APPEAL NO. 92653

On October 16, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that the respondent, claimant herein, sustained an injury in the course and scope of his employment on (date of injury), and that benefits be paid under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1991) (1989 Act).

Appellant, carrier herein, contends that the hearing officer erred in that the decision is against the great weight and preponderance of the evidence and in failing to adequately review a video tape exhibit. Carrier requests us to reverse the hearing officer and render a decision that the claimant did not sustain an injury on the job on (date of injury). Claimant did not file a response.

DECISION

The decision of the hearing officer is affirmed.

The claimant testified through an interpreter that he was employed as a dishwasher for (employer), herein employer, on (date of injury). The claimant testified, and the hearing officer found, that one of the claimant's duties was to mop the kitchen floor. The hearing officer found that the drains in the kitchen were clogged and the mop water on the floor did not drain freely into the drains. Claimant's testimony as recited in the statement of evidence was that after claimant mopped the floor he took the trash outside to a dumpster and when he returned to the kitchen he slipped on the floor and fell injuring his back and neck. Claimant got up, continued his normal duties and when he finished, clocked out and left without mentioning or reporting his fall or injury. The carrier's evidence presented by (Ms. Mc), employer's co-manager, was when she arrived at work on the morning of (date), she noticed the kitchen floor was dirty and the cook pointed out the oven was dirty, ice bins were not filled, and trays of cups and glasses were not washed, all being duties claimant should have accomplished the night before. Ms. Mc then reviewed a video tape which was taken by three security cameras, one showing the front desk, one showing the dining room and one showing the kitchen. Ms. Mc testified that after watching the tape she determined that claimant had not done his required tasks and because he had previously been advised of his responsibilities, she determined to terminate claimant. Ms. Mc made other arrangements to cover claimant's evening 6:30 p.m. to 11:30 p.m. work hours and attempted to contact claimant. Being unable to do so, Ms. Mc left word with the assistant manager that when claimant came in that evening, he was not to clock in but to go home and call Ms. Mc the next day. The testimony was claimant came in shortly after 6:00 p.m. on (date). The assistant manager, who was unable to speak Spanish, and claimant being unable to communicate in English, called a front desk sales rep who was bilingual to translate. The desk sales rep told claimant that Ms. Mc had been unable to contact him, that claimant was not needed at work that day and to call Ms. Mc the next day. It is undisputed claimant's wife called Ms. Mc on May 12th. Exactly what was said was in dispute. Ms. Mc was clear that claimant had been fired and he could come by and pick up his last check. Claimant's

wife testified Ms. Mc was rude, refused to hear claimant's version and hung up before claimant's wife could report claimant's fall. Later on May 12th, claimant's wife came by to pick up claimant's check and was told it would not be ready until Thursday, May 14th. Claimant's wife at that time left a letter reporting claimant's fall and injury. The carrier's position is that claimant did not fall as he alleges, that claimant did not report the fall on (date of injury) or the next day on (date), that claimant did not appear injured to the assistant manager or the desk sales rep who spoke with claimant on (date), and that the security video cameras did not show a fall on the evening of (date of injury).

Claimant did not seek medical attention until June 10, 1992 when he was seen in the (Hospital) ER. Claimant testified that the employer had denied his claim and he could not afford to go to a doctor sooner. X-rays of the thoracic spine and back were taken with finding of "partial avulsion of the superior-anterior osteophyte at L5" noted. Medical bills submitted by claimant were in excess of $6,000.00. The ER medical record recites claimant ". . . at work and slip (sic) on wet floor and landed on his back."

The issue as certified by the benefit review officer and acknowledged by the parties as correct was:

Whether the Claimant (Mr. A) sustained an injury in the course and scope of his employment on (date of injury).

What makes this case unusual is the existence of a video tape taken by the three security cameras. The hearing officer discusses the video tape at some length in the Discussion portion of her decision. It was represented that the video tape could not be copied and it was not a standard video because the six hour tape was from three cameras and was timed to record 24 hours within six hours. The testimony was that the tape consists of scenes from the three video cameras with about 25 seconds from each camera before moving to photograph a sequence from the next camera. Consequently, according to the testimony, the scene shifts back to the original camera every 50 seconds. However the times on the video tape, and as recited in carrier's appeal, would indicate that almost two minutes elapse from the time a sequence shifts from a particular location to the time the scene shifts back to that location. The hearing officer watched the pertinent sequences at the contested case hearing and then watched some forty-five minutes, which would cover some three hours of real time, at a later date. The hearing officer apparently found the video unsatisfactory, based on some of her discussion quoted below:

> The video tape is almost impossible to follow; it is difficult to discern what occurs because the tape jumps. There is tremendous amount of static and blurriness in the framing. The viewer can see someone mopping the floor, but it is difficult to discern whether the person mopping is the claimant; it is difficult to discern what the person is wearing. One can also see a person, purportedly the Claimant, walking toward the camera, from what appears to be the back door. The Claimant did not fall at that time. He could have fallen

at another time, since two thirds of the recording do not depict the kitchen, and of the time that does, in only two sequences can the viewer observe an individual in the kitchen engaged in the tasks which the claimant was hired to do.

