Following two continuances, a contested case hearing was held on December 5, 1991, in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing officer concluded that the claimant, respondent herein, sustained a compensable repetitive trauma injury in the course and scope of her employment with her employer, (employer), during the period of late December 1990 through (date of injury); that the injury was unrelated to her earlier compensable injuries; and that good cause existed for her failure to give timely notice of her injury to her employer. The hearing officer decided that respondent is entitled to recover income and medical benefits as a result of her compensable injury. Appellant contends that the evidence does not support the hearing officer's conclusions, and that its rights were prejudiced by the granting of a continuance over its objection. Appellant requests that we reverse the hearing officer's decision and render a new decision or, in the alternative, remand the case for another hearing.

DECISION

Finding no abuse of discretion in the granting of the continuance, and finding that the hearing officer's conclusions are supported by some evidence of probative value, and are not against the great weight and preponderance of the evidence, we affirm his decision awarding workers' compensation benefits to respondent.

The first issue we consider is the continuance granted on November 14, 1991, by (hearing officer), who was presiding as hearing officer on that date. The hearing in this matter was originally set for September 4, 1991, but was continued at the request of respondent and reset for November 14, 1991, by Order dated August 30, 1991. Respondent failed to personally appear at the November 14, 1991, hearing. Her attorney, who did make an appearance, requested a continuance representing that respondent had moved to a new address and that the Commission had sent the order resetting the hearing to November 14, 1991, to respondent's old address. He acknowledged that his law firm received the reset notice and knew of respondent's new address and telephone number by October 10, 1991, but represented that the attorney who had been representing respondent had left the law firm and that it appeared that he did not notify respondent of the new hearing date. Respondent's attorney also represented that he attempted to call respondent at her new address but got no answer. Respondent's attorney acknowledged that due to an oversight at his office, respondent was not notified, and he gave no reason as to why appellant's interrogatories were not answered. He assured the hearing officer that they would be answered and stated that he did not anticipate calling any other witness besides respondent.

Appellant objected to a continuance on the grounds that no good cause for a continuance had been shown and that a continuance would be highly prejudicial to appellant because it would give respondent time to answer interrogatories which had been sent on August 7, 1991, but had not been answered at the time of the hearing. Appellant asserted that if the hearing were to proceed as scheduled, respondent would not be allowed to call any witnesses because, by not answering its interrogatories, respondent failed to identify witnesses known to have knowledge of relevant facts. Appellant requested the hearing officer to enter an order that respondent not be allowed to call witnesses at the next hearing if the continuance was granted.

The hearing officer granted a continuance, reciting in her order that there appeared to be good cause; denied appellant's request for an order excluding respondent from testifying at the next hearing; and ruled that respondent would have no other witnesses, except for herself, at the next hearing unless a compelling reason was shown to allow them

to testify at the next hearing due to her failure to show good cause for not answering appellant's interrogatories. The hearing officer also issued a written order on November 14, 1991, limiting oral witness testimony to that of respondent unless she could demonstrate compelling good cause why the order should not remain in effect.

Appellant appears to assert on appeal that the hearing officer erred in not prohibiting respondent from introducing medical records into evidence in her order of November 14, 1991, wherein she limited or excluded oral witness testimony. We disagree. Appellant requested only that respondent's witnesses be excluded at the next setting on the basis that witnesses with relevant knowledge were not identified due to the interrogatories not being answered. There was no request by appellant for exclusion of documents.

Appellant also asserts on appeal that respondent failed to show good cause for a continuance and that the continuance prejudiced its rights in that it gave respondent an opportunity to answer interrogatories that were past due and submit evidence at a later hearing that she would not have been able to introduce at the November 14, 1991, hearing. The evidence complained of are medical records. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.10(c)(3) provides that "A party may orally request a continuance during a hearing. In addition to showing good cause, the party must show that a continuance will not prejudice the rights of the parties." It has been held that the movant has the burden of proof on a motion for continuance, and that rulings on motions for continuance are within the discretion of the hearing officer and will only be overturned for abuse of discretion. Gibraltar Savings Association v. Franklin Savings Association, 617 S.W.2d 322 (Tex. Civ. App.-Austin 1991, writ ref'd n.r.e.). We are of the opinion that the hearing officer did not abuse her discretion in granting respondent's request for a continuance, after admonishing respondent's counsel, under the circumstances presented in this case.

