APPEAL NO. 002359

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on September 21, 2000. The issues at the CCH were whether the claimant sustained an injury in the form of an occupational disease and, if so, the date of such injury, whether she had disability from the injury, whether the carrier's defense to compensability was limited to the grounds stated on its first-filed Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21), and (if not), whether the carrier was relieved from liability by the failure of the claimant to give timely notice to her employer of her injury.

The hearing officer held that the claimant sustained carpal tunnel syndrome (CTS) and that it arose out of her employment, that her date of injury was _____, that she timely notified her employer of her injury on this same date, and that the carrier was limited to the defense on its first TWCC-21, which did not include the timely notice issue. She further found that the carrier should have known before the date that it filed the first TWCC-21 that the claimant had been previously treated for her hands in _____.

The carrier has appealed. It argues that it had newly discovered evidence, the medical report from the doctor who treated claimant in _____, which was not received until shortly before its second TWCC-21. The carrier also argues that the findings of a date of injury (and timely notice of same) of _____, are against the great weight and preponderance of the evidence, including the testimony of the claimant. The carrier also disputes the sufficiency of evidence on disability. There is no response from the claimant.

DECISION

Affirmed in part, reversed and rendered in part.

The claimant was employed as a housekeeper by (employer), which entailed numerous cleaning and straightening activities at all levels of duty. The claimant said that she initially worked part time, but by November 1999 was working full time. The claimant said that on or about _____, she had numbness and tingling in her hands with shooting pains up her arms, to the point where she could not work. She reported this to her supervisor and advised that she would be seeking medical treatment. The claimant went to an emergency room that night.

Medical records in evidence show that she was treated by Dr. S on November 24, 1999, for right CTS. Dr. S's report noted a history of previous treatment for bilateral CTS by Dr. W. A later report that month by Dr. S said that the condition was definitely exacerbated by her work.

The claimant explained what had occurred to her before. She said that on _____, she had gone to see a doctor one time (Dr. W), and was given braces to put

on her hands. She said at that time, she was bothered with numbness and pain in her hands. She denied that this had been going on for six months. The claimant said that the doctor told her that we "are going to treat this like CTS".

Significantly, the claimant stated on cross- and redirect-examination that she knew at this time that her hands hurt because of her work. She stated that there was nothing else that she did that could have caused her hand pain and numbness. She said that her reason for not reporting this as an injury at the time was that she was working part-time and had been informed by the employer that she did not qualify for any benefits, and she thought that workers' compensation was one of those benefits for which she was not eligible. The claimant said she missed three days work, then wore the braces (primarily at night) and the problem resolved. She said that after _____, except for a brief episode of hand pain in early 1998, she had no problems until her _____, incident. The claimant said that the _____ pain also consisted of numbness and tingling but had additional aspects of the shooting pain up her arm.

The claimant was taken off work after her _____ episode. By December 22, 1999, Dr. S had confirmed CTS through a nerve conduction study. The claimant testified that she later had a right carpal tunnel release surgery.

The claimant said that when she reported her _____ injury the employer told her it was not work related and she could not get workers compensation, and the claimant thereafter contacted the Texas Workers Compensation Commission (Commission).

The employer did not notify the carrier of the claim for injury until December 17, 1999. On December 21, 1999, the adjuster for the carrier interviewed the claimant at some length. During that interview, the claimant was asked when she first had problems with her hands. She responded that the very first time she had problems was in September 1997, and even specified the 29th. The claimant said that she did not report it then because she was part time and did not have insurance. She was given braces to wear. The claimant told the adjuster she missed three days work at that time. She could not at first recall the doctor's name, but later in the interview said that he was Dr. M. She said that she told the doctor what she did at work but that he did not really say whether it was an on-the-job injury. The claimant said that she worked until November 1999 without further problem. There were at least four or five references throughout the interview to the claimant's earlier treatment for bilateral hand pain. At one point, the adjuster asked her if she had "flare-ups" between September 1997 and the current injury. At the end of the interview, the adjuster summarized his understanding of the sequence of events, starting with the first treatment resulting in wearing of braces and the fact that she did not then file a workers' compensation claim.

The adjuster's notes of that same day document his understanding that the claimant had a preexisting condition. He also apparently talked with the office of Dr. S and was informed that the claimant had a history of bilateral CTS previously treated by Dr. W. The adjuster assigned to another worker the task of contacting the employer and indicating that

he was going to dispute the file and needed at least a verbal statement from the employer right away. In answers to requests for admission that were propounded by the claimant, the representative of the carrier admitted that as of December 23, 1999, the carrier had knowledge that the claimant had a history of bilateral CTS and that this was a preexisting condition.

On December 23, 1999, the carrier filed a TWCC-21 with the Commission, refused to initiate benefits, and controverted the compensability of the injury for the stated reason that there was no medical evidence of the existence of CTS, or that it might be an ordinary disease of life or a preexisting condition (or something which is illegible). This TWCC-21 also disputed that the injury arose in the course and scope of employment, and stated that the investigation was continuing. On January 14, 2000, the carrier filed a second TWCC-21 with the Commission asserting that it had received "newly discovered evidence" on January 12 and was raising another defense of not timely reporting the claim. The cited newly discovered evidence was a copy of Dr. W's _____, medical report.

