APPEAL NO. 990644

This appeal is considered in accordance with the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 1, 1999. The stated issues were whether the respondent's (claimant) compensable injury of _____, was a producing cause of his pseudoarthritis or nonunion of the L4-5 intervertebral level of his lumbar spine, and whether he was entitled to the 14th and 15th quarters of supplemental income benefits (SIBS).

The hearing officer determined that the claimant's injury to his back that occurred at home was a direct and natural consequence of his compensable injury, which he characterized as a "follow on" injury, and thus the first injury was the "producing cause" of the second back injury. As an element of this finding, he found that the claimant's first back injury caused him to lose strength in his lumbar muscles and upper leg muscles. He further found that the claimant was entitled to SIBS for the two quarters in issue, although he found that claimant made no search for employment but was "not excused" from attempting to find work because he had no ability to perform any work.

The appellant (carrier) appeals, arguing that the claimant's fall at home was an "independent, intervening injury" and that the consequences flowing from this are those for which the carrier is not liable. The carrier further points out that although the hearing officer found that claimant was "not excused" from the requirement to search for employment, he was nevertheless found entitled to SIBS. The carrier points out that the claimant failed to produce evidence that (leaving aside the producing cause issue) he had the total inability to work due to the injury at home. There is no response from the claimant.

DECISION

Affirmed.

On _____, while employed by the (self-insured city), the claimant was knocked in the head by the bucket of a crane, resulting in injuries to his low back and neck. He had not worked since his accident. The claimant had lumbar fusion surgery in July 1997, performed by Dr. H, at two lumbar levels. He continued to suffer low back pain, and was referred by Dr. H to a pain management specialist, Dr. M. He had some injections which afforded relief.

Claimant underwent a functional capacity evaluation on April 16, 1998, and was determined to be functioning at the medium level, with restrictions, and light duty without restrictions. Claimant reported moderate lumbar pain during this evaluation. He had low back pain on the right with straight leg raising (SLR). Manual muscle strength testing of the lower extremities (hip, knee, ankle) showed that claimant achieved 4+ to 5/5. The test also showed that kneeling and crouching would be restricted on a repetitive basis.

According to an April 30, 1998, case management note made for the carrier, claimant reported numbness and weakness in his hands, and pain, when he turned his neck. According to the case manager's meeting with Dr. M 10 days earlier, claimant's low back pain was nearly resolved.

Dr. H's notes of February 9, 1998, record that claimant moved quickly on and off the examination table, that his SLR was negative, and that he had full range of motion of the lower extremities and hips.

Claimant said that on May 21, 1998, his son needed assistance with a bicycle chain. Claimant got down on his knees and resolved the problem. He then began to rise by shifting to his feet; however, he said he lost his balance when he was about a foot to perhaps a foot and one-half upwards and fell backwards, landing straight on his buttocks. As he made contact with the ground, he felt pain down both legs. The claimant said that he felt like he could not rise all the way from his squatting position as he tried to do so. The claimant is of average height and weight. After his accident, further evaluation and testing by Dr. H showed that claimant had an instability, or pseudoarthritis, at his L5-S1 surgical site. The other operative level appeared to be rigid. Dr. H opined that he would need further instrumentation to restabilize the area. The instability was detected eventually upon a flexion/extension test, rather than a standard MRI.

The carrier's doctor, Dr. C, testified live at the CCH. Essentially, he agreed that claimant would likely require further surgery. He stated that his review of records indicated that claimant's fusion was deemed solid until after his May 21st accident. Dr. C said that full body weight dropping on the buttocks from the height expressed by the claimant would be enough to disrupt his fusion. Dr. C, asked to comment on the flexion/extension test that detected the nonunion, agreed that a nonjoinder of claimant's nature would not necessarily show up on objective testing. However, he opined that this one was caused by the May 21st accident.

A note from Dr. M states that he met with the carrier's case manager on December 1, 1998, and told her that the claimant's fall and resulting muscle soreness "could not have possibly caused the pseudoarthritis that was diagnosed." Dr. M continued to treat claimant with pain medication after his May 21st fall. Both Dr. H and a doctor for the carrier, Dr. L, recommended that the claimant remain off work. Throughout the medical evidence after the May 21st accident, it is made clear that the carrier has taken the position that it need not pay for further medical treatment of the claimant's lumbar spine. Both Dr. C and Dr. L agreed that continued steroid injections would not afford relief from claimant's pain, the source being a nonjoinder.

Claimant did not search for employment during either of the filing periods in question. The filing period for the 14th quarter began on May 19, 1998; the end of the filing period for the 15th quarter was November 16, 1998.

The hearing officer's theory of recovery, as set forth in his discussion and findings of fact, was that it was "common experience" that back injuries caused muscular weakness, and such weakness caused claimant to fall back on May 21st. He therefore found that claimant's fall was a "direct and natural consequence" of his injury. Because claimant could not work "due to a combination of factors" from both injuries, the hearing officer found that making no search for employment was tantamount to a good faith search, and that he was entitled to SIBS.

The carrier correctly points out that the Appeals Panel has not extended compensability to every follow-on injury that arguably would not have happened "but for" the original injury or even a weakened state brought about by the injury. Texas Workers' Compensation Commission Appeal No. 941575, decided January 5, 1995; Texas Workers' Compensation Commission Appeal No. 971849, decided October 20, 1997; Texas Workers' Compensation Commission Appeal No. 980037, decided February 23, 1998. However, such cases have generally involved a contention of injury to a different area of the body not originally injured. *See* Texas Workers' Compensation Commission Appeal No. 960021, decided February 15, 1996.

The case under consideration here is distinguishable in the analysis to be employed because the claimant in this case is not contending injury to another region of the body due to the state brought about by his original compensable injury or medical treatment therefor. He is contending, rather, that his original injury has, in effect, "continued" and the injury involves a further development in the course of his original injury. Texas Workers' Compensation Commission Appeal No. 92463, decided October 14, 1992. The fusion which has become unstable is one put into his back as a direct result of his _____, injury. Consequently, the provisions in the statute concerning the right to lifetime medical treatment come into play in a way that they do not when a different regional injury is claimed. As stated in Appeal No. 92463 cited above, whether a condition represents a new injury, or the continuation of a previous compensable injury, is a matter of fact to be determined by the hearing officer.

Texas Workers' Compensation Commission Appeal No. 980004, decided February 20, 1998 (Unpublished), contains a good discussion of the analyses that are brought to bear in Appeals Panel cases where a subsequent accident leads to injury. That case involved the affirmance of a decision by a hearing officer that a claimant continued to suffer the effects of his compensable knee injury when that his knee buckled and he was hurt while jogging. As noted by the Appeals Panel, a contention that the effects of a compensable injury to a specific region have continued and have led to a subsequent worsening is not strictly the claim that there has been a "follow-on" injury. The Appeals Panel therefore observed that those cases where a weakened condition from the injury was asserted to have caused another injury (outside of work) to a different area of the body were not applicable. As part of its decision in Appeal No. 980004, the Appeals Panel emphasized that a carrier is liable for lifetime medical benefits reasonably required by the nature of a compensable injury. While a subsequent worsening through activities of daily

living would still have to be related causally by the claimant to the compensable injury (as part of his/her case in chief), the Appeals Panel also noted that the carrier would bear the burden to prove that a subsequent event was the "sole cause" of the condition for which current treatment was sought. This was consistent with what had also been stated in Appeal No. 92463, *supra,* which cited the case of American Surety Co. of N.Y. v. Rushing, 356 S.W.2d 817 (Tex. Civ. App.-Texarkana 1962, writ ref'd n.r.e.) in support.

In this case, the hearing officer has attempted to bridge the causal connection by finding, out of purported "common experience," that claimant had weakened lumbar and upper leg muscles. We cannot agree that this is a matter within "common experience." There is essentially no medical evidence in support of this theory of linking the fall to the compensable injury. There is likewise no evidence whatsoever supporting the hearing officer's observation that if claimant had not been injured in 1993, he would not have fallen in 1998. While the hearing officer noted that claimant had a "whole new set of symptoms" after May 1998 he had not experienced before, there was no dispute over the medical evidence that the condition from which he suffered at the CCH was a nonjoinder of fusion, brought about by his fall backwards. However, the hearing officer's conclusion that claimant's pseudoarthritis was a "direct and natural consequence" of his earlier injury (§13.11, Larson, A., Larson's Workers' Compensation Law, Mathew-Bender 1998) does not fail because his particular theory of muscular weakness is not supported. Rather, the area of nonjoinder was the site of the surgery which was necessitated by his compensable 1993 injury, and, as Dr. C pointed out in his testimony, the nonjoinder was of the nature that could be expected to result from dropping body weight onto the buttocks. The hearing officer could thus choose to believe that the nonjoinder to the original surgical level was a foreseeable consequence of the original injury and its treatment, which is the essence of his holding here.

We will uphold the hearing officer's judgment if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 950791, decided July 3, 1995. Furthermore, we are guided in our interpretation of the statute by standards recently repeated in Albertson's Inc. v. Sinclair, 984 S.W.2d 958 (Tex. 1999). We agree that the record supports the hearing officer's findings and conclusion that the pseudoarthritis was causally connected to the 1993 injury, which injury was a producing cause of conditions existent after May 21, 1998. It does not seem reasonable statutory construction to us to posit that the legislature would confer upon injured workers the right to lifetime treatment of a compensable injury, only to have the carrier's liability removed when activities of daily living acted providentially upon the injury to make it worse. While we might agree that there are those events (such as a subsequent work-related accident or motor vehicle accident) which are extraordinary in nature and effectively become the "sole cause" of subsequent infirmity to the injured region of the body, the hearing officer evidently did not believe that the bicycle episode was an accident of that nature such that it overcame the effects of the 1993 accident as a causative factor in the subsequent need for medical treatment and inability to work.

Concerning the finding on SIBS, it is clear that the hearing officer's conclusion of law that claimant was "not excused" from attempting to find work is a typographical error. However, we have expressed dissatisfaction with the concept of "excuse" from the job search requirement. Consequently, we reform this conclusion of law to state that the claimant had the inability to work during the filing periods of the 14th and 15th quarters and thus no search was a good faith search commensurate with his ability to work.

The hearing officer's decision and order are affirmed on the basis stated above.

Susan M. Kelley
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge