APPEAL NO. 93712

This appeal arises under the Texas Workers' Compensation Act of 1989, TEX. LAB. CODE ANN. Section 401.001 *et seq.* (1989 Act). On July 23, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. She determined that (claimant) did not establish an injury suffered in the course and scope of her employment. The claimant appealed the hearing officer's decision. The respondent, (carrier), argued that the decision of the hearing officer is supported by sufficient evidence.

DECISION

Sufficient evidence exists in the record to support the hearing officer's decision. We affirm.

The claimant worked as a security officer for (employer). She returned to work after approximately two years of recovery from a wrist injury. The claimant had filed a prior workers' compensation claim with her employer two years earlier. Until her return to her employer, she had not worked since her prior injury. The claimant had been back at work for approximately two weeks before the alleged incident on (date of injury). Upon her initial return to work for the employer the claimant had a black eye which resulted from a scuffle the claimant was involved in after having left a bar with people she had met that night and did not previously know. On March 26th, the claimant was assigned to be a security guard for the perimeter of a shopping center. The evidence from the hearing shows substantial inconsistencies and conflicts respecting the sequence of events on the night of (date of injury).

Claimant gave the following account of the disputed events of (date of injury). The claimant and a male security guard, (Mr. A), walked around the back of the shopping center at about 7:20 p.m. The claimant saw a friend of hers, (Ms. M), drive up at about 7:30 p.m., and Mr. A walked on away from them. Ms. M had brought the claimant some ice cream. Ms. M drove off after about five minutes leaving the claimant alone in the back of the shopping center. Then three Hispanic males in a large two-door car drove up, forced claimant into the back seat of the car, drove away, and beat her about the head. The claimant does not remember anything else until she walked up to two off-duty police officers then acting as security guards at one of the stores in the shopping center. The claimant presented testimony at the hearing that the assault occurred between 7:40 and 7:45 p.m.

Ms. M testified that she is a good friend of the claimant and that on the night of (date of injury), she brought the claimant ice cream at approximately 7:30 p.m. Ms. M found the claimant in the back of the mall and gave her the ice cream as the male security guard walked off. Ms. M explained that the next thing she did was to drive off. Further, Ms. M testified that at sometime between 8:15 and 8:30 p.m., she drove back to find the claimant and did not find her in the front or the back of the store, but only saw the male security officer. Ms. M stated that when she could not find the claimant, she went home.

No eyewitnesses testified to the assault upon the claimant. The initial medical report, based on examination of the claimant the following day, contained notes that the claimant stated her injury occurred between 7:30 to 8:00 p.m. on the previous evening. However, the police report, which recorded the account of the information the claimant provided the officer, stated that the claimant and Mr. A had been checking the rear of a building a little before 9:00 p.m. The first witness to see claimant after the assault was (Mr. C), an off-duty police officer, who was working as a security guard for a store in the shopping center. Mr. C reported that he saw her approaching the shopping center at approximately 9:38 p.m.

(Mr. L) worked as a roving patrol officer for the employer on the incident date. Mr. L acted in the capacity of a security guard with some supervisory duties. Mr. L testified that while he was on routine patrol between job sites, he noticed both the claimant and Mr. A talking outside the mall at 7:40 p.m. to 7:50 p.m. Mr. L noted his observation of the two security officers in his activity log. Mr. L's testimony contradicts the claimant's testimony that she was abducted after a struggle around 7:40 p.m. to 7:45 p.m.

A recorded statement of (Mr. M), who worked as an assistant manager for (store), was taken by the investigator for the claimant's attorney. Mr. M repeatedly stated, both in the investigator's report and in an affidavit, that he personally saw a female security officer outside of the store at 8:30 p.m. Mr. M stated he was sure it was a female officer. (Ms. B), in an affidavit, stated that she saw the two security guards, the claimant and the male guard, outside the store at about 7:50 p.m.

(Mr. T) worked as the field supervisor for the employer. Upon the claimant's return to work for the employer, Mr. T testified that he first noticed and then questioned the claimant about her black eyes, which the claimant said resulted from a fight she had been in the weekend before. Mr. T stated that the claimant told him that she had hit a man who struck her. Mr. T was concerned about how a security guard with black eyes would appear to the employer's clients and their customers. Mr. T confirmed that Mr. A's daily activity log was accurate, and that Mr. A recorded and reported that both he and the claimant checked out at the same time. In the log Mr. A wrote that the claimant left work about 8:40 p.m. and she told him to "call her out" at 9:00 p.m. Mr. A, in a statement given after the incident, restated this same version of the events of (date of injury).

The issue appealed is whether the claimant proved she suffered an injury in the course and scope of her employment. The burden of proof is on the claimant to prove that she sustained an injury in the course and scope of her employment. Reed v. Aetna Casualty & Surety Company, 535 S.W.2d 377, 378 (Tex. Civ. App.--Beaumont 1976, writ ref'd n.r.e.) Section 401.011(12) defines "course and scope of employment" to mean:

> an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of

the employer or at other locations.

Section 406.032 contains statutory exceptions to insurance carriers' liability for compensation. Section 406.032(1)(C) excepts the carrier from liability if "the injury arose out of an act of a third person intended to injure the employee because of a personal reason and not directed at the employee as an employee or because of employment;. . ."

The primary question is whether the injury was connected with the employment. If the injury was connected to the employment, then it must have occurred in the course of the employment. Williams v. Trinity Universal Insurance Company, 309 S.W.2d 850, 852 (Tex. Civ. App.--Amarillo 1958, no writ). The evidence presented by the claimant and by the carrier is in direct conflict respecting claimant's whereabouts at between 7:30 and 8:00 p.m., the period during which she insisted she was abducted and assaulted. According to the claimant, she was abducted and assaulted while on the job. According to the carrier's evidence, she left work at 8:40 p.m. and was not again seen until Mr. C saw her walking towards the shopping center at about 9:38 p.m.

If the assault on the claimant occurred, as she claims, while she was on duty, then claimant's injury would have been in the course and scope of employment. Taking into consideration the above referenced intentional injury language exception, the intentional killing of an on-duty employee for the purpose of robbing the employee has been held to be an injury sustained in the course of employment. Williams, *supra*; Vivier v. Lumbermen's Indemnity Exchange, 250 S.W. 417, 418 (Tex. Comm'n App. 1923, opinion adopted). In Vivier, a nightwatchman was killed by a murderer whose motive apparently was to rob the decedent. The court determined that the intention of the legislature was to prohibit workers' compensation benefits in such cases "where antecedent malice existed in the mind of another causing the other to follow the employee and inflict injury upon him, wherever he was to be found, or to cases where the employee by his own initiative provoked a difficulty which caused the other party to feel a `personal' interest in assaulting him." Vivier, *supra* at 418. Thus, if the assault had indeed occurred while the claimant was on duty, the claimant's injury would have been suffered in the course and scope of her employment as long as the third persons involved did not assault her for motives personal to the claimant and unrelated to the employment. There was no evidence introduced to suggest any reasons whatsoever for the assault.

Vivier discussed the notion that employment duties may create an increased exposure to common dangers and that such could relate the employment to the injury. *Id.* at 420. In Commercial Standard Insurance Company v. Marin, 488 S.W.2d 861, 869 (Tex. Civ. App.-San Antonio 1972, writ ref'd n.r.e.), the court explained the "positional risk" test:

> With specific reference to assaults this well settled doctrine, at the very least means . . . that an assault arises out of the employment if the risk of assault is increased because of the nature of the work, or if the reason for the assault is a quarrel having its origin in the work. . . . Although risks of the street are

> dangers which an employee shares in common with the general public, if the performance of his duties make it necessary for the employee to be on the streets, the risks he there encounters are held to be incident to his employment. Jecker v. Western Alliance Ins. Co., 369 S.W.2d 776 (Tex. 1963).

Similar to a nightwatchman, a security guard obviously has an increased exposure to possibly dangerous situations.

Whether claimant was injured in the course and scope of her employment was an issue of fact for the hearing officer to determine. The conflicts and inconsistencies were significant between the claimant's and the carrier's versions of the events of (date of injury). Under the 1989 Act, the hearing officer is the trier of fact at the contested case hearing and is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Section 410.165(a). The trier of fact can believe all or part or none of any witness's testimony, including that of the claimant, and judges the credibility of the witnesses, the weight to assign their testimony, and resolves the conflicts and inconsistencies in the testimony. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 93426, decided July 5, 1993; Texas Workers' Compensation Commission Appeals No. 93155, decided April 14, 1993. As the fact finder, the hearing officer must resolve conflicts and inconsistencies in the evidence, weigh the credibility of the witnesses, and make findings of fact. Texas Workers' Compensation Commission Appeal No. 92657, decided January 15, 1993; Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. Where sufficient evidence supports the findings and they are not so against the overwhelming weight of the evidence as to be clearly wrong and unjust, then the decision should not be disturbed. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Dyson v. Olin Corp., 692 S.W.2d 456, 457 (Tex. 1985); In Re King's Estate, 150 Tex. 662, 664-665, 244 S.W.2d 660-661 (1951).

The hearing officer's findings that claimant was in the company of Mr. A almost continuously until she left work at 8:40 p.m., that Mr. A clocked himself and claimant off work at 9:00 p.m., that claimant showed no signs of having been assaulted when she left Mr. A at 8:40 p.m., that claimant was seen on duty by others at 7:40 p.m. and at 8:30 p.m., that claimant was next seen by police officers at about 9:38 p.m. when she advised them she had been assaulted, and that the claimant did not meet her burden to prove she was injured in the course and scope of her employment are all supported by sufficient evidence. The hearing officer's decision was not so against the great weight and the preponderance of the evidence as to be manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Finding no reversible error and finding sufficient evidence to support the challenged findings, we affirm the hearing officer's decision and order.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Thomas A. Knapp
Appeals Judge