APPEAL NO. 000739

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 March 14, 2000. With regard to the only issue before him, the hearing officer determined that respondent (claimant) was a full-time student under the auspices of the Texas Rehabilitation Commission (TRC) in a vocational rehabilitation program and that claimant is entitled to supplemental income benefits (SIBs) for the fourth quarter from November 11, 1999, through February 9, 2000. Appellant (carrier) appealed, contending, basically, that claimant was obligated to look for employment commensurate with her ability to work every week of the qualifying period, including the 18 days prior to the beginning of classes, and that claimant=s unemployment was not a direct result of the impairment from her compensable injury. Carrier requests that we reverse the hearing officer=s decision and render a decision in its favor. Claimant responded, urging affirmance.

DECISION

Affirmed.

Many of the background facts are not in dispute. Claimant had been employed as a machine operator by the employer. Claimant described how she sustained a cervical injury pushing a large pallet on _____. It appears undisputed that claimant has objectively diagnosed cervical disc herniations at C4-5 and C5-6. Claimant testified that she was not considered for spinal surgery because it would require a multi-level disc fusion. Claimant also testified regarding her ongoing medical care and ongoing neck and shoulder pain. Claimant admits that she has some ability to work (at what level is in dispute). Claimant testified that at one time she attempted to return to work with the employer in a light-duty position in 1997 but sustained muscle spasms and was terminated. The parties stipulated that claimant sustained a compensable injury on _____; that claimant has an impairment rating (IR) of 15% or greater; and that impairment income benefits (IIBs) have not been commuted. The hearing officer made an unappealed finding that the qualifying period for the fourth quarter ran from July 29 through October 26, 1999. The issues here are whether claimant met the good faith effort requirements of Tex. W.C. Comm=n, 28 TEX. ADMIN. CODE ' 130.102 (Rule 130.102) and the direct result requirements of Section 408.142(a)(2).

Sections 408.142(a) and 408.143 provide that an employee is entitled to SIBs when the IIBs period expires if the employee has: (1) an IR of at least 15%; (2) not returned to work or has earned less than 80% of the employee=s average weekly wage as a direct result of the impairment; (3) not elected to commute a portion of the IIBs; and (4) made a good faith effort to obtain employment commensurate with his or her ability to work. At issue in this case are subsections (2) and (4), whether claimant=s unemployment was a direct result of her impairment and whether claimant made the requisite good faith effort to obtain employment commensurate with her ability to work.

The standard of what constitutes a good faith effort to obtain employment in SIBs cases was specifically defined and addressed after January 31, 1999, in Rule 130.102(d). Rule

130.102(d)(2) (the version then in effect) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee=s ability to work if the employee:

> (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the [TRC] during the qualifying period[.]

At some point (apparently in 1998), claimant was referred to the TRC with a recommendation for appropriate services in accordance with Section 408.150(a), the section in effect through August 31, 1999. We note that Section 408.150(b) provides that an employee who refuses services or refuses to cooperate with services provided by the TRC Aloses entitlement to [SIBs].@ In evidence is correspondence dated September 15, 1999, from the TRC that claimant Ais currently enrolled in and is making satisfactory progress and is participating full time in her vocational rehabilitation plan with [TRC].@ Claimant is apparently pursuing a teaching certification program at Tyler Junior College (the college). In evidence is a letter from the college=s dean of admissions stating:

> This is to verify that [claimant] enrolled in and completed (course) upon the recommendation of a faculty advisor. She was advised to try to find a KINE course so that the instructor would assist her with her limited abilities to successfully complete the course. This course is a degree requirement at (college) and at most major universities.

(course) is a Tae Kwon Do (karate) class, a part of the college=s physical exercise program.

Unlike a similar situation in Texas Workers= Compensation Commission Appeal No. 000677, decided May 17, 2000, there is no dispute that claimant was enrolled in a full-time TRC-sponsored program taking 13 credit hours. Although not specifically referenced at the CCH, we do note that in Texas Workers= Compensation Commission Appeal No. 992564, decided December 31, 1999 (Unpublished), the Appeals Panel affirmed the hearing officer=s decision that this claimant was not entitled to SIBs for the third compensable quarter, where claimant sought SIBs based on Rule 130.102(d)(2) because claimant Awas not enrolled in, and did not satisfactorily participate in, a full-time vocational rehabilitation program sponsored by TRC in the qualifying period.@ Claimant explained at the CCH that she had withdrawn from the second summer session at the college because of an accident involving her son. The hearing officer in Appeal No. 992564 also found, and the Appeals Panel affirmed, that claimant=s Aunemployment in the qualifying period was not a direct result of her impairment.@

In this case, the qualifying period for the fourth quarter began on July 29, 1999, and the fall term classes at the college began August 16, 1999. Claimant testified that during this period she enrolled for the fall term, sought Afinancing,@ bought her books and supplies, met with the TRC, met with her (school) counselor, obtained certain approvals, met with her counselor again, did a change of schedule and a book exchange, and inquired at an independent school district about a job as a teacher=s aide. Carrier contended at the CCH,

and on appeal, that claimant had not looked for work every week of the qualifying period that she was not actively attending school, citing Rule 130.102(e). Rule 130.102(d) and (e) specify how the good faith effort requirement of the 1989 Act may be met. If an injured employee meets the good faith requirements of one of those sections then the employee has satisfied the good faith requirement and does not have to meet the requirement of the other section. In this case, claimant met the requirement of Rule 130.102(d)(2) of having been enrolled, and satisfactorily participated, in a full-time vocational rehabilitation program sponsored by the TRC. As we noted in Appeal No. 000677, *supra*, comments on the proposed Rule 130.102(d)(2) were to the effect that the concept was that it would Apreclude an insurance carrier from requiring an injured employee to participate in a vocational rehabilitation program provided by TRC . . . and then expect the injured employee to continue to seek employment commensurate with the injured employee=s ability over and above the rehabilitation plan requirements.@ 24 Tex. Reg. 10339 at 10343. The TRC has certified claimant was enrolled in and was participating in the rehabilitation plan during the qualifying period. Claimant=s uncontroverted testimony was that she was meeting with her counselor and the TRC, registering, etc. during this time frame. We affirm the hearing officer=s finding that claimant Awas either in the process of enrolling or was attending college as a full-time student under the auspices of the [TRC] in a vocational rehabilitation program.@

The hearing officer, in his discussion, commented:

> The most troubling aspect of this case involves the other prong of [SIBs] eligibility - - the so-called Adirect result@ criterion. Although there was much testimony concerning the Claimant=s restrictions, the Claimant stated on more than one occasion that she felt that she could have returned to her pre injury occupation, but was Afired anyway@. This would tend to indicate that the Claimant=s exclusion from her pre-injury job and her subsequent unemployment was the result of something other than the impairment from her compensable injury. In this particular instance, however, the medical evidence tends to override what appears to be the Claimant=s overly sanguine opinion on the subject, and indicates that the Claimant could not realistically expect to return to her pre-injury duties with her impairments that resulted from the compensable injury. That conclusion is supported by other portions of the Claimant=s testimony regarding her continuous pain and continuing treatments.

Regarding claimant=s statement that she could return to her preinjury job, on cross-examination, claimant was asked if she was Aphysically capable of working@ and she replied:

> A I was physically capable of working at [employer].
>
> Q Okay.
>
> A But I got fired anyway.

Q I am not asking you about your employment at [employer]. I=m asking you right now, as we sit here today and the early part of August of >99, you - -

A I - - I would like to be physically capable of working and doing a lot of things that my mind says I could do. I=m just going by what the doctor tell me.

In evidence are a number of reports regarding claimant=s restrictions. In a report dated April 21, 1999, Dr. F, claimant=s treating doctor, stated that claimant Ain essence is unable to physically work in even a light duty status as we tried to get her back into on numerous occasions [perhaps referring to claimant=s efforts to return to light-duty in 1997]. Fortunately, she is now retraining for another job, is going to school and should be able to reenter the employment force in a level which would not likely cause her re-injury.@ Dr. F states his Atotal disagreement@ with an independent medical examination and functional capacity evaluation which indicate a medium lifting capacity. Carrier offered into evidence a videotape of claimant in one of her (course) (karate) classes in September 1999. The video shows claimant participating in the exercise class where she is stretching, punching, kicking, doing situps, and completing various back extension exercises. Carrier argues this shows an ability to work and that claimant=s unemployment is not a direct result of her impairment. First, we would note that claimant was referred to the TRC by the Texas Workers= Compensation Commission and in evidence is a letter from the dean of admissions stating that this course is a degree requirement. It could be argued that had claimant refused to take the class, or a similar physical education class, she would be refusing to cooperate with services provided by the TRC and would lose entitlement to SIBs under Section 408.150(b). Under carrier=s argument, claimant would lose entitlement if she took the class because it showed that her unemployment was not a direct result of the impairment and she would lose entitlement if she did not take the class because she was not cooperating with the TRC program. We have early on said that we would not place claimant on the horns of such a dilemma. Texas Workers= Compensation Commission Appeal No. 93936, decided November 29, 1993.

