APPEAL NO. 92334

On June 5, 1992, a contested case hearing was held at (city), Texas, (hearing officer) presiding as hearing officer. He determined the appellant sustained a compensable injury in the course and scope of his employment on (date of injury), but that he was physically able to obtain and retain employment at wages equivalent to the preinjury wage and therefore did not suffer disability. Accordingly, he awarded medical benefits but denied temporary income benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art. 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant urges that the hearing officer's finding of no disability is against the great weight and preponderance of the evidence and asks that his decision be reversed and a new decision rendered. Respondent argues the evidence is sufficient to support the hearing officer and requests the decision be upheld.

DECISION

Determining there is sufficient evidence to support the findings and conclusions of the hearing officer, the decision is affirmed.

The Statement of Evidence in the hearing officer's Decision and Order is fairly and adequately set forth and we adopt it for purposes of this decision. Succinctly, the appellant had a prior back and shoulder injury from an on-the-job incident in April 1990. He returned to work on (date), as a maintenance man at the employer. His duties involved sweeping, mopping and general clean-up activities. At about 11:15 p.m. on (date of injury), he stumbled on a water retaining ridge on the floor and almost fell, catching himself on a low mopping sink. He stated he strained his back, mentioned this to a coworker and his supervisor, and subsequently went home. Several days later he saw the chiropractor who had treated him previously, was advised not to work, and was put on a physical therapy program. He stated he continued to go to therapy until April 1992 but does not believe he can work and has not sought any employment. The respondent introduced testimony of a private investigator and photographs from videotapes taken on three separate occasions between August 10 and 15, 1991 and one videotape taken on August 15, 1991 by the private investigator. These show considerable physical activity on the part of the appellant including extensive bending, stretching of his arms, washing of an automobile, getting in and out of a vehicle, hurrying up and down stair steps and other movements. There was also evidence that the appellant was involved in a physical struggle with another individual at the end of the year without any apparent back problems manifesting themselves. Appellant subsequently stated he could do the things depicted in the pictures and video because he was careful to bend his knees. He also indicated that his chiropractor prescribed a back brace (he had a back brace from his first injury) but that "a lot of times I didn't wear my back brace."

As indicated, the occurrence of a compensable injury is not in issue by either party to this appeal. However, that a compensable injury is sustained does not necessarily mean there is disability. Article 8308-1.03(16) defines disability as "the inability to obtain and

retain employment at wages equivalent to the preinjury wage because of a compensable injury." From the evidence, although finding a compensable injury, the hearing officer determined the appellant was able to obtain and retain employment at wages equivalent to his preinjury wage, that is, that the compensable injury was not causing him disability. It is apparent the hearing officer did not believe the testimony of the appellant that he was not able to work because of his injury and the running opinion of the appellant's chiropractor from August 1991 into April of 1992 that he was not capable of returning to work. The chiropractor's initial report contained an assessment of "lumbar decreased ROM, antallgia, positive: Kemp, Lasagues, Soto-Hall. Decreased sensitivity at right LE. Severe spasm and splinting." The hearing officer quite apparently gave greater weight to the testimony of the private investigator and the rather compelling pictures and videotape of the appellant in various states of activity.

The hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). He can believe all, part or none of the testimony of witnesses. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Ashcraft v. United Supermarkets, Inc., 758 S.W. 2d 375 (Tex. App.-Amarillo 1988, writ denied). A claimant's testimony is that of an interested party and only raises an issue of fact: his testimony may be believed or disbelieved in whole or in part. *See* Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ); Texas Employers Insurance Association v. Thompson, 610 S.W.2d 208 (Tex. Civ. App.-Houston 1981, no writ). And, lay testimony may be believed over that of an expert. *See* Thompson, *supra*; Hernandez v. Texas Employers Insurance Association, 783 S.W.2d 250 (Tex. App.-Corpus Christi 1989, no writ); Texas Employers Insurance Association v. Stephenson, 496 S.W.2d 184 (Tex. Civ. App.-Amarillo 1973, no writ). Pictures and videotapes can provide probative evidence of physical activity inconsistent with a claimant's assertions of disability. *See* Texas Workers' Compensation Commission Appeal No. 91057 (Docket No. redacted) decided December 2, 1991; Texas Workers' Compensation Commission Appeal No. 92209 (Docket No. redacted) decided July 13, 1992. As the trier of fact, the hearing officer resolves conflicts and inconsistencies in the testimony. *See* Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); Burlesmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). Only if we were to determine, which we do not, that the findings of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust would we set aside or otherwise disturb his findings and determinations. Pool v. Ford Motor Co. 715 S.W.2d 629 (Tex. 1986); Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.).

The decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Susan M. Kelley
Appeals Judge