that Dr. H "adamantly states he did not take [claimant] off work and the claimant had the ability to do his job during the disputed periods of time." The clear implication of this argument is that neither the claimant's testimony nor the opinion of Dr. D was persuasive. The hearing officer, however, was the sole judge of the weight and credibility of the evidence. Section 410.165(a). In the discharge of her fact-finding responsibility, the hearing officer found the claimant and Dr. D credible and persuasive. Indeed, she may have considered Dr. H to have been somewhat self-impeaching in that he seemingly endorsed Dr. D's refusal to place the claimant at MMI pending work hardening, and then later insisted the claimant was able to return to work as of May 26, 1998. In any case, we will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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 Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the testimony of the claimant and the opinion of Dr. B, found credible by the hearing officer, sufficient evidence to support her determination of disability in this case.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

_____
Alan C. Ernst
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge