APPEAL NO. 991454

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 June 4, 1999. She (hearing officer) determined that the appellant's (claimant) compensable injury of _____, was a producing cause of his cervical myofascial pain syndrome and that he did not have disability. The claimant appeals the disability finding, contending that it is contrary to the great weight and preponderance of the evidence. The respondent (carrier) replies that the decision is correct, supported by sufficient evidence, and should be affirmed. The extent-of-injury determination has not been appealed and has become final.

DECISION

Affirmed.

The claimant worked as a floor hand on an oil rig. On _____, his right foot was caught in some piping and he fell about five or six feet to the drill floor. The parties stipulated that he sustained a right ankle injury. This included an ankle infection, but whether the injury extended beyond a sprain was not clear. Given this stipulation of a right ankle injury and an unappealed finding of cervical myofascial pain syndrome, we assume, for purposes of the disability determination, that this was the extent of the compensable injury.

The claimant did not report the injury and continued working his regular job until May 17, 1998, when the driller and tool pusher walked off the job citing safety reasons. Because the claimant came to the work site with them, he said, he had to leave with them. When he reported back for work the next morning, he was told he was terminated because he had quit. At this time, according to the claimant, his ankle was still swollen and he reported his injury to Mr. R, the district manager. The claimant said he told Mr. R that he wanted medical attention and he was referred by the employer to Dr. S, whom he saw on May 19, 1998. Dr. S diagnosed right lower leg cellulitis, and an ankle and lumbar strain. He advised the claimant to stay off his right leg and elevate it for 24 hours. He also placed the claimant on light duty and told him to report back to work, but the claimant did not because he had already been terminated. At the claimant's return visit on May 22, 1998, Dr. R noted that the infection was slowly improving and continued claimant on a restriction of avoiding "excess" walking or climbing. By May 26, 1998, the infection apparently cleared up. The claimant testified that Dr. S referred him to physical therapy, but he declined to go because he felt that Dr. S (and his colleague at the clinic, Dr. K), were not interested in the claimant's recovery, but only in helping the employer. He last saw Dr. S on May 29, 1998.

The claimant said that he attempted to get the carrier to approve a change of treating doctors, but this was refused so he did nothing about medical care for a couple months until July 27, 1998, when he saw Dr. P. At his first visit, Dr. P placed the claimant in an off-work status and saw him on an almost daily basis thereafter. On some visits, Dr. P would again check the "off work" block on his medical forms and on other days he

would not. His diagnoses were facet syndrome, cervicobrachial syndrome, and deep and superficial muscle spasms. In a letter of March 15, 1999, Dr. P wrote that "it would be entirely consistent that the injuries sustained on _____, would result in continuous total disability from his occupation from the date of injury" and that the injuries "would become worse with the progression of time."

The claimant testified that he could not work because of his injuries beginning May 18, 1998, and continuing through November 16, 1998,[1] mainly because of the pain radiating from his neck. He admitted to driving a dump truck a "couple times" during this period and was observed in a video surveillance tape doing so on July 14, 1998. He said he had to do this to make some money and that because the ride was too bumpy, he had to stop. He also acknowledged that on May 18, 1998, he returned to Mr. R after having left the job site the day before to ask for a job on another rig.

Dr. P testified that he tried to place the claimant in a light-duty status, but he was already out of work. He also said that while the claimant could drive the truck, he could not perform rehabilitation activities like riding a stationary bicycle. Mr. R testified that he was told of the injury right after it happened. He insisted that the claimant "quit" on his own and was not fired. He said light duty was available, but only for employees.

Section 401.011(16) defines disability as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Whether disability exists is generally a question of fact for the hearing officer to decide and can be proved by the testimony of the claimant alone if deemed credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. Termination for cause does not as a matter of law preclude a finding of disability after the termination, but is a factor for the hearing officer to consider in determining whether the compensable injury is a cause of the inability to earn the preinjury wage. Texas Workers' Compensation Commission Appeal No. 91027, decided October 24, 1991. In Texas Workers' Compensation Commission Appeal No. 91045, decided November 21, 1991, the Appeals Panel stated that "[w]here the medical release is conditional and not a return to full duty status because of the compensable injury, disability, by definition, has not ended unless the employee is able to obtain and retain employment at wages equivalent to his preinjury wages." In the case we now consider, the hearing officer found that the claimant did not have disability for the period claimed. The claimant appeals this determination, asserting that the medical evidence is virtually unanimous in placing the claimant in a light-duty status from Dr. S's first treatment through the numerous visits with Dr. P. He also argues in reliance on Texas Workers' Compensation Commission Appeal No. 960057, decided February 21, 1996, that because his release to work was conditional, he had no duty to search for employment and that he does not have to prove he cannot work. Finally, he asserts that it was incongruous for the hearing officer to find him credible on the question of the extent of his injury, but not on his claim of disability.

[1] Why he did not claim disability beyond this date was not clear from the proceedings below.

We agree with the claimant to the extent that a light-duty release is normally effective in establishing disability. This case, however, is somewhat more factually complicated because the claimant continued to work long hours after his injury and even came back for more work after he left the job site on May 17, 1998. There was other evidence that he was doing work during the approximately two months that he did not seek further medical care. While the claimant had explanations for this, it was up to the hearing officer as sole judge of the weight and credibility of the evidence to determine if the claimant established disability. Section 410.165(a). In her role as fact finder, she could accept or reject in whole or in part any of the evidence, including the claimant's testimony and the medical evidence. Texas Workers' Compensation Commission Appeal No. 93819, decided October 28, 1993. Although the circumstances of the claimant's departure from the job site and the employer's reaction to this were properly considered by the hearing officer, we cannot conclude that she gave this evidence controlling significance on the disability issue as a matter of law. And, while we acknowledge the statement in Appeal No. 960057, *supra*, that the claimant did not have the burden of establishing he cannot work, he, nonetheless, bore the burden of proving that he could not earn his preinjury wage as a result of his compensable injury. The hearing officer was unpersuaded by the evidence that he met this burden. 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 decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer, but rather find that the evidence, including the work history of the claimant after the injury, was sufficient to support her determination that he did not have disability as claimed.

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