

**STEVEN K. BURGLUND**

**Petitioner**

**vs.**

**LIBERTY MUTUAL NORTHWEST INSURANCE COMPANY**

**Respondent/Insurer for**

**UNITED PARCEL SERVICE**

**Employer.**

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

**Summary:** In this second litigation involving a UPS driver (see [WCC No. 9303-6721](#)), claimant argued his current back-related disability results from 1984 injury. Insurer argues occupational disease developed after claimant returned to work.

**Held:** Physician's testimony left no doubt that claimant's 1991 surgery, and thus his 1984 injury, are substantial and material factors in claimant's current disability. WCC was persuaded claimant's continued employment may have hastened the degenerative process, but was not persuaded it substantially or materially did so. Most importantly, physician testified that even had claimant not returned to a labor intensive job, his degenerative condition would have ultimately progressed and that the current condition is consistent with a natural progression of the underlying condition. Accordingly, claimant's position prevails. (Note: WCC decision affirmed by Supreme Court in [Steven K. Burglund v. Liberty Mutual Fire Ins. Co.](#), 286 Mont. 134, 950 P.2d 1371 (1997).)

**Topics:**

**Injury and Accident: Aggravation: Generally.** UPS driver and insurer disputed whether claimant's current disability was result of 1984 back injury and following surgery or occupational disease resulting from claimant's return to work. Based on medical testimony, Court found condition was result of earlier injury. Physician's testimony left no doubt that claimant's 1991 surgery, and thus his 1984 injury, are substantial and material factors in claimant's current disability. WCC was persuaded claimant's continued employment may have hastened the degenerative process, but was not persuaded it substantially or materially did so. Most importantly, physician testified that even had claimant not returned to a labor intensive job, his degenerative condition would have ultimately progressed and that the current condition is consistent with a natural progression of the underlying condition. (Note: WCC decision affirmed by Supreme Court in [Steven K. Burglund v. Liberty Mutual Fire Ins. Co.](#), 286 Mont. 134, 950 P.2d 1371 (1997).)

**Injury and Accident: Occupational Disease.** UPS driver and insurer disputed whether claimant's current disability was result of 1984 back injury and following surgery or occupational disease resulting from claimant's return to work. Based on medical testimony, Court found condition was result of earlier injury. Physician's testimony left no doubt that claimant's 1991 surgery, and thus his 1984 injury, are substantial and material factors in claimant's current disability. WCC was persuaded claimant's continued employment may have hastened the degenerative process, but was not persuaded it substantially or materially did so. Most importantly, physician testified that even had claimant not returned to a labor intensive job, his degenerative condition would have ultimately progressed and that the current condition is consistent with a natural progression of the underlying condition. (Note: WCC decision affirmed by Supreme Court in [Steven K. Burglund v. Liberty Mutual Fire Ins. Co.](#), 286 Mont. 134, 950 P.2d 1371 (1997).)

**Injury and Accident: Causation.** UPS driver and insurer disputed whether claimant's current disability was result of 1984 back injury and following surgery or occupational disease resulting from claimant's return to work. Based on medical testimony, Court found condition was result of earlier injury. Physician's testimony left no doubt that claimant's 1991 surgery, and thus his 1984 injury, are substantial and material factors in claimant's current disability. WCC was persuaded claimant's continued employment may have hastened the degenerative process, but was not persuaded it substantially or materially did so. Most importantly, physician testified that even had claimant not returned to a labor intensive job, his degenerative condition would have ultimately progressed and that the current condition is consistent with a natural progression of the underlying condition. (Note: WCC decision affirmed by Supreme Court in [Steven K. Burglund v. Liberty Mutual Fire Ins. Co.](#), 286 Mont. 134, 950 P.2d 1371 (1997).)

**Occupational Disease: Disease.** UPS driver and insurer disputed whether claimant's current disability was result of 1984 back injury and following surgery or occupational disease resulting from claimant's return to work. Based on medical testimony, Court found condition was result of earlier injury. Physician's testimony left no doubt that claimant's 1991 surgery, and thus his 1984 injury, are substantial and material factors in claimant's current disability. WCC was persuaded claimant's continued employment may have hastened the degenerative process, but was not persuaded it substantially or materially did so. Most importantly, physician testified that even had claimant not returned to a labor intensive job, his degenerative condition would have ultimately progressed and that the current condition is consistent with a natural progression of the underlying condition. (Note: WCC decision affirmed by Supreme Court in [Steven K. Burglund v. Liberty Mutual Fire Ins. Co.](#), 286 Mont. 134, 950 P.2d 1371 (1997).)

**Occupational Disease: Last Injurious Exposure.** UPS driver and insurer disputed whether claimant's current disability was result of 1984 back injury and following surgery or occupational disease resulting from claimant's return to work. Based on medical

testimony, Court found condition was result of earlier injury. Physician's testimony left no doubt that claimant's 1991 surgery, and thus his 1984 injury, are substantial and material factors in claimant's current disability. WCC was persuaded claimant's continued employment may have hastened the degenerative process, but was not persuaded it substantially or materially did so. Most importantly, physician testified that even had claimant not returned to a labor intensive job, his degenerative condition would have ultimately progressed and that the current condition is consistent with a natural progression of the underlying condition. (Note: WCC decision affirmed by Supreme Court in [Steven K. Burglund v. Liberty Mutual Fire Ins. Co.](#), 286 Mont. 134, 950 P.2d 1371 (1997).)

**Occupational Disease: Proximate Cause.** UPS driver and insurer disputed whether claimant's current disability was result of 1984 back injury and following surgery or occupational disease resulting from claimant's return to work. Based on medical testimony, Court found condition was result of earlier injury. Physician's testimony left no doubt that claimant's 1991 surgery, and thus his 1984 injury, are substantial and material factors in claimant's current disability. WCC was persuaded claimant's continued employment may have hastened the degenerative process, but was not persuaded it substantially or materially did so. Most importantly, physician testified that even had claimant not returned to a labor intensive job, his degenerative condition would have ultimately progressed and that the current condition is consistent with a natural progression of the underlying condition. (Note: WCC decision affirmed by Supreme Court in [Steven K. Burglund v. Liberty Mutual Fire Ins. Co.](#), 286 Mont. 134, 950 P.2d 1371 (1997).)

The trial in this matter was held in Kalispell, Montana, on September 26, 1995. Petitioner, Steven K. Burglund (claimant), was present and represented by Mr. Darrell S. Worm. Respondent, Liberty Mutual Northwest Insurance Co. (Liberty), was represented by Mr. Larry W. Jones. The parties requested and obtained leave of Court to file post-trial memoranda. The final memorandum was received June 6, 1996, at which time the case was deemed submitted for decision.

Issues presented: This is the second proceeding involving a dispute arising out of an industrial back injury the claimant suffered on February 14, 1984. In the previous case, *Steven K. Burglund v. Liberty Mutual Northwest Ins. Co.*, WCC No. 9303-6721, this Court awarded claimant 20% permanent partial disability benefits. The award was entered on April 10, 1995, but was appealed by both parties. The Supreme Court appeal is still pending.

At the time of the trial in the previous matter, claimant was still employed by United Parcel Service (UPS). Thereafter, his back condition worsened and he was unable to continue working for UPS. The present case arises because Liberty concluded that claimant's condition worsened on account of an occupational disease arising subsequent to his 1984 injury. Thus, Liberty treated the matter as an occupational disease. Initially, it paid

temporary total disability benefits. After claimant reached maximum medical improvement it began paying out a \$10,000 award under section 39-72-405(2), MCA. At the time of trial, Liberty was continuing to pay out the \$10,000 award on a biweekly basis.

Claimant contends that his current disabling condition is the result of his 1984 injury rather than any occupational disease. He does not ask the Court to presently award any additional compensation benefits but does request an award of attorney fees and costs.

Exhibit and depositions: Exhibits 1 through 4 were admitted by stipulation. The parties submitted the depositions of the claimant and Ned A. Wilson, M.D., for the Court's consideration. The parties also stipulated that all testimony and exhibits admitted in a prior case, *Steven K. Burglund v. Liberty Mutual Northwest Ins. Co.*, WCC No. 9303-6721, may be considered by the Court provided the party intending to rely on prior testimony and exhibits furnish copies to the opposing party and the Court.

