APPEAL NO. 022583
FILED NOVEMBER 25, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on September 11, 2002. The hearing officer determined that (1) the date of injury is September 15, 2001; (2) the respondent (carrier) is relieved of liability under Section 409.002, because the claimant failed to notify his employer of the injury pursuant to Section 409.001, without good cause; (3) because the carrier is relieved of liability, the appellant (claimant) did not sustain a compensable repetitive trauma injury; and (4) because he did not sustain a compensable injury, the claimant did not have disability. The claimant appeals the date-of-injury and timely notice determinations on sufficiency grounds. The carrier urges affirmance. The carrier did not appeal the hearing officer's determinations that the claimant sustained a repetitive trauma injury in the course and scope of his employment and that the claimant was unable to obtain and retain employment at wages equivalent to his preinjury wage because of his injury from February 11 to May 23, 2002, and from July 10, 2002, through the date of the hearing. As such, those determinations have become final pursuant to Section 410.169.

DECISION

Reversed and rendered.

Section 408.007 provides that the date of injury for an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment. The hearing officer determined that the claimant's date of injury was September 15, 2001, approximately five weeks after the claimant began his employment with the employer. The evidence in this case does not support that date of injury. To the contrary, the evidence demonstrates that as of that date, the claimant had only begun to experience pain and discomfort in his right hand, which he attributed to his having undertaken a more physically demanding job than he had previously held. We have often cautioned that a date of injury in an occupational disease case that corresponds with the date the claimant first has pain and symptoms is frequently determined to be against the great weight of the evidence. Texas Workers' Compensation Commission Appeal No. 021373, decided July 11, 2002; Texas Workers' Compensation Commission Appeal No. 022013, decided September 27, 2002; Texas Workers' Compensation Commission Appeal No. 022101, decided October 8, 2002. In this instance, the evidence overwhelmingly establishes that the claimant first appreciated that he had an injury, as that term is defined in the 1989 Act (damage or harm to the physical structure of the body), as opposed to pain, on _____, when he saw Dr. R and was tentatively diagnosed with carpal tunnel syndrome. Accordingly, we reverse the determination that the claimant's date of injury is September 15, 2001, and render a new determination that the claimant's date of injury is _____.

The parties stipulated that the claimant reported his injury to his employer on January 24, 2002. Given our determination that the date of injury is _____, the claimant timely reported his injury to his employer pursuant to Section 409.001. Thus, we reverse the determination that the carrier is relieved of liability pursuant to Section 409.002 and render a new decision that the carrier is not relieved of liability in this instance.

The hearing officer's date-of-injury and notice determinations are reversed and a new decision rendered that the date of injury of the claimant's occupational disease is _____, and that the claimant timely reported his injury to his employer. Thus, we likewise reverse the determination that the claimant did not sustain a compensable injury and that he did not have disability and render a new decision that the claimant sustained a compensable injury and that he had disability, as a result of his compensable injury, from February 11 to May 23, 2002, and from July 10, 2002, through the date of the hearing. Accrued and unpaid benefits are to be paid in a lump sum with interest.

The true corporate name of the insurance carrier is **ST. PAUL FIRE & MARINE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MIKE MARINO
225 EAST JOHN CARPENTER FREEWAY, SUITE 1100
IRVING, TEXAS 75062.

_____
Elaine M. Chaney
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

CONCURRING OPINION:

I concur, but write separately only to point out that I am persuaded that the "should have known" clause in Section 408.007 is not a co-equal line of analyzing evidence, but is written as a "fallback" definition when evidence is lacking as to when an injured employee "knew" of both an injury and its relationship to work, or the weight of the evidence is such that it proves a sequence of events that should have made it clear

to an ordinarily (not extraordinarily) prudent person that he had physical damage or harm that more likely than not arose out of his work. Otherwise, it would be enough to define the date of injury only in terms of when a worker "should have known", a term broad enough to incorporate actual knowledge.

_____

Susan M. Kelley
Appeals Judge