APPEAL NO. 001040

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 April 20, 2000. The hearing officer determined that the respondent/cross-appellant (claimant) had disability beginning December 6, 1999, and continuing through February 25, 2000, as a result of the compensable injury of _____. The appellant/cross-respondent (carrier) appealed, contending that this determination was against the great weight and preponderance of the evidence and urging that the claimant failed to prove any period of disability. The claimant appealed the decision insofar as it ended disability on February 25, 2000. Neither party responded to the other's appeal.

DECISION

Affirmed.

We note initially that the issue reported out of the benefit review conference was whether the claimant had disability from December 10, 1999. The hearing officer found disability beginning December 6, 1999. This discrepancy is not a separate basis for the carrier's appeal and, as discussed below, was presumably predicated on a work excuse issued on December 6, 1999. In any case, we do not further consider it in this decision.

The claimant sustained a compensable left foot and ankle injury on _____, variously described in medical records as a fracture, a bruise, and a crush injury. He was released to light duty with restrictions of sitting 100% of the time and a requirement to elevate his left leg. He then returned to work for a period of time at a desk job (presumably at his preinjury wage and hours) that, according to all the evidence, included some getting up from the chair. The claimant testified that he could only work this light duty for about two weeks when the pain became too severe for him to continue.

On November 29, 1999, the claimant was terminated from his employment for failure to report to work or call in. On December 6, 1999, he was seen by Dr. M, who immediately placed, and has continued, him in a complete off-work status based on increasing foot pain. On February 25, 2000, Dr. S completed an independent medical examination of the claimant at the request of the carrier. He considered the claimant's fracture closed and diagnosed ankle sprain/strain. In his opinion, there was no residual impairment. He concluded that the injury "appears to have healed uneventfully. . . . He may return to work regular duty without limitations as long as he engages in the use of proper body mechanics."

The hearing officer considered this evidence and concluded that the claimant established disability only for the period from December 6, 1999, to February 25, 2000. In doing so, he found the claimant and Dr. M credible in their assertions as to when a period of disability began, but found Dr. S more persuasive on when this period of disability ended. The carrier challenges the starting date of disability and the claimant challenges

the ending date of disability, each arguing that their evidence is more persuasive than the other party's evidence. The claimant had the burden of proving disability. Whether a period of disability existed as claimed was a question of fact for the hearing officer to decide and could be proved by the claimant's testimony alone if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993.

Both parties are correct that their evidence, if accepted at face value, could establish their position. However, Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. In his role as fact finder, he weighed the evidence and determined what facts had been established. In so doing, he obviously found some of the evidence more persuasive than other, on both a starting date and ending date for disability. 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 evidence sufficient to support the decision and order of the hearing officer.

Affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Tommy W. Lueders
Appeals Judge