Witnesses: The claimant and Loren Hartman testified at the time of the trial.

Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions, the exhibits, and the arguments of the parties, the Court makes the following:

#### FINDINGS OF FACT

1. In its April 10, 1995 Amended Findings of Fact, Conclusions of Law and Judgment in cause WCC No. 9303-6721, this Court set forth the facts regarding the claimant's injury in 1984. Relevant findings include:

5. On February 14, 1984, claimant suffered an industrial injury arising out of and in the course of his employment with UPS. He injured his back when he fell from a platform.

6. At the time of claimant's 1984 injury, UPS was insured by Liberty Mutual Northwest Insurance Company (Liberty). Liberty accepted liability for the claim in this matter and has paid various compensation and medical benefits.

....

10. On March 7, 1984, claimant told Dr. Swanberg that he was feeling better and wanted to return to work on March 12, 1984. (*Id.* at 17.) Dr. Swanberg approved a return to work and told claimant to contact him if he had any continuing back difficulties. (*Id.*) Claimant did not thereafter seek treatment from Dr. Swanberg for his low-back condition. (*Id.*) . . .

12. Following his return to work [in 1984] claimant continued to experience intermittent low-back pain.

13. On February 16, 1988, claimant was examined by Dr. Henry Gary, who is a neurosurgeon. . . . Dr. Gary diagnosed claimant's condition as a herniated disk at the L5-S1 level. (*Id.* at 9.)

14. Between February 1988 and February 1991, claimant's back and leg pain increased. (*Id.* at 33.)

15. On February 18, 1991, Dr. Gary performed a lumbar laminotomy and a foramenotomy at the L5-S1 vertebral level. (*Id.* at 29 and Ex. 6.)

16. [T]he Court is persuaded that claimant's herniated disk and February 1991 surgery were related to his 1984 injury: . . .

17. . . . Both Dr. Gary and Dr. Swanberg released claimant to return to work without any restrictions. (Tr. at 130-131, 215-217, 392.)

. . . .

28. Claimant is able to perform his job with little physical discomfort and his job performance is unaffected by his job injury.

. . . .

29. As illustrated by his recreational activities, claimant remains in excellent physical condition[.]

30. Claimant testified that his job causes low-back pain and that he "constantly" has pain in his leg. (*Id.* at 154.) He also testified that he has numbness in his left foot. (*Id.* at 154-155.) According to claimant, his job exacerbates his pain and numbness. (*Id.*) The Court did not find this testimony credible. As previously found (Finding of Fact No. 29. h.) the claimant is comfortable performing his job duties and does not suffer significant pain or discomfort in doing so.

. . . .

39. The Court is persuaded that the claimant is presently physically able to perform the jobs within his pre-injury normal labor market. The performance of his present job is unaffected by his injury and the Court is persuaded that he will be able to continue to perform his job duties satisfactorily at the same level as pre-injury. **Whether his condition may deteriorate in the future is a matter of speculation.** [Emphasis in original.]

2. The trial in the earlier proceeding (WCC No. 9303-6721) took place over a number of days and was finally concluded on December 1, 1993. Briefing was completed in August of 1994 and this Court issued its initial decision in January 1995. The initial decision was then withdrawn and the Court thereafter issued its Amended Findings of Fact, Conclusions of Law and Judgment on April 10, 1995. On April 18th, just 8 days after the Court's final

decision, the claimant left his job with UPS as a package car driver. Claimant testified he left his position due to an increase in symptoms in his legs and his continuing low-back pain.

3. On April 20, 1995, claimant was seen by Dr. Ned A. Wilson, who is an orthopedic surgeon. At that time the doctor noted:

He's always had some intermittent back pain which seems to have been getting progressively worse and in the last 4 mos. has become significantly worse, making it difficult even to sleep. He now has developed bilateral lower extremity pain radiating down to the calves.

(Wilson Dep. Ex. 2 at 2.) Dr. Wilson's assessment of claimant's ability to continue working for UPS was as follows:

I think it's unlikely that he will be able to maintain any heavy lifting or heavy laboring type of position and I think it's dubious as to whether or not he'll be able to maintain as a UPS driver as he has in the past.

(*Id.*)

4. Claimant did not thereafter return to work for UPS. He resigned his position in June 1995.

5. Liberty does not dispute that claimant is unable to return to his job at UPS due to his back condition.

6. Dr. Wilson has been claimant's treating physician since April of 1995. He testified by deposition. Since his testimony is the basis for resolving the present case, it is quoted liberally in the following findings of fact so that the reader can fully appreciate the nature and limitations of his testimony.

7. Initially, Dr. Wilson described claimant's current low-back condition as follows:

Q What is the present condition and likely cause of Mr. Burglund's symptoms?

A L5-S1 spondylosis.

Q What is that?

A That's a degenerative condition of the L5-S1 disk space. The cause, like most human disease, is what we call **multifactorial**, meaning there are many different things that contribute to that problem.

....

Q I referred earlier to your comparison of plain x-rays taken in April with those taken prior to the 1991 surgery. . . . What did that comparison show you?

A Progression of his spondylosis.

....

A The disk space in particular, and what's noted is that the disk space is much narrower than it was in 1991, and he's developed more osteophyte formation, which are bone spurs around the disk space, which are consistent with the degenerative process of the disk space.

(Wilson Dep. at 9-11, emphasis added.)

8. He identified "epidural fibrosis," or scarring, at the S-1 nerve root as possibly contributing to claimant's symptoms and his degenerative condition at L5-S1. That scarring was the result of claimant's 1991 surgery, which in turn was the result of his 1984 injury. Dr. Wilson testified as follows:

Q . . .I'd like you to assume he said that that pain had become more constant or more intense prior to his seeing you. What's the clinical significance of those kind of complaints?

A The concern would be that he may have developed a recurrent disk herniation or stenosis, which would be pinching of the nerve roots by bone spurs or something like that. . . The MR scan was late April. We evaluated him for that, and we did not see a significant degree of stenosis or recurrent disk herniation. In fact, the only thing we did see was **epidural fibrosis**, which is scar tissue around the S1 nerve root on the right side.

**I think that his leg pain could be coming either from nerve root irritation as a result of epidural fibrosis or as a result of the original injury to his nerve, or it could be referred pain from the arthritic disk space itself, and at this time I can't distinguish which of those two processes are causing his calf pain.**

....

A . . . [E]pidural fibrosis is expected as a result of his disk operation. You would expect to see at least some epidural fibrosis, and the implication is that epidural fibrosis is affecting that nerve root and causing his persistent leg pain. . . .

Q Is that epidural fibrosis more likely than not entirely a result of the surgery he had in February 1991?

A It is certainly a result of the surgery, and I might add that that is -- That's the normal finding that you find after surgery. . . .

(*Id.* at 12-14; emphasis added.)

9. Dr. Wilson further discussed the role of disk space narrowing and arthritis and their cause:

Q Apart from the epidural fibrosis, taking a look at his lower back condition, disregarding that for a moment, is there a direct relationship between that condition [disk space narrowing and arthritis] and his condition in 1991 of a herniated disk and the related surgery?

A Yeah. They're directly related. They are part of the same pathophysiologic process. It's the same disease that you're simply seeing at a later time.

(*Id.* at 16.) He testified that claimant's left leg pain was most likely referred pain from arthritis within the disk space. (*Id.*)

10. Dr. Wilson's testimony leaves no doubt that claimant's 1991 surgery, and thus his 1984 injury, are substantial and material factors in claimant's current condition and his current disability. However, the Court must further determine whether claimant's subsequent employment *materially or substantially* accelerated or worsened his preexisting condition. *Caekaert v. State Compensation Ins. Fund*, 268 Mont. 105, 112, 885 P.2d 495, 499 (1994).

