APPEAL NO. 981710

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 January 5, 1998, in (city), Texas, with (hearing officer) presiding as hearing officer. With regard to the issues at the CCH, she determined that the respondent (claimant) is entitled to supplemental income benefits (SIBS) for the seventh quarter. The appellant (carrier) appealed and sought a reversal of the decision. We reversed the hearing officer's determinations that, during the filing period for the seventh quarter of SIBS (filing period), the claimant's unemployment was a direct result of his impairment and he attempted in good faith to obtain employment commensurate with his ability to work. Texas Workers' Compensation Commission Appeal No. 980406, decided April 13, 1998. We remanded the case to the hearing officer for further consideration regarding the direct result and good faith SIBS criteria. We directed her to reconsider the claimant's refusal of two offers of employment from (employer) during the filing period.

A CCH on remand was held on May 11, 1998, and the hearing officer issued a decision on remand. She determined that the claimant's unemployment during the filing period was a direct result of his impairment, that he attempted in good faith to obtain employment commensurate with his ability to work and that he is entitled to SIBS for the seventh quarter. The carrier appeals from the decision on remand, seeks its reversal and argues it is not supported by the evidence. The claimant does not respond.

DECISION

We reverse and render.

The parties stipulated that the claimant sustained a compensable left foot injury on (date of injury), that his impairment rating is 15% or more and that the filing period was from May 8 to August 7, 1997. The disputed SIBS criteria are whether the employee, the claimant, during the filing period, had "not returned to work or has returned to work earning less than 80% of the employee's average weekly wage as a direct result of the employee's impairment" and "attempted in good faith to obtain employment commensurate with the employee's ability to work." Sections 408.142(a)(2) and 408.142(a)(4); *see also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.104(a) (Rule 130.104(a)). In our decision remanding the case, we affirmed the hearing officer's finding of fact that, during the filing period, "the Claimant's physical work ability was

extremely minimal ('limited sedentary work') in that he had to be sitting and could not move around, and if he worked more than two to four hours, his left foot had to be elevated for an hour or two to decrease swelling."

The employer's manager, (Ms. W), testified at the CCH that the employer is a temporary employment service which provides temporary employees to its customers, as and when the employees are needed. She said that the claimant was familiar with the process of obtaining an assignment with the employer's customers. She said that when customers needed employees he and other employees like him were contacted by telephone each morning they were not already assigned to work at a customer's facility. When they were called, they had to accept or decline the opportunity to work that day. Employees were paid for the time they worked for a customer and received repeated assignments if they performed satisfactorily. She said that when an employee is called, he either had to commit to showing up and working for a customer that day or decline the offer to work, in which case other employees were called.

Ms. W stated the claimant was offered employment on two different occasions, with two different customers and declined both offers. She said that on June 24, 1997, she offered him a temporary position with (customer 1) and he refused it, claiming it was too far from his home and not within his physical restrictions. On June 25, 1997, he appeared in the employer's office, wanting to accept the position with customer 1. Ms. W explained to him that the position was filled shortly after the claimant declined it the day before because she called other employees who were willing to work. She placed the claimant as an alternate employee for customer 1 but it did not need him prior to the expiration of the filing period. Ms. W said she called the claimant again on July 22, 1997, and offered him a position with (customer 2), which he also declined. Ms. W swore she was familiar with the restrictions (Dr. K) placed on the claimant and both customer 1 and customer 2 would have accommodated him.

The claimant testified that during the filing period his treating doctor, Dr. K, had not released him to return to work. He said he sought employment with 11 potential employers during the filing period because: "I knew if I didn't look for work the insurance company would turn me down." He said he did not refuse any job offers made by the employer. He said he tried to accept the June 24, 1997, offer on June 25, 1997. He said he received an offer from the employer on July 22, 1997, but informed it he could not accept the offer because he had an appointment with Dr. K. However, the medical reports in the record do not reflect an appointment with Dr. K on July 22, 1997.

In remanding the case, we voiced our concerns that the hearing officer shifted the burden of proof to the carrier and required it to show that the employer made bona fide offers of employment to the claimant. In response to our instructions, the hearing officer writes in the decision on remand:

> Regarding the good faith effort criterion, there has been no shifting of the burden of proof from the Claimant to the Carrier. The only issue is [SIBS], and the Claimant clearly has the burden of proof. There was no issue of *bona fide* offer litigated, but to the extent the Carrier emphasized a job offer made by the employer, I pointed out–and would do so again–how the offer did not even approach being *bona fide*. The Claimant testified that he did not reject either of the two job offers at issue made by the Employer and, in fact, that he attempted to accept the one made July 22, 1997. To the extent an offer was made to the Claimant on June 24, 1997, he did not accept it on June 24, 1997, but he went to the employer's office on June 25, 1997 with the intent of accepting it. His action or inaction on June 24, 1997 does not, in my opinion, militate against a finding herein of a good faith effort. This, after all, was not an offer that followed a contact made by the Claimant. It was a phone call that came to the Claimant unexpectedly and required the Claimant, without the benefit of a complete job description, to make a decision within a matter of minutes–now or never.

The contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). We will reverse the hearing officer's determinations if they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Whether an employee's unemployment during a SIBS filing period was a direct result of his impairment from the compensable injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. Good faith is an intangible and abstract quality with no technical meaning or statutory definition. It encompasses, among other things, an honest belief,

the absence of malice and the absence of design to defraud or to seek an unconscionable advantage. An individual's personal good faith is a concept of one's own mind and inner spirit and, therefore, may not be determined by one's protestations alone. Texas Workers' Compensation Commission Appeal No. 950364, decided April 26, 1995. Generally, an employee who seeks employment merely to go through the motions to qualify for SIBS is not attempting in good faith to obtain employment commensurate with his ability to work. *Id*.

However, an employee's refusal to accept an offer of employment made to him during a SIBS filing period is a very important consideration in determining whether an employee's unemployment or underemployment was a direct result of his impairment. Texas Workers' Compensation Commission Appeal No. 970276, decided March 31, 1997. That refusal is also a very important consideration in determining whether he attempted in good faith to obtain employment commensurate with his ability to work. Texas Workers' Compensation Commission Appeal No. 980025, decided February 19, 1998. As we enunciated in our decision remanding the case to the hearing officer:

> Refusing a job offer during a filing period is strong evidence of a lack of good faith. An employee's unwillingness to attempt to perform the duties required of a position offered to him and held out to be commensurate with his ability also is evidence that he was not attempting to obtain employment commensurate with his ability to work. [A] potential offer of employment does not have to meet all the standards set forth in Rule 129.5(e) to have a profound effect on determining whether his unemployment was a direct result of his impairment and whether he attempted in good faith to obtain employment commensurate with his ability to work. Appeal No. 980406, *supra.*

The hearing officer, in her decision on remand, does not indicate the claimant's refusal of the job offers is an important consideration. She discounts the claimant's actions on June 24, 1997, because he should not have had to "make a decision within a matter of minutes" and because the employer's offer was "not an offer that followed a contact made by the Claimant." Employees, whether they receive an offer of employment from a temporary employment provider or directly from an employer, may need to make quick employment decisions in order to take advantage of employment opportunities. The importance of refusing an offer of employment is not diminished

because it was not made by an employer the claimant initiated a contact with. Under the facts of this case, where the claimant worked for a temporary employment company prior to his injury, admitted he conducted his job search merely to satisfy the statutory and regulatory SIBS criteria and turned down its offer of temporary employment without attempting to perform the tasks it entailed, the determinations that his unemployment was a direct result of his impairment and that he attempted in good faith to obtain employment commensurate with his ability to work are not supported by the evidence. Appeal No. 970276, *supra*; Appeal No. 980025, *supra.* Those determinations are so against the great weight and preponderance of the evidence so as to be clearly wrong or manifestly unjust. Cain, *supra.*

We reverse the good faith and direct result determinations and the decision that the claimant is entitled to SIBS for the seventh quarter. We render a new decision that the claimant is not entitled to SIBS for the seventh quarter.

Christopher L. Rhodes

Appeals Judge

CONCUR:

Robert W. Potts

Appeals Judge

Alan C. Ernst

Appeals Judge