APPEAL NO. 931144

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB CODE ANN § 401.001 *et seq*.(formerly V.A.C.S., Article 8308-1.10 *et seq*.). On August 19 and November 17, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) was injured in the course and scope of employment on (date of injury); that she had good cause for reporting the injury to her employer more than 30 days after it occurred; that claimant has disability as a result thereof; and that the carrier is not relieved of liability because of an exception found in Section 406.032(1)(C) and (D). Appellant (carrier) asserts that the injury was not shown to have happened, or if it did occur, it was not shown to have been in the course and scope of employment; that claimant did not give timely notice and did not establish good cause for so doing; that even if there was injury and notice was satisfied, the injury did not cause the claimant's medical condition; that claimant has no disability and a *bona fide* offer of work was tendered; and that the hearing officer erred in stating that the carrier had the burden of proof in regard to exceptions to liability. The claimant replies that the hearing officer should be upheld.

DECISION

We affirm.

Claimant worked as a teacher at (employer). She had taught for employer for 10 years and was considered to be a good teacher with good habits regarding thoroughness, promptness, reliability, and interest in regard to her work and students. On (date of injury), she testified that she stayed after school and was working on lesson plans, grading papers, and preparing for a classroom move. She moved boxes with (FV), and he made a "pass" at her that day. At about 5:30 to 6:00 while walking down a hall near her classroom she was grabbed from behind by a man who asked a question and then produced a knife. She was raped in a hallway.

Claimant's first memory after the rape is of being at the home of a friend, near the school, who she had planned to visit. She said nothing about the assault and while the friend, (CT), said that claimant's behavior was somewhat different (she kept getting up to go get her child at the school dance even though it was not time to do so yet), she was not disheveled or markedly different during the visit. Claimant said nothing of the rape until the latter part of March and did go back to work the next school day after the assault.

Within a period of days claimant started having dizzy spells and lost consciousness on at least one occasion. Claimant was hospitalized for ten days in March 1992. Medical tests found no organic basis for the symptoms. Claimant had been admitted by (Dr. G), but when testing was negative, she was then seen by a psychiatrist, (Dr. K). In this period claimant began having nightmares and incomplete segments of memory of particular events which she reported to Dr. K. In this manner she remembered the rape of (date of injury), over a period of days, rather than at one time. Once recalled on March 22, 1992, she told

Dr. G and then drove to the school to tell her supervisor, (SA) that same day. She told her husband at that time. She did not recall at that time the way the assailant looked, but as his image became clear to her with additional time, she reported the assault to the police. (Because the rape was not reported until March 22nd, no evidence at the site or in regard to claimant's clothes was available.)

Claimant was admitted to the hospital again on March 26th after fainting at school. She only stayed in the hospital two days at this time, but could not return to teach after that. She was again hospitalized from June 9 to July 9, 1992, although that period included a move from one hospital, (hospital), to another, BP. She was again hospitalized from August 10 to September 11, 1992. During this period she was seen by Dr. K and a therapist, (Mr. G). In July 1992 after being discharged from the hospital, she remained on some type of nightly release but reported to the hospital daily. In July 1992 at claimant's request, Dr. K did write a letter indicating that she could return to work.

Mr. G testified that he is a licensed professional counselor and has been a psychotherapist for 22 years. He has a masters degree in psychology and has done a residency in clinical psychology. While now in private practice, he has worked in hospital psychiatric intensive care units in which he supervised treatment of patients. He has treated claimant since June 1992. Mr. G agrees with Dr. K's diagnosis of post traumatic stress disorder, major depression, and multiple personality disorder. He said that the multiple personality disorder had its inception in childhood sexual abuse, but did not reveal itself until after the (month) assault. He stated that claimant was functional prior to (date of injury) and since then there has been a "severe decline of function."

Mr. G stated that multiple personality disorder may not need treatment in itself. The post traumatic stress disorder causes the problem, the "precipitous decline." Claimant, he said, has at least ten observed personalities, and one of these has been hostile. When asked whether one personality could conceivably consent to a course of action that the others would not, Mr. G said that the other personalities would reveal such action, but he never got any information from the other personalities that one had in some way consented to the assault. When asked whether the whole incident could have been "dreamed up," Mr. G replied that in over 400 cases he's studied there has never been a breakdown of function based on a dream or fantasy; he opined that such reports are easy to identify. He added that there has been a logical and chronological consistency to the events related by claimant with no self-contradiction.

Mr. G also testified that claimant had reported the assault to him and to Dr. K in similar accounts. He believes that the assault is the only precipitating basis for claimant's current condition, which he characterizes as being unable to work as a teacher now. He believes that with three to five years of psychotherapy claimant's prognosis for recovery is good. He adds that she may be able, under the best circumstances, to resume work in six to 12 months. When asked about marital stress, Mr. G replied that if the marital stress were reported with a "great sense of distress" and if the other personalities reported it, then it could bring forth the multiple personality disorder. That has not happened. Her current

condition includes weight loss (she dropped from approximately 130 pounds to 90 pounds), sleeping problems, and panic attacks (she may act as if an assault is presently happening).

Mr. G said that it is common for there to be no recollection immediately after a rape; the event is taken into an alternate stream of consciousness (dissociation). It is typical for claimant to seem to have forgotten the assault. It is consistent that she did not tell her friend later that day. A dissociation reaction is an involuntary response used in childhood which can be used again as an adult as a defense mechanism. He states that she can distinguish the reality of the rape and opined that the reality is that claimant was raped in (month).

Mr. G also agreed that claimant could not identify the assailant but was able to describe him. He stated that as the pieces of the rape were coming back to her, claimant had consciously questioned whether a teacher (FV) at school, who had made passes at her, could have been the assailant. FV did not appear in nightmares or glimpses of memory, however. As memory of the rape became more clear to claimant, she no longer had any question that FV was any part of it. At one point claimant placed a green snake in association with the recollection of the rape. Mr. G also took this into account in concluding that the rape was a reality.

The testimony was overwhelming that while teachers' contracts, including that of claimant, required the teachers to be at the school on school days from 7:30 to 3:30, many teachers stayed later to work on lesson plans or to grade papers. SA agreed with that point although it was pointed out that teachers had been warned not to stay late on the grounds. CT is also a teacher at the same school, and she agreed it was not unusual for teachers to stay late to work. CT also testified as to the great weight loss in claimant at this time and the drastic change in personality. CT characterized the teachers as being free to either stay late and work or take the work home.

Claimant's husband has had to take razors away from claimant; when he did so claimant expressed herself in a different tone of voice, a personality that is bent on killing herself. He described the pressure now on the family, early questions in their relationship because of his profession at the time (priest), and the fact that they both sought counseling for a short period at that time (they have been married since 1976).

FV testified that he coached and taught for employer and was a friend of claimant. He said he never kissed her, but that she did ask him whether anything had happened between them; he recalled the question as being posed in late 1992 and replied to her that nothing had ever happened. He did recall moving boxes, preparatory to the classroom move, with claimant on the day of the rape.

(MD) taught in the classroom next to claimant's. She can recall the afternoon of (date of injury) because she and her husband were going out that night. She was in a hurry but was at school at approximately 5:15 p.m. when she saw claimant on the phone in the faculty lounge. She used claimant's keys, replaced them, and left for the day. She remembers claimant as being a teacher who went from being the "most competent, detailed,

conscientious teacher" to one who had "difficulty remembering things" who was seen "visibly shaking," and who never asked about her students. She acknowledged that there was to be a dance for the students that night and that tables were set up in certain hallways, but did not see anyone loitering about the area.

(LK) testified that she had an office by the gym; she is a coach. She remembered that tables had been set up in the breezeway and hallway. She said you had to "squeeze through" to get by the tables.

(RK) is a teacher and director of music. At some time, not on (date of injury), he saw claimant and FV "in an embrace."

(DG) testified as to the benefit plans she administered for the employer. She described long term disability payments and workers' compensation in relation to the claimant.

SA testified that she is the principal of the school. She permitted teachers to stay past 3:30 at the school. She also frequently stayed late to work. Claimant had been a good teacher. She believed claimant when she reported the rape. She acknowledged that some construction was going on with workers around the school and that others were sometimes on the school grounds. She did not feel that claimant could teach again the next year after the assault unless her doctor cleared her to do so by a certain time, which was not done. A part-time position was discussed with claimant but claimant would not take it. SA acknowledged that "we never got to that point. We never talked about the finances." She did have a report that prior to the assault claimant had fainted once and that was not on a school day. She said that she got no report that any tables in the breezeway or hallway had been moved or disturbed on (date of injury).

The hearing officer is the sole judge of the evidence. *See* Section 410.165. While there is no requirement that medical evidence must be offered in a traumatic injury such as this, medical evidence supported the claimant's assertion that she had been raped on (date of injury). This medical evidence was unrefuted; carrier presented no medical opinion contrary to that of claimant that a rape had occurred. Testimony of employees and relatives referred to claimant's actions before and after the time of the assault, but did not address it directly since there was no witness, nor anyone with claimant at the time she said the incident occurred. The evidence sufficiently supports the finding that the rape occurred. *See* Commercial Standard Ins. Co. v. Marin, 488 S.W.2d 861 (Tex. Civ. App.-San Antonio 1972, writ ref'd n.r.e.).

There was no evidence that claimant was at the school after hours to do anything other than work on school matters that benefitted the employer. There was supposition that claimant stayed only because her daughter was going to the dance that night. Claimant testified otherwise. Many witnesses testified that staying to do work for the school was a common practice, and claimant was described as very reliable and conscientious about such matters. There was some corroboration that boxes for the pending move were gathered that afternoon and set aside by claimant and FV. The evidence was sufficient to conclude that claimant was injured in the course and scope of employment. *See* Marin, *supra*.

While scope of employment may be said to have been found, the carrier will not to be liable for benefits if it is found that an exception (Section 406.032(1)(C) or (D)-assault by a third person for a personal reason and not directed at the employee because of the employment and voluntary participation in off-duty recreational activity) applied to this case. An issue to this effect was added after the benefit review conference. While the issue was added, Texas Workers' Compensation Commission Appeals No. 91029, decided October 25, 1991, and Texas Workers' Compensation Commission Appeal No. 91047, decided November 20, 1991, indicate that evidence has to be introduced to raise the issue of an exception and then the employee has to show that the exception does not apply. The carrier is correct is saying that the hearing officer misstated the burden of proof as to these exceptions in his conclusions of law. However, the record of the hearing clearly shows that the hearing officer stated that the burden of proof was on the carrier to prove the attack was personal and that claimant was engaged in recreational activities; no objection was made to this declaration at the hearing. In addition, the findings of fact indicate that notwithstanding the misstatement of burden of proof, the hearing officer made two findings that also address this issue:

On (date of injury), claimant remained at school after required work hours to grade papers and prepare lesson plans.

The claimant did not and does not know her assailant.

These findings together with the absence of any evidence of recreational activities by claimant on that day or any evidence that claimant knew the assailant, much less had a "prior relationship of any kind" with him (*See* Marin, *supra*), indicate that evidence had not been introduced that would require the claimant to prove that the exceptions did not apply. In Texas Workers' Compensation Commission Appeal No. 93953, decided December 7, 1993, no reversible error was found when the burden of proof was improperly placed because the hearing officer also stated that, whoever had the burden of proof, the issue (disability) was proven. With no evidence of recreational activity and no evidence that claimant had a prior relationship with the assailant, the misstatement of the burden of proof does not compel reversal of the decision.

The hearing officer found good cause for delay in reporting the (date of injury), injury until March 22, 1992. Hawkins v. Safety Cas. Co., 146 Tex. 381, 207 S.W.2d 370 (1948),

stated that good cause for not timely filing a claim is based on ordinary prudence, whether the claimant used a degree of diligence that an ordinarily prudent person would have exercised "under the same or similar circumstances." It went on to say that the question is ordinarily one of fact for the trier of fact to decide. Mr. G testified that the claimant's action after the rape was typical, that dissociation was common, and that it was consistent for the events to come back to claimant in the form of panic and nightmares. There was no evidence contradicting that as soon as claimant could tell there had been a rape, she told her doctor and reported it to her supervisor. The hearing officer did not abuse his discretion in finding that the claimant had good cause for reporting her injury over 30 days after it occurred.

Carrier argues that even if the claimant is found to have been raped, the rape was not shown to have caused the current medical condition, pointing to the sexual abuse that predated the injury at work. The evidence includes both medical testimony and medical documents in support of claimant's assertion of causation, plus other testimony of the extreme change in claimant's condition after the assault. The 1989 Act only requires that the compensable injury be a cause of injury or an aggravation of the condition. *See* Texas Workers' Compensation Commission Appeal No. 92242, decided July 24, 1992. The testimony of claimant and Mr. G provided sufficient support that the rape precipitated claimant's current condition.

Carrier argues that claimant did not have disability because at one time she received a release to return to work and because she was offered a part-time job. The hearing officer had not allowed the adding of a separate issue as to a *bona fide* offer of employment but stated that such offer could be shown in determining the issue of disability. In determining that claimant has had disability since June 30, 1992 (claimant after the rape did some work and was paid through that time), the hearing officer could consider the claimant's testimony that she cannot work, the testimony of Mr. G that she cannot work, but may be able to in six to 12 months, and the fact that claimant was hospitalized again soon after the letter releasing her to work was composed in July 1992. The evidence was sufficient to support the finding of disability. The hearing officer was not compelled to make a finding of fact that the offer of part-time work should reduce the amount of benefits paid; the discussion of such work did not reach the point of being an offer. Even had it reached that point, the hospitalization of claimant on August 10, 1992, for the compensable injury could have been found to contradict the release upon which the offer was made.

The evidence sufficiently supports the findings of fact and conclusions of law with the exception of Conclusions of Law Nos. 6 and 7 which place the burden of proof in regard to exceptions to liability on the carrier. As stated, Conclusions of Law Nos. 6 and 7 do not compel reversal. Conclusion of Law No. 8 that carrier is not relieved from liability pursuant to Section 406.032(1)(C) and (D) is sufficiently supported by the evidence of record and the findings of fact. Finding that the decision and order are not against the great weight and preponderance of the evidence (*See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951)), we affirm.

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Joe Sebesta
Appeals Judge

CONCUR:

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Lynda H. Nesenholtz
Appeals Judge

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Gary L. Kilgore
Appeals Judge