Appellant's assertion that its rights were prejudiced by the granting of the continuance is not supported by the record. First, we cannot be certain that respondent's medical documents would have been excluded from evidence due to failure to answer interrogatories had the hearing on November 14, 1991, proceeded as scheduled. Article 8308-6.33(c) provides that discovery shall not seek information which may readily be derived from the documentary evidence described in Section (d) of that article, and that the answers need not duplicate such information. Article 8308-6.33(d) provides for the exchange of, among other things, medical records and reports. Therefore, if respondent had exchanged its medical records with appellant within the time prescribed by the Commission rules, an unanswered request for information relating to such medical records that could be derived from the records exchanged would not preclude introduction of those records into evidence. There is no indication in the record as to whether or not respondent exchanged medical records prior to the November 14, 1991, hearing. *See also* Rule 142.13(b).

Second, at the rescheduled hearing on December 5, 1991, appellant was the first party to introduce into evidence all the medical records it complains prejudiced its rights. A party may not complain of improper evidence introduced by the other side where he has introduced the same evidence or evidence of a similar character. Hughes v. State, 302 S.W.2d 747, 750 (Tex. Civ. App.-Eastland 1957, writ ref'd n.r.e.).

Third, appellant did not object to the introduction of respondent's medical records when respondent offered them into evidence at the December 5, 1991, hearing (after appellant had already introduced into evidence the same documents). Evidence which is admitted without objection cannot be complained of on appeal. Dicker v. Security Insurance Company, 474 S.W.2d 334 (Tex. Civ. App.-Waco 1971, writ ref'd n.r.e.).

Appellant's contention that the hearing officer erred in granting a continuance is overruled.

Although not complained of on appeal, we note that the hearing officer did not err in not excluding respondent's testimony in her order of November 14, 1991. *See* Texas Workers' Compensation Commission Appeal No. 91049 (Docket No. MO-00020-91-CC-1) decided November 8, 1991.

Appellant also contends that the evidence shows that respondent did not sustain a new injury in the course and scope of her employment, that the new alleged injury was caused solely by a prior injury of (prior injury), and that there was no timely notice of injury. Respondent did not allege an aggravation of a preexisting injury or condition, but instead, alleged that she sustained a new injury to her left arm which was caused by repetitive trauma at work on or about (date of injury), and that she did not realize it was a new injury until her doctor told her of the results of an EMG on April 4, 1991, the day she reported to her employer that she sustained a new injury at work.

When reviewing questions of factual sufficiency, we consider and weigh all the evidence, both in support of and contrary to the challenged finding. We should uphold the finding unless we determine that the evidence is so weak or the finding is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. *See* In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951).

The 1989 Act defines "repetitive trauma injury" as "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Article 8308-1.03(39). To recover for an occupational disease of this type, one must not only prove that repetitious, physical traumatic activities occurred on the job, but also must prove that a causal link existed between these activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. Davis v. Employer's Insurance of Wausau, 694 S.W.2d 105 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). To defeat a claim for compensation because of a preexisting injury, the carrier must show that the prior injury was the sole cause of the worker's present incapacity. Texas Employers' Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977).

Under the 1989 Act, if the injury is an occupational disease, such as a repetitive trauma injury, the employee or person acting on the employee's behalf must notify the employer of the injury not later than the 30th day after the date on which the employee knew or should have known that the injury may be related to the employment. Article 8308-5.01(a). In interpreting the occupational disease notice provision under the prior workers' compensation law, the court in Commercial Insurance Company of Newark, New Jersey v. Smith, 596 S.W.2d 661 (Tex. Civ. App.-Fort Worth 1980, writ ref'd n.r.e.), stated that the statutory time period for notice begins to run in an occupational disease case when the claimant, as a reasonable man or woman, recognizes the nature, seriousness, and the work-related nature of the disease. The Commission can determine that good cause existed for failure to give notice in a timely manner. Article 8308-5.02(2). The test for the existence of good cause is that of ordinary prudence, that is, whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances, which is ordinarily a question of fact to be determined by the trier of facts. Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948). A mistake as to the cause of an injury or disability may constitute good cause. Baca v. Transport Insurance Company, 538 S.W.2d 814 (Tex. Civ. App.-El Paso 1976, writ ref'd n.r.e.).