Other than the two sequences mentioned in which the Claimant is purportedly the person in the kitchen, the hearing officer noted only one other time that this person was in the kitchen. In that sequence, a second person, presumably a cook, is also present. It was difficult to give this video tape great evidentiary weight. Since two thirds (2/3) of the tape does not depict the activities in the kitchen, the value of the tape is lessened.

The original video tape was submitted with the appeal and was reviewed. When run at regular S.P. speed the images were sharp and clear but the characters moved in a stilted high speed fashion like a silent movie. However, when the video is played in a frame drag mode, where the tape is advanced slowly one or a few frames at a second, the pictures, including the moving characters, are very clear. The issue, however, is not what is viewable to the Appeals Panel, but rather whether the hearing officer erred in failing to give greater weight to the video tape.

The hearing officer in her statement of evidence and discussion, summarizes the testimony and evidence. There is nothing on the video tape which changes any of the material facts. The video does not show the claimant's fall, but as the hearing officer emphasizes, two thirds of the tape does not show the kitchen. It would have been possible for claimant to fall and get up while the cameras were recording the 100 second or so sequences from the dining room and front desk. The only item which was in dispute at the contested case hearing, which an undistorted view of the tape was able to resolve, was that claimant was wearing dark pants, possibly blue jeans, rather than checkered cook's pants. This additional evidence would tend to support claimant's version that he was wearing blue jeans the evening of the incident and not checkered uniform pants as carrier contends. The last sequence showing claimant leaving the kitchen is at 10:16:29, (which allowing for daylight savings time would be 11:16:29) and is consistent with testimony the claimant clocked out at 11:17. We find nothing on the tape which contradicts the hearing officer's findings and conclusions. The hearing officer did not abuse her discretion in not viewing the tape using special equipment. We would note the tape is viewable without special equipment, particularly if it can be run in a frame drag mode. Even without the special equipment or viewing the tape in frame drag mode, the tape does not contradict the findings of the hearing officer. It is not an abuse of discretion to not view the tape for a clearer view of what was apparently readily viewable, albeit through static and some distortion, to the hearing officer. In fact the undistorted version supports the claimant's testimony that he was wearing blue jeans rather than checkered uniform pants as contended by carrier. Finally, we would note, when a party desires to have evidence admitted requiring unique equipment or special procedures, that party must make the necessary arrangements to provide such equipment or procedures at the time the evidence is offered.

Carrier alleges the hearing officer erred in Findings of Fact Nos. 5, 6, 7 and 8 and in Conclusions of Law Nos. 3 and 4. Findings of Fact Nos. 5, 6 and 7 simply state the claimant mopped the kitchen floor as part of his prescribed duties, that mopping the floor furthered the employer's business and the drains in the kitchen were clogged and the mop water did not freely drain. The findings on mopping are virtually undisputed. The claimant testified mopping was claimant's job and even a distorted view of the video showed claimant mopping. The claimant testified that the drains were clogged causing mop water to accumulate and that he fell in the accumulated mop water. There is no direct evidence to the contrary; carrier's evidence that claimant did not report the accident that evening to the night auditor, nor the next day to the Spanish-speaking desk clerk and assistant manager is, as carrier concedes, a circumstance that can be considered.

The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Article 8308-6.34(e). She had the opportunity to hear the witnesses and observe their demeanor. When presented with conflicting evidence, the trier of fact may believe one witness and disbelieve others and may resolve inconsistencies in the testimony of any witness. McGalliard v. Kuhlmann, 772 S.W.2d 694, 697 (Texas 1986). The hearing officer apparently accorded greater weight to the claimant's testimony of how he was injured, as supported by testimony of claimant's wife, than that of the carrier's circumstantial evidence. The carrier alleges the security video tape is "of crucial importance." Although the hearing officer did not have the benefit of a clear and undistorted version, it was apparent in the version the hearing officer did view that the tape did not show claimant falling. However, as the hearing officer notes, two thirds of the tape, including the crucial time of 10:45 p.m. (recorded on the camera as 9:45) to approximately 11:16, does not depict activities in the kitchen. Consequently, as the trier of fact, the hearing officer did not assign great weight to this evidence. The fact, as apparently considered by the hearing officer, that there was anywhere from 50 seconds to two minutes between sequences is not changed whether viewing a fuzzy unclear version or a clear sharp version. The hearing officer obviously believed that the fall occurred during the period of time that the cameras were not recording events in the kitchen. We will reverse the hearing officer, based on insufficiency of the evidence, only if the evidence supporting the hearing officer's determination is so weak or so against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.) and Texas Workers' Compensation Commission Appeal No. 92447, decided October 5, 1992. In considering a challenge to the sufficiency of the evidence, we recognize the function of the hearing officer, as the trier of fact, to judge the credibility of the witnesses, assign weight to be given their testimony, and resolve any conflicts or inconsistency in the testimony. Texas Employers' Insurance Association v. Jackson, 719 S.W.2d 245 (Tex. App.-El Paso 1986, writ ref'd n.r.e.). The court in Commercial Union Assurance Company v. Foster, 379 S.W.2d 320, 322 (Tex. 1964) held "it is an elemental proposition of law that where there is some evidence of a substantial and probative character to support the . . . findings of fact, they are controlling [on appeal] and will not be disturbed, even though this court might have reached a different

conclusion therefrom." Applying these standards of review, we conclude that sufficient probative evidence exists to support the hearing officer's findings and decision.

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge