On January 7, 1992, a contested case hearing was held in (city), Texas, to determine whether appellant (claimant at the hearing) sustained an injury in the course and scope of her employment with her employer, or whether she had a preexisting injury or condition which caused her present problems, and whether she gave timely notice of her injury to her employer. The hearing officer, (hearing officer), determined adversely to appellant on all issues and denied her benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act).

Appellant contends that the hearing officer's Findings of Fact Nos. 7, 9, 11, and 13, and Conclusions of Law Nos. 4 through 8 are either not supported by, or are contrary to, the greater weight of the credible evidence, and that the preponderance of the evidence established her entitlement to benefits. She requests that we reverse the complained of findings and conclusions and grant her all benefits available under the law. Respondent (carrier at the hearing) contends that the hearing officer's findings and conclusions are supported by the evidence and requests that we affirm his decision.

DECISION

We affirm the hearing officer's decision and order.

In ruling on a question of factual sufficiency of the evidence, we consider and weigh all the evidence in the case and should set aside the hearing officer's decision if we conclude that the decision is so against the great weight and preponderance of the evidence as to be manifestly unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Texas Workers' Compensation Commission Appeal No. 92019 (Docket No. FW-A-136288-01-CC-FW41) decided March 9, 1992.

Appellant claims she suffered a repetitive trauma injury to her back while working for her employer, (employer), over a three-year period. The term "repetitive trauma injury" is defined in the 1989 Act 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). The term "course and scope of employment" is defined as "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 activities conducted on the premises of the employer or at other locations, but does not include certain transportation and travel activities. Article 8308-1.03(12). To defeat a claim for compensation because of a preexisting injury the insurance 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, 100 (Tex. 1977).

The employer in this case provides private duty nursing for patients in the home and in the hospital. In order to handle requests for nursing services that are made after work hours or on the weekends, the employer assigns an employee to be "on call" during those time periods. The on-call employee takes an on-call bag with them which contains, among other items, written information on nurses employed by the employer.

When appellant was hired by the employer in July 1988, she was 38 years of age and a licensed vocational nurse. She noted on her employment application that she had occasional back trouble, but also noted that she did not have any health problems "at

present" nor any condition which should be taken into consideration when placing her on assignment. Appellant explained that her back problems prior to working for the employer were occasional muscle strains which had been successfully treated by her family doctor, (Dr. A), with muscle relaxants and bed rest over a period of 15 years. She said it had probably been a couple of years prior to her employment that she had seen (Dr. A) for back problems. Appellant stated that prior to her employment with employer she had no serious back trouble, preexisting back condition, ruptured discs, or radicular pain.

Appellant did mostly clerical work as an administrative assistant for her employer. However, her duties also required her to pick up office supplies at another office once a week and to be on call some evenings and weekends. She said the office supplies came in boxes which were sometimes "quite heavy." Occasionally there were no supplies to be picked up, but on average there was one box and sometimes two or three boxes to be picked up she said. The boxes contained various items including forms, brochures, and promotional items. Appellant estimated that a small amount of supplies would weigh about 5 pounds, but at times, one box would weigh up to 30 pounds. She had to drive to the other office, carry the boxes from the other office to her car in the parking lot, and then after returning to her office, carry the boxes from her car to her office. If only one box was involved in this once a week task, it would take her about two minutes to carry it to her car and then another two minutes to carry it from her car to her office.

During her first year at work, appellant said she rotated on-call duty with (Ms. N), a co-worker, which meant being on call every other night and every other weekend. During that period, appellant said the on-call bag contained two "kardexes" made of metal and cardboard, two large three-ring binders, and one small three-ring binder. She estimated that the on-call bag with contents weighed 17 or 18 pounds. The bag itself is made of canvas and is 18" high, 14" long, and 8" wide. It has two handles for carrying. When she was on call she would carry the on-call bag from her office to her car, which would take a minute or two, and then from her car to her house, which would take about one minute. This procedure would be reversed when she went into work with the on-call bag. Also, if she left her house during an on-call weekend, she would take the on-call bag with her in her car.

In December 1988, appellant said she started seeing (Dr. B), a chiropractor, for lower back pain and that his treatment helped her get back to work within two or three days. She stated this was the first time she had seen a chiropractor. She said she did not know what caused her pain and assumed "it was more of the same." She further stated that she saw (Dr. B) regularly for a while, that he then put her on a once-a-month schedule, but that she only visited him once every three or four months. Appellant said her lower back pain "went away," but when it started up again in about three weeks she went to see (Dr. A).

After her first year of work, appellant said the weight of the on-call bag was increased to 22 or 23 pounds with the addition of two more kardexes, and that the bag was "extremely heavy." She also said that after the first year she was only required to be on call one weekend and four nights per month; that she always took more on-call duty than was required; but that she never was on call during her last two years of work as much as she had been in her first year. Appellant further stated that about two or three weeks before she got sick and was required to be off work (date of injury), two kardexes were removed from the on-call bag so that the weight of the bag decreased to about 17 pounds.

On (date of injury), appellant said she went to see (Dr. A) for very severe pain down her left leg which she had not had before. She stated she was not having any low back pain at this time. (Dr. A) treated her with pain medication and stretching exercises. On a follow-up visit on June 18, 1991, she said (Dr. A) gave her an "off work until further notice" note

and told her to go home to bed. Instead of doing that, appellant said she gave the note to her supervisor, (Ms. D), and arranged to work half days. On June 21st, an electromyographic study (EMG) was performed by (Dr. L). On June 25, 1991, appellant said (Dr. A) got upset when she told him about working half days and that the doctor gave her another off work note and told her to stay in bed for two weeks. She said (Dr. A) did not have the results of the EMG at this time and that she could not remember what he told her about the EMG. She said she took this second note to her supervisor and then went home. She also testified that she didn't tell her supervisor "how it happened" because she didn't know "how that had happened" at that time. On July 10th, appellant had a magnetic resonance imaging (MRI) done and on (prior injury) she said (Dr. A) told her it showed two ruptured discs. She said that she had only one MRI performed and that prior to the MRI she knew she had a medical problem, but did not know how serious it was until she got the MRI results. She further testified that upon getting the MRI results she went home and "began to put it all together," asked (Dr. B) and (Dr. A) for their opinions, that both doctors told her "it" was from "repetitive trauma," and that (Dr. A) told her he felt like "it" was work related. Appellant said that after getting the MRI results and securing her doctor's opinions she "felt like this is the repetitive motion that I did week in and week out, day in and day out." She also said that she did not have the same symptoms she experienced in (date of injury) prior to her employment with employer. She said she did not realize she had sustained a work-related injury prior to (prior injury), the day she was told of the MRI results.

Appellant said she stopped working about June 24th when (Dr. A) prescribed bed rest and that she was terminated from her employment sometime toward the end of July 1991. She agreed that she did not notify her employer of her alleged on-the-job injury from repetitious trauma until July 31, 1991; which is the date of her letter to her employer which gave notice of a work-related injury to her back occurring over a period of time from carrying boxes and the on-call bag, and which stated she was filing a workers' compensation claim that same day. Subsequently, she saw (Dr. H) whom she said "complied with what (Dr. A) had said."

Medical reports and records were introduced into evidence by appellant. (Dr. A's) record of appellant's (date of injury) examination states, "This lady has come in again grossly overweight, complaining of soreness to the back, this has been going on since yesterday, she had some stiffness off and on for some time. Initially went down to left hip and down to knee, did not go below the knee and she had no weakness or numbness." The notation concerning complaints of back soreness contradicts appellant's testimony that she had only left leg pain at this time. He diagnosed a "definite somatic dysfunction," recommended swimming or biking, and stretching to help rehabilitate her back, and prescribed pain medication. On June 18th, he examined her for continuing pain localized to her leg and low back, took x-rays which revealed "narrowing of L5, S1," reported that these findings were consistent with a possible herniated disc, concluded that an EMG should be performed, and advised appellant to stay off work until further notice.

An EMG and nerve conduction study were done by (Dr. L) who gave his impression of the study in a report dated June 21, 1991, as "abnormal, showing moderate degree of acute radicular process involving the left S1 nerve root." (Dr. A's) records reveal that he again saw appellant on June 25, 1991, at which time he noted that the EMG showed long-term changes consistent with dyscogenic or redicular disease and advised appellant to stay totally off work. The June 25th record contradicts appellant's testimony that (Dr. A) did not have the results of her EMG on that date. There was also a follow-up visit on July 6, 1991, for "severe lumbar strain, possible herniated disc" for which an MRI was scheduled. The doctor who performed the MRI examination of appellant's lumbar spine on June 10, 1991, reported his impression as degenerative changes with herniated nucleus pulposus at L3,

centrally and on the right, and a prominent bulge at the L4 disc. (Dr. A) noted the MRI results in his record of appellant's follow-up visit on June 12th, and also noted that she was improving, but that he would keep her on therapy for two weeks and expected to start her working half days at that time. (Dr. A) also noted that appellant was continuing to improve in his reports of July 26 and August 23, 1991. In his two Initial Medical Reports to the Commission, dated September 2 and 3, 1991, (Dr. A) diagnosed "HNP" [herniated nucleus pulposus] and "LS strain." His clinical assessment was "definite somatic dysfunction," and his prognosis was "unknown at this time." Nowhere in his reports does (Dr. A) relate appellant's herniated disc or back strain to her work, nor do the reports reflect that appellant mentioned her work activities as a possible cause of her back condition.