Respondent, who is 34 years of age, has worked for her employer for over five years doing electrical assembly work. She does wire crimping which is stripping insulation off a wire and putting a contact on the wire by hand. She said she crimps about 1,000 wires per day. She holds the wire in her left hand and crimps it with her right hand. In the early part of 1990 her wrists started giving her pain. She said she had pain in her right hand, fingers, and arm, and pain in her left hand and fingers, but that she had no problems with her left arm. (Dr. W) diagnosed carpal tunnel syndrome in April 1990 and performed a carpal tunnel release operation on her right arm in that same month, and performed a carpal tunnel release on her left arm with an epineurectomy of the median nerve in May 1990. His report of August 9, 1990, gave a ten percent permanent partial functional loss on the left hand associated with her injury and a ten percent permanent partial functional loss on the right hand associated with her injury. He released respondent to return to work with no restrictions in August 1990, and she returned to her job as a wire crimper. Respondent stated that (Dr. W) did not treat her left elbow when he treated her for injuries of (prior injury), and that he told her that her hands would hurt.

Respondent performed her job as a wire crimper until (date of injury), when, she said she went to (Dr. W) because of pain in her left wrist, inside forearm, and elbow which extended all the way to her little finger on her left hand. She said the pain started in early or mid (month), and that she also had swelling in her left hand. She said that although the symptoms she experienced were different from those she experienced in her 1990 injuries, she thought her pain was from her carpal tunnel syndrome. She said her left elbow felt like she had hit her "funny bone." Respondent testified that (Dr. W) thought she had an overuse syndrome of the left hand, treated her hand with medication to reduce the swelling, put her on work restrictions, and sent her back to work. She said at that point, she thought she had a continuation of her old injury, but that the doctor did not tell her it was related to her old injury. She said she went back to work the same day, (date of injury), and talked to (Dr. J) in the plant clinic. He was going to allow her to return to work, but her supervisors didn't think there was any work she could do with her work restrictions.

Respondent stated that (Dr. W) referred her to (Dr. G) for an EMG because he told her he thought he was treating her for the wrong thing. She said (Dr. G) performed an EMG on her left arm and that (Dr. W) reported the results to her on April 4, 1991. Respondent further testified that (Dr. W) told her on April 4th that she had an elbow injury, that it was a new injury, that she needed surgery, and gave her a letter to take to her employer. She said that after the doctor explained the results of the EMG she realized she had a new injury, and that same day, April 4, 1991, took the doctor's letter to (Dr. J) at work, and reported her injury to him. She said that after a while, when she had not heard from anyone, she called (Mr. M), the employer's workers' compensation administrator, and talked to him, and that he said he would call her back, but that he didn't. Respondent also testified that she had surgery on her left elbow on April 25, 1991, went back to work on July 8, 1991, and has been okay since her return to work.

Respondent's transcribed recorded statement, which was introduced into evidence by appellant, is generally consistent with her testimony at the hearing except that she said in this statement that her left arm started to swell up around Christmas time (1990). She also related that her doctor told her hands would be sore from time to time after the operations in 1990, that when her arm started to swell she called (Dr. W) and he told her it would keep getting sore, that her doctor realized he was treating her for the wrong thing because the swelling was not going down, and that (Dr. G) told her it was not carpal tunnel syndrome. She reiterated that she did not have a problem with her left elbow in (prior injury).

(Mr. M), the employer's workers' compensation administrator, testified that respondent called him on April 4, 1991, and reported she had a new injury and that she had information from her doctor regarding her new injury. He said she told him that the pain in her arm started about mid-(month). He also said he had experience with claims for carpal tunnel syndrome and for ulnar nerve problems. He said sometimes those conditions come together and sometimes they don't.

Medical records and reports introduced into evidence by both parties revealed that respondent underwent a carpal tunnel release on the right arm in April 1990 and a carpal tunnel release on the left arm in May 1990, and that she was released to return to work with no restrictions on August 20, 1990. The carpal tunnel releases involved the median nerve. (Dr. W) performed the operations and released her to return to work. These records also show that respondent visited (Dr. W) on (date of injury), for complaints of pain in her left hand. He felt she had overuse syndrome, prescribed treatments for decreasing swelling, and released her to return to work with restrictions. On March 15, 1991, (Dr. W) reported that respondent complained of numbness in her little finger and that her left elbow ached. He stated that an EMG would be obtained on the left ulnar nerve at the elbow to see if the numbness and ache were caused by cubital tunnel syndrome (carpal pertains to the wrist; cubital pertains to the elbow or to the ulna or forearm. Dorland's Illustrated Medical Dictionary, 26th Ed. (W. B. Saunders Company 1981). An EMG performed by (Dr. G) on March 27, 1991, revealed "entrapment neuropathy of the left ulnar nerve at the elbow level." (Dr. G) reported that respondent told him she had pain, numbness, tingling, and weakness sensation in her left upper extremity, mostly in her ring and little fingers, since October 1990. (Dr. W's) report of April 4, 1991, stated that respondent has an entrapment of the ulnar nerve and is scheduled for surgery April 25, 1991. An operative report dated April 25, 1991, confirms that (Dr. W) performed an operation on respondent on that date for "anterior transportation of ulnar nerve, for cubital tunnel syndrome on the left."

In a report dated April 30, 1991, (Dr. W) commented that respondent's "current surgical procedure and/or injuries are all related to original injury on [prior injury]." However, in a subsequent report dated May 8, 1991, he reported that:

> "She [respondent] did note today that the date of injury is [date of injury]. Dr. [G]'s letter regarding [respondent] on 3/27/91 said that the date of injury was 10/90, and she says that this was incorrect. She said the elbow was bothering her prior to the visit to my office in early April and that the elbow had begun to hurt in (date of injury). It had not been bothering her during the other problem for which she was treated in 1990. She would like this clarified on her record and I reviewed the chart with her and it appears that this is the case."

A written release to return to work with no restrictions on July 7, 1991, and reports maintained by the employer's clinic on respondent's injuries were also in evidence. The employer's clinic report shows a date of visit to the clinic by respondent on March 5, 1991, which (Dr. J) stated in an affidavit should be April 5, 1991.

At the hearing and on appeal, appellant relies on (Dr. W's) report of April 30, 1991, wherein he states that the current surgery and injuries are all related to the original injury of (prior injury), to support its contentions that no new injury was sustained by respondent on (date of injury), and that her current alleged injury was caused solely by the injury of (prior injury). On the other hand, respondent relies on her testimony that her prior injury did not

involve her left elbow and on (Dr. W's) letter of May 8, 1991, which reflects that he agreed with respondent, after reviewing her chart, that her elbow had not bothered her during her treatment in 1990. We believe that it would be reasonable for the hearing officer to infer from (Dr. W's) letter of May 8, 1991, that he had not taken into consideration the fact that respondent's left elbow had not bothered her during her treatment for her prior injuries when he commented that the current injury was related to the original injury of (prior injury). That inference, plus respondent's testimony concerning the difference in the symptoms she experienced between her prior injury and her current injury, her testimony concerning the repetitious physical activities involved in her work, the absence of complaints about left elbow pain in medical records connected with her prior injury, the full release to return to work in August 1990, and the fact that the carpal tunnel release operation in 1990 involved the median nerve of her left arm and not the ulnar nerve of her left arm as was involved in her operation for cubital tunnel syndrome in 1991, provide probative evidence from which the hearing officer could conclude that respondent sustained an injury to her arm from repetitive trauma during the period December 1990 through (date of injury), which was unrelated to her prior injury of (prior injury).

It is also our opinion that there is sufficient evidence to support the hearing officer's determination that respondent had good cause for failure to report her injury until April 4, 1991, in light of respondent's testimony that she thought her pain was associated with her carpal tunnel syndrome until she was informed of the EMG results on April 4, 1991, and was told of a new injury to her elbow.

We hold that the complained of conclusions of law are supported by some evidence of probative value, and are not so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. The hearing officer's decision is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Joe Sebesta
Appeals Judge