First, we affirm the determination that the claimant had a compensable repetitious trauma injury and disability therefrom. There is sufficient evidence that, when believed, established that the claimant repeatedly and traumatically used her hands in the course of her everyday work. There is medical evidence in support of this. The condition resulted in an inability to work from November 1999. A claimant's testimony alone may establish that an injury has occurred, and disability has resulted from it. Houston Independent School District v. Harrison, 744 S.W.2d 298, 299 (Tex. App.- Houston [1st Dist.] 1987, no writ).

However, we reverse the hearing officer's determination that the date of injury was _____, as against the great weight and preponderance of the evidence. Section 408.007 states that the date of injury for an occupational disease (which includes a repetitive trauma injury) is "the date on which the employee knew or should have known that the disease may be related to the employment." Under the prior law, the time for notice in an occupational disease case began to run when it was reasonable to recognize the "nature, seriousness, and . . . the work-related nature of the disease." Texas Workers' Compensation Commission Appeal No. 92443, decided September 28, 1992. The 1989 Act, in defining "occupational disease" and in setting the date of injury, is substantially the same as the prior law. Texas Workers' Compensation Commission Appeal No. 91002, decided August 7, 1991. We note that we have declined to hold that the "knew or should have known" standard for determining either the date of injury or when notice should have been given to the employer is met only when a doctor has given the worker a concrete diagnosis and takes the worker off work. Texas Workers' Compensation Commission Appeal No. 92559, decided December 3, 1992. Likewise, knowledge of work-related pain will not always equate to knowledge of an injury. Texas Workers' Compensation Commission Appeal No. 941505, decided December 22, 1994.

In this case, the clear and unequivocal testimony of the claimant was that she knew, when she saw Dr. W in _____, that her hand pain was due to her employment. She

was told that her condition would be treated like CTS. She wore braces as a result. The claimant said that she did not report this as a workers' compensation injury only because she (mistakenly) believed that she could not qualify for workers' compensation benefits due to her part-time status. Based on this straightforward, and repeated, testimony, we find that the great weight and preponderance of the evidence is against the determination that the date of the claimant's injury is _____. We reverse and render a decision that the date the claimant first knew, or should have known, that her injury may be related to her employment was _____.

We need not remand for a determination as to whether of the subsumed exceptions to any untimely notice apply, however, because the hearing officer properly determined that the carrier was limited to its defenses set out in the first TWCC-21 that it filed, as set forth in Section 409.022(b), and that it did not have the statutory basis when the second TWCC-21 was filed to reopen the issue of compensability. Her finding of fact that the carrier knew or should have known of the claimant's previous medical treatment as of December 21, 1999, does not articulate an erroneous standard, as the carrier argues, but constitutes her factual analysis of whether the second TWCC-21 was based upon "newly discovered evidence that could not reasonably have been discovered at an earlier date."

We have held before as a general proposition that when a carrier determines to initiate payment of benefits, it has a full 60 days to investigate any possible defenses, but that, if the claim is disputed within the first seven days after written notice of injury, the carrier is bound to the defenses set out in its initial TWCC-21. Sections 409.021 and 409.022; Texas Workers' Compensation Commission Appeal No. 931131, decided January 26, 1994.

We agree that Section 409.022(b) and Texas Workers' Compensation Commission Appeal No. 931131, *supra*, acknowledge that new defenses may be raised, but only if based on "newly discovered evidence". The hearing officer was therefore faced with analyzing whether the report of Dr. W qualified as such. It has been observed in another context that workers' compensation insurance carriers have a "duty" to investigate claims. *See* Aranda v. Insurance Co. of North America, 748 S.W.2d 210, 213 (Tex. 1988). Reference to Rule 124.6(c) also makes clear that the reasons for denial of benefits should result from "actual investigation of the claim." Senator Montford, in 1 John T. Montford, ET AL., A Guide to Texas Workers' Comp Reform § 5.21 (1991), notes the objective of promptness:

> Commentary, Section 5.21 . . . As compared to the prior comp law, Section 5.21 significantly accelerates processing time for carriers either to initiate benefit payments . . . or to contest compensability. Promptness of the initial comp payment was considered an important reform objective since delays in initiating benefits under the prior law at times resulted in hardship upon the employee and/or a need (viewed from the employee's perspective) for early attorney involvement.

The interview with the claimant and the notes of the adjuster make clear that all elements needed by the carrier to raise the untimely notice defense, based upon a date of injury prior to _____, were either known to or could reasonably have been investigated prior to filing the first TWCC-21. The hearing officer determined that mere receipt of Dr. W's report could not reasonably be said to have triggered any new knowledge about such a defense. Any concern that medical documents were needed to mount a good faith defense was obviously absent when the first TWCC-21, reciting the lack of medical evidence, was filed refuting that the injury arose in the course and scope of employment. As in Texas Workers' Compensation Commission Appeal No. 931131, *supra*, the timeliness of the notice to the employer, therefore, need not be addressed because the carrier here, as in that case, had not established the grounds upon which to add to the defenses raised in the first TWCC-21.

For the reasons set forth above, we reverse and render on the date of injury, but otherwise affirm the hearing officer's decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Kathleen C. Decker
Appeals Judge

Tommy W. Lueders
Appeals Judge