Secondly, claimant testified that she discussed this matter with the TRC, her counselor, and the course instructor and that the college did not have yoga or At=ai chi@ classes which would qualify for her degree program. Claimant testified that she talked with the instructor and Ahe was aware that there would be some times when I could not do what the rest of the class was doing.@ That testimony is supported by the dean of admission=s letter that Athe instructor would assist her with her limited abilities to successfully complete the course.@ The video of claimant participating in the exercise class was shown to Dr. F, who, in a report dated November 23, 1999, commented:

> As you are aware, I did review a video in which [claimant] is participating in karate activities. After review of your information, I would suggest you review the previous discogram which was presented by [Dr. Ro], as well as a subsequent surgical consult by [Dr. R]. It is obvious that [claimant] has some significant disc problems. I also discussed this with [Dr. S] and the likelihood that she could continue to be employed with these underlying factors would be

> highly probable in resulting re-injury. Inasmuch as the fact she elected on her own to participate in a contact class such as karate was clearly against all reasonable medical advise. Nonetheless, the underlying problem still has not changed by the fact that she chose on her own to participate in a contact sport does not negate the fact that her underlying condition could present her with serious, life-threatening, limb-threatening paralysis or even death type injuries.

Finally, claimant contends that her restrictions dealt with lifting restrictions and overhead work and that she did neither in the karate class.

In any event, all of this information was made available to the hearing officer and the hearing officer determined that claimant=s unemployment was a direct result of her impairment. We decline to say that the hearing officer=s decision on direct result is wrong as a matter of law and we will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion for that of the hearing officer.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer=s determinations unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or unjust. In re King=s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and, consequently, the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

DISSENTING OPINION:

I dissent and would reverse and render a new decision that the finding that claimant=s unemployment "was a direct result of the impairment from her compensable injury" is so against the great weight of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King=s Estate, 150 Tex. 662, 244 S.W.2d 660

(1951). While enrollment and satisfactory participation in a full-time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission during the qualifying period may satisfy the statutory requirement (Section 408.142(a)(4)) that an employee seeking supplemental income benefits (SIBs) has attempted in good faith to obtain employment commensurate with the employee=s ability to work, it does not satisfy the statutory requirement (Section 408.142(a)(2)) that the employee=s unemployment or underemployment be a direct result of the employee=s impairment.

The Appeals Panel has long held that the "good faith" and "direct result" statutory requirements for entitlement to SIBs are separate and distinct and that the direct result criterion was not intended as another method to evaluate the job search requirement. *See, e.g.,* Texas Workers= Compensation Commission Appeal No. 960165, decided March 7, 1996 (citing Texas Workers= Compensation Commission Appeal No. 950849, decided July 7, 1995). We have also consistently held that a claimant need not establish that the impairment is the only cause of the unemployment or underemployment in order to satisfy the direct result criterion and that a claimant need only establish that the impairment is a cause of the unemployment or underemployment. *See, e.g.,* Texas Workers= Compensation Commission Appeal No. 960905, decided June 25, 1996. The Appeals Panel has also many times stated that a finding that a claimant=s unemployment or underemployment is a direct result of the impairment is sufficiently supported by evidence that an injured employee sustained a serious injury with lasting effects and could not reasonably perform the type of work being done at the time of the injury. *See, e.g.,* Texas Workers= Compensation Commission Appeal No. 960028, decided February 15, 1996.

Except for listing the carrier=s videotape as an exhibit, the hearing officer nowhere in his decision mentions this evidence. It is difficult to understand how the hearing officer, if indeed he viewed the videotape of claimant=s physical activities in the karate class, could find that she had any impairment whatsoever from her cervical spine injury which directly resulted in her unemployment or underemployment. This is particularly so when even claimant herself acknowledged that she could return to her former employment but for the fact that she was "fired." Notwithstanding restrictions and stated concerns of doctors in her medical records, claimant clearly demonstrated in her Karate class that she has no cervical spine impairment whatsoever to which her unemployment could be directly related. In the videotape, claimant is seen to vigorously and repeatedly move her head from side to side, repeatedly bend forward and touch her toes, lay on her back and arch her back up so that she is supporting her upper body weight with the back of her head and neck, and so forth. Claimant=s multiple exercise activities showed her repeatedly flexing and extending her neck, moving her neck from side to side, and bearing weight with her head and neck, all with no visible indication whatsoever of any discomfort. In her response to the carrier=s appeal, claimant asserts that the carrier excised portions of the videotape showing her walking and evidencing pain.

While the Appeals Panel accords appropriate deference to a hearing officer in his or her fact finding role, as we are instructed to do by Section 410.165(a) which provides that the hearing officer is the sole judge of the weight and credibility of the evidence, the Appeals Panel is also not to function as a mere rubber stamp and turn a blind eye towards the overwhelming evidence. While it would normally be appropriate to remand this case to require

the hearing officer to review and comment on the videotape, in my opinion, we should render a decision that, based on that videotape, the finding that claimant=s unemployment was a direct result of the impairment from her compensable injury is clearly wrong, manifestly unjust, and against the great weight of the evidence.

Philip F. O=Neill
Appeals Judge