(Dr. B's) undated Initial Medical Report to the Commission showed a date of visit of "6-5-91;" gave a diagnosis using ICD-9 codes which translate to lumbar sprain/strain, sciatica, thoracic and lumbar vertebra closed displacement, and myalgia and myositis, and recited in the history portion of the report that "the patient states that there was not a specific incidence that produced the pain" and "due to the patient's lifting duties at work in all probability it is work related." (Dr. B) also noted "MRI showing herniation and a prominent bulge." Appellant testified that she gave (Dr. B) the medical report form to fill out in August 1991 after she had her MRI, although she said she probably saw him both before and after the MRI was performed and may have visited him on June 5, 1991, as shown in the report. She also testified that (Dr. B) told her "it" was from repetitive trauma after her MRI was performed in July, but before she filed her workers' compensation claim.

(Dr. H)' Initial Medical Report to the Commission dated December 15, 1991, showed a diagnosis of "sacroiliac strain" and "herniated disc." The history portion of his report related that appellant was injured at work from repetitive lifting during the years 1988 through 1991.

(Ms. N) and (Ms. D) testified for respondent. (Ms. N) said that her job was basically the same as appellant's job was; that she and appellant began work together; that appellant complained of back pain off and on from when they first started work; that appellant complained of leg pain toward the end of her employment; and that the employer purchased a chair that better fit appellant's back. She also testified that she weighed the on-call bag with its contents and found it to weigh 14 pounds; that the contents of the on-call bag had been the same except for a three-month period; that she and appellant had rotated on-call duty when they started work, but that for the last eight or nine months of appellant's employment, appellant had on-call duty only one night a week and one weekend a month.

(Ms. D), who was appellant's supervisor, testified that over the period of time appellant worked for the employer, she complained about back and leg pain; that a chair was purchased to make her more comfortable; that appellant brought her an off-work note from (Dr. A) the second time she saw that doctor; and that appellant last worked at the office on June 25, 1991, but the employer had extended her some vacation time after that. This witness also said she had picked up the office supplies before and that she did not think one supply box weighed 20 to 30 pounds. She thought that all the boxes together could weigh that much.

The findings and conclusions complained of on appeal are:

Finding of Fact 7: That the claimant carried the on call bag, weighing about 14 pounds, for approximately one minute at a time, twice a day, on three to four days a week from July 1988 to July 1989; and since that time, she carried the bag about one minute at a time, twice a day, one day per week; and twice on one weekend per month.

Finding of Fact 9: That frequently throughout her employment by (employer), claimant complained about her back and leg pain.

Finding of Fact 11: That claimant's back problem was not caused nor aggravated by the carrying of the on call bag or office supplies.

Finding of Fact 13: That claimant knew, or should have known, whether her back problems were caused by her on-the-job duties as early as June 5, 1991.

Conclusion of Law 4: That claimant has not proven by a preponderance of the evidence that her back injury was caused by or aggravated by carrying an on call bag and office supplies as a part of her employment duties.

Conclusion of Law 5: That the claimant has not proven by a preponderance of the evidence that her back injury is within the course and scope of her employment.

Conclusion of Law 6: That claimant's injury is the result of a pre-existing injury or condition which has caused her present problem.

Conclusion of Law 7: That claimant did not notify the employer of her alleged injury within 30 days, after she knew or should have known, that the injury may be related to her employment.

Conclusion of Law 8: That claimant is not entitled to any benefits as a result of the alleged injury on (date of injury).

The Texas courts have stated the element of causation in repetitive trauma cases as follows:

"To recover for an injury or disease of this type, one must not only prove that repetitious physical traumatic activities occurred on the job, but must also show that a causal link existed between the traumatic activity and the incapacity; that is, the disease must be inherent in the type of employment as compared with employment generally. (Citation omitted.)" Texas Employers Insurance Association v. Ramirez, 770 S.W.2d 896, 899 (Tex. App.-Corpus Christi 1989, writ denied); Davis v. Employers Insurance of Wausau, 694 S.W.2d 105, 107 (Tex. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). *And see* Texas Workers' Compensation Commission Appeal No. 91026 (Docket No. EP-00003-91-CC-1) decided October 18, 1991; Texas Workers' Compensation Commission Appeal No. 91113 (Docket No. HO-A091752/01-CC-BC41) decided January 27, 1992; Texas Workers' Compensation Commission Appeal No. 91118 (Docket No. AM-A110837-01-CC-LB41) decided January 31, 1992; and, Texas Workers' Compensation Commission Appeal No. 91124 (Docket No. TY-191-131172-01-CC-TY41) decided February 12, 1992.

The hearing officer is the trier of fact in a 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. Article 8308-6.34(e) and (g). As the trier of fact, the hearing officer resolves conflicts and consistencies in the evidence. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). He or she is privileged to believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer is not bound to accept the testimony of the claimant at face value. Garza, *supra*. As an interested party, the claimant's testimony only raises an issue of fact for determination by the trier of fact. Escamilla v. Liberty Mutual Insurance Company, 499 S.W.2d 758 (Tex. Civ. App.-Amarillo, no writ). As the trier of fact, the hearing officer also judges the weight to be given expert medical testimony, and resolves conflicts and inconsistencies in the testimony of expert medical witnesses. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ); Atkinson v. United States Fidelity Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.).

Given the evidence of the infrequency of the work activities alleged to have caused appellant's claimed repetitive trauma injury, the very short duration of those activities when they occurred, and the modest lifting requirements involved in those activities, together with appellant's history of back problems predating her employment by 15 years which continued through her employment, and the absence of any mention of a work-related cause of injury in the records of the doctor who examined and treated her for complaints of back problems before, during, and after her employment with employer, we find that there was sufficient evidence to support Findings of Fact 7, 9, and 11, and Conclusions of Law 4, 5, 6, and 8. And, after reviewing all of the evidence, we find that those findings and conclusions are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, *supra*. It is apparent that the hearing officer assigned little, if any, weight to the medical reports of (Dr. B) and (Dr. H) as they relate to whether appellant's herniated disc was caused by her work activities. We do not find his assessment of these reports to be unwarranted when viewed in the light of other evidence of record, the fact that references to causation are found in the "history" portion of those reports, and in the absence of any mention of a work-related cause of injury in (Dr. A's) records and reports. As the trier of fact, the hearing officer was entitled to judge the weight to be given those medical reports. Campos, *supra*.

If an injury is an occupational disease, which includes a repetitive trauma injury, the employee or a 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. It is apparent to us that Finding of Fact 13 (knew or should have known on June 5) and Conclusion of Law 7 (did not notify employer within 30 days) are based on (Dr. B's) undated Initial Medical Report to the Commission which shows a "date of visit" of "6-5-91" and recites in the history section "due to the patient's lifting duties at work in all probability it is work related." Apparently, the hearing officer inferred from this report that (Dr. B) told appellant that her injury was work related on June 5th. While such an inference is possible, it does not seem to consider the fact that (Dr. B) refers in his report to the MRI which was not performed until (date of injury). In other words, in all likelihood, (Dr. B's) report was not prepared until on or after (date of injury) (notice of injury was given to employer on July 31st). But the fact that the report was made subsequent to the date of visit does not, in and of itself, preclude an inference that (Dr. B) advised appellant as to what is stated in the report on June 5, 1991, from the recited date of visit, the notation as to causation, and appellant's testimony that she visited the doctor both before and after her MRI and could have visited the doctor on June 5th. As the trier of fact, the hearing officer is the judge not only of the facts proved but of the inferences to be drawn from the facts, provided the inferences are not unreasonable. *See* Gonzales v. Texas Employers Insurance Association, 419 S.W.2d 203 (Tex. Civ. App.-Austin 1967, no

writ). We find that Finding of Fact 13 and Conclusion of Law 7 are not so against the great weight and preponderance of the evidence as to be manifestly unjust.

The concept that the hearing officer, as the trier of fact, might have arrived at findings different from those he made does not justify the abrogation of the determinations of the hearing officer concluded from the evidence to be the most reasonable. Escamilla, *supra*. Viewed in its entirety, the evidence does not reveal the hearing officer's findings and conclusions to be so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

The hearing officer's decision and order are 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