11. After reviewing all of Dr. Wilson's testimony I am persuaded that claimant's continued employment *may* have hastened the degenerative process but I am not persuaded that it substantially or materially did so. Dr. Wilson indicated that while claimant's work more likely than not contributed to his worsening condition, the original injury was a substantial factor in his condition and other, ordinary living activities also contributed to the worsening condition. He was unable to apportion among the factors and testified that to do so amounted to speculation. Finally, and most importantly, he testified that even had claimant not returned to a labor intensive job, his degenerative condition would have ultimately progressed and that claimant's current condition is consistent with a natural progression of his underlying condition. I set forth his pertinent testimony as follows, emphasizing the portions of testimony which are critical to my ultimate determination:

Q . . . I want to ask you whether that day-to-day work activity would affect a back condition like Mr. Burglund had following his surgery in 1991.

A It certainly can.

Q And how so?

A Well, I think that, after having the weakened disk that you're describing or that I've described, returning to labor intensive jobs is apt to result in a progression of the disease.

. . . .

Q . . . Is it possible for the kind and degree of degeneration which has occurred in Mr. Burglund's back since 1991 to occur given the absence of strenuous heavy work activities like that?

A Yes, it's possible. In fact, the progression does continue no matter what. Unless you can put them in outer space and take away all the stresses of life on the disk, the degenerative process will progress. It's a question of the rate at which it progresses, and we think that returning to heavy laboring activity increases the rate of degeneration.

Q Now, what kind of stresses, outside of heavy labor, would affect that degenerative process?

A Well, everything stresses the disk to some extent. You know, even coming up from a lying down position, getting up out of bed in the morning, will put stress on the disk itself, and you can measure those stresses. . . .

Therefore, as I said earlier, any activity of life is going to put some stress on the disk, and that's the reason why we see disks deteriorate over a period of years and decades . . . .

Q In your opinion would Mr. Burglund eventually come to have the same back condition as he has today irrespective of his work activities?

A That's almost impossible to say with any high degree of certainty. I guess I would say that my opinion is that his work has affected it and that, had he not been involved in laboring activities, his back would be in better condition, but, you know, you're asking me to predict and look in the crystal ball, and I really can't do that in terms of a single individual with a high degree of certainty.

Q I believe you have said, however, that given the herniation and subsequent surgery, there would be some progression irrespective of his activities.

A That's true. In fact, there is some progression in every -- I mean, everybody has some progression of disk degeneration just as a function of living.

Q And what you're seeing now in Mr. Burglund's lower back is a condition that's consistent with the kind of progression you would expect; is that correct?

A That's correct.

. . . .

Q And would you also agree that the cause of these permanent anatomical changes we've discussed, the ones since 1991 and these increased symptoms of which Mr. Burglund told you, was the result of a combination of his work at UPS since June of '91 and the preexisting back condition he had when he returned to work in June of 1991?

A You're correct that it's multifactorial, and it's related to multiple different things, including what you mentioned.

Q Besides those two things you mentioned, what other factors would you require be included there.

A Life in general.

Q Daily activities of life?

A Sure.

Q Getting up in the morning?

A That's true.

Q Cutting the lawn?

A Absolutely. As well as just his genetic predisposition. Some people have healthier disks than another person. That's just the way you're born.

Q Is there any way for you to quantify in terms of causation these different factors?

A No.

....

Q You said that you could not quantify the role of the various factors that contribute to Mr. Burglund's back being the way it is today.

A I cannot.

Q And you pointed to -- We've discussed a variety of factors, the original herniated disk and subsequent surgery, his work activities and then just living.

A Correct.

Q Is this failure to quantify something that's a personal deficiency in you, or is it something the medical profession can't do?

A In my opinion it's something that medical science cannot do. There are some physicians that appear to be able to quantify and can apportion causation. My personal bias is that that's a very arbitrary apportionment, and they have little or no science to base those relative causations on.

Q Is it fair to characterize the herniated disk and related surgery as a substantial factor in causing the condition as it is today?

A Yes.

....

Q Would you agree that Mr. Burglund's return to work in June of 1991 through sometime in April of 1995, which is about three and a half years, was a substantial factor causing his current condition?

A I think it is a factor.

Q Substantial factor?

A Well, define substantial.

Q You used that phrase yourself earlier, and whatever definition you were using then I'd like you to apply now.

A Okay. I think that it is a significant factor in that, had he not returned to those activities, that his back may have been preserved longer. It's possible that -- Well, in fact, it's likely that eventually his back would have deteriorated regardless of whether or not he did that, but I think that it probably accelerated that process, at least more likely than not.

(Wilson Dep. at 20, 22-25, 33-34, 37-38, 42-43, emphasis added.)

12. Since resigning from his job, the claimant has gone through a back school, has received physical therapy, including a back stabilization program, and had an epidural steroid injection. (Wilson Dep Ex. 2.)

13. Since the time of the first trial claimant has experienced "spikes" in his symptoms, however, in each instance they have resolved. At the time of the trial in this case, his leg symptoms had virtually disappeared, but he still experiences low-back pain. He has become less tolerant of pain over the past few years.

14. At the time of the trial on September 26, 1995, Liberty advised the Court and claimant that it had initiated the payment of benefits to the claimant at his permanent partial disability rate on a biweekly basis, and will continue these payments until the maximum \$10,000 provided under section 39-72-405(2), MCA, of the Occupational Disease Act is paid out or a lump sum request is made by the claimant.

#### CONCLUSIONS OF LAW

1. As an initial matter, the Court must determine which party bears the burden of proof. Ordinarily, the claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979). In this case claimant has established a clear connection between his current condition and his 1984 injury, and has therefore satisfied his burden. The insurer, however, insists that it should be relieved from liability for the 1984 injury because claimant is suffering from a subsequent occupational disease which accelerated his degenerative low-back condition. Since the insurer is affirmatively alleging facts that would relieve it of liability, it must bear the burden of proof regarding its assertion. *Walker v. United Parcel Service*, 262 Mont. 450, 456, 865 P.2d 1113, 1117 (1993); *Lee v. Group W. Cable of Montana*, 245 Mont. 292, 295, 800 P.2d 702, 705 (1990).

2. In order to relieve it of liability for the 1984 workers' compensation claim, Liberty must establish (1) that claimant is in fact suffering from an occupational disease and (2) that the disease *materially or substantially* contributed to or aggravated claimant's underlying condition. *Caekaert v. State Compensation Ins. Fund*, 268 Mont. 105, 112, 885 P.2d 495, 499 (1994). Liberty must prove that claimant's increased disability is not the result of a natural progression of the condition caused by claimant's 1984 industrial accident. *Id.*

3. Liberty has not carried its burden of proof. While Dr. Wilson's testimony establishes that claimant's continued work for UPS has contributed to some degree to claimant's current condition and disability, it did not establish to my satisfaction that the contribution was material or substantial. Dr. Wilson's ultimate agreement that the contribution *was* substantial must be viewed in light of the fact that he had to ask what Liberty's attorney meant by "substantial", was told that he (Dr. Wilson) had used the term previously and that he should answer using "whatever definition you were using," and then replied by using the word "significant." He also qualified his answer by saying:

It's possible that -- Well, in fact, it's likely that eventually his back would have deteriorated regardless of whether or not he did that, but I think that it probably accelerated that process, at least more likely than not.

(Wilson Dep. at 43.) Dr. Wilson could not say how much the degenerative process was accelerated by claimant's work, and declined to even attempt to quantify the factors contributing to claimant's condition, indicating that to do so would require speculation. He noted that everyday activities could contribute to further degeneration of claimant's condition. Dr. Wilson also agreed that claimant's current condition is consistent with what would be expected from a natural progression of his preexisting condition.

One other fact is of significance in my finding that Liberty failed to meet its burden. Claimant testified at trial that his episodes of leg pain have resolved, at least for the present, and that his low-back pain has returned to the same level it was at the time of trial in the first case. Thus, at present, his symptomatology is essentially the same as before, however, his tolerance for pain while working has diminished, i.e., he tolerated pain while working in the past but no longer feels that he can do so on a daily basis.

4. The present case is factually distinguishable from the recent case of *Liberty Northwest Ins. Corp. v. Champion Int'l Corp.*, WCC No. 9601-7477 (June 25, 1996). In that case the claimant suffered a low-back strain while working as a millwright at Champion International's mill in Bonner, Montana. While a bulging disk was demonstrated on MRI, it was felt to be non-contributory to claimant's symptoms. Claimant returned to work at his time-of-injury job with Champion International and continued working for more than a year. Champion then sold its Bonner mill to Stimson Lumber and claimant went to work for Stimson. However, after a short time Stimson returned claimant to heavier-duty work than he had been performing over the previous few years. Claimant experienced a significant,

disabling and permanent increase in his low-back pain after working at the heavier job for several months.

The differences between the facts in the two cases may seem subtle but they are real.

First, the claimant in this case, unlike the claimant in *Liberty*, underwent significant surgery as a result of his 1984 back injury. The surgery created scar tissue. The surgery and 1984 injury contributed to disk space narrowing and arthritis which can be objectively demonstrated by medical imaging. The claimant's injury at Stimson was far less significant, did not require surgery and did not cause specific objective damage to his low back.

Second, the treating physician in this case indicated that because of the 1984 injury and 1991 surgery, the claimant's current condition was essentially inevitable and that his current condition is consistent with a natural progression of his preexisting condition. There was no similar indication in *Liberty*.

Third, the claimant in *Liberty* returned to work and performed his time-of-injury job successfully for more than a year. It was only *after* his work duties were increased to heavy labor that his pain and disability increased. In this case, the nature of claimant's labor has not changed since 1984.

Fourth, the treating physician in *Liberty* testified that "something definitely happened" during claimant's employment at Stimson. There was no similar testimony in this case. Rather, the testimony supporting the insurer's position in this case was of a more general nature, indicating that heavy labor can generally be expected to hasten spinal degeneration. In other words, women and men engaging in hard labor wear out their bodies at a faster rate than women and men who work at less physically demanding occupations. If that testimony is sufficient, then liability for future costs of nearly every back injury, and every other injury which may be affected by the wear and tear of physical labor, can be transferred to future employers and their insurers.

Ultimately, this case is driven by the differences in the benefits afforded under the Workers' Compensation Act (WCA) and the Occupational Disease Act (ODA). The insurer (Liberty) at risk for claimant's alleged occupational disease is the same insurer which is liable for his 1984 workers' compensation injury. Under either the WCA or the ODA the insurer's liability for temporary total and permanent total disability benefits is essentially the same. But liability for permanent partial disability benefits differs. Under the 1983 version of the WCA, the claimant may be entitled to up to 500 weeks of permanent partial disability benefits. In this case, that potential liability is \$69,250 ( $\$138.50 \times 500$ ). In *Burglund I*, I awarded claimant \$13,850 in permanent partial disability benefits based on his condition at that time. Under the 1995 ODA, as well as the 1984 ODA, the insurer is potentially liable for \$10,000, which it has conceded is due claimant. By cutting off the difference between what has already been ordered and the potential of 500 weeks, the insurer may save \$45,400

(\$69,250 - \$13,850 - \$10,000) even after paying \$10,000 pursuant to section 39-72-405(2) (1993), MCA, of the ODA.

Since 1984 the legislature has sharply reduced permanent partial benefits available under the WCA to the extent that the \$10,000 benefit permitted by section 39-72-405(2) (1993), MCA, may be more attractive to claimants, and less attractive to insurers, than the permanent partial benefits available under the WCA. Thus, the differences in the benefits afforded by the two acts may continue to spawn litigation.

5. The claimant is entitled to attorney fees and costs. Under the 1984 WCA he need not prove that the insurer's conduct was unreasonable. His claim for further benefits was denied in its entirety. Under section 39-71-611, MCA (1983), he is entitled to attorney fees by prevailing in this action. *Hartman v. Staley Continental*, 236 Mont. 141, 148, 768 P.2d 1380, 1385 (1989); *Carroll v. Wells Fargo Armored Service Corp.*, 240 Mont. 151, 156-7, 783 P.2d 387, 391 (1989). He has prevailed.

#### JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. The claimant has established that his present condition is due to his 1984 injury and Liberty failed to satisfy its burden of proving that a subsequent occupational disease is responsible for claimant's current condition. Therefore, it remains liable for his condition under the 1984 Workers' Compensation claim.
3. Petitioner is entitled to attorney fees and costs pursuant to section 39-71-612, MCA, in accordance with ARM 24.5.343.
4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.
5. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 29th day of August, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Darrell S. Worm

Mr. Larry W. Jones

Submitted: June 6, 1996