

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 72

WCC No. 9508-7378

RAYMOND KUNTZ

Petitioner

vs.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer for

CEREAL FOOD PROCESSORS, INCORPORATED

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 47-year old former mill worker seeks permanent partial disability benefits on account of an industrial injury occurring on January 20, 1987.

Held: While finding claimant credible on many basic facts, WCC found his testimony not credible concerning critical elements of the case, including the nature and extent of his pain and disability. Where claimant suffered at least eight back injuries and strain, some of them work-related and some not, the Court was not persuaded that the 1987 incident caused any material, significant, or permanent aggravation of his pre-existing back condition. To become entitled to permanent partial disability benefits, claimant must prove a causal connection between his 1987 injury and his disability. He has not done so; thus, permanent partial disability benefits were denied. (Note: WCC affirmed by Supreme Court at [Kuntz v. Nationwide Mutual Fire Ins. Co., 1998 MT 5](#).)

Topics:

Injury and Accident: Aggravation: Generally. 47-year old mill worker failed to prove causal connection between 1987 injury and claimant's disability. Where claimant suffered at least eight back related injuries, and was not credible concerning the nature and extent of his pain and disability at various times in his history, the Court was not persuaded the 1987 incident caused any material, significant, or permanent aggravation to his pre-existing back condition. (Note: WCC affirmed by Supreme Court at [Kuntz v. Nationwide Mutual Fire Ins. Co., 1998 MT 5](#))

Injury and Accident: Aggravation: Temporary Aggravations. 47-year old mill worker failed to prove causal connection between 1987 injury and claimant's disability. Where claimant suffered at least eight back related injuries, and was not credible concerning the nature and extent of his pain and disability at various times in his history, the Court was not persuaded the 1987 incident caused any material, significant, or permanent aggravation to his pre-existing back condition. (Note: WCC affirmed by Supreme Court at [Kuntz v. Nationwide Mutual Fire Ins. Co., 1998 MT 5.](#))

The trial in this matter was held on May 8 and 9, 1996, in Billings, Montana. Petitioner, Raymond Kuntz (claimant), was present and represented by Mr. James G. Edmiston. Respondent, Nationwide Mutual Fire Insurance Company (Nationwide), was represented by Mr. Kelly M. Wills and Mr. Peter J. Stokstad.

Issues presented: Claimant seeks permanent partial disability benefits on account of an industrial injury he suffered on January 20, 1987. He also seeks attorney fees and costs.

Testimony: Claimant, Russell Miller, Kerry Wilks, Dr. William Shaw, Juanita Hooper, Brenda Williams, Harry Singh, Walter Seaberger, Daniel Hill, John Erker, Greg Uhren and Donna Kuntz were sworn and testified. Additionally, the parties submitted the depositions of claimant, Dr. Peter Teal and Juanita Hooper for consideration by the Court.

Exhibits: Exhibits 1, 3, 5-9, 15-29, 31-36, 39, 41, 42, 45-47, 54 and 56 were admitted without objection. Pages 59, 60, 62, 66, 79, 94, 97 and 101 of Exhibit 2 were admitted. Exhibits 10 through 14, 30, 37, 38, 52 and 53 were withdrawn. Exhibits 4, 40, 43 and 44 were admitted over the objection of Mr. Wills. Exhibits 48 through 51 and 55 were admitted over the objection of Mr. Edmiston. Exhibit 56 was objected to by Mr. Edmiston and not admitted. Exhibit 57 was admitted as a demonstrative exhibit over the objection of Mr. Edmiston.

* * * * *

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

FINDINGS OF FACT

1. Claimant is 47 years old, is married, has two children, and lives in Billings, Montana.
2. In his **first** proposed finding of fact, claimant requests this Court to find his testimony in this case to be credible and true. The placement of the request is not surprising since this case in large part involves claimant's credibility. While claimant was certainly credible on many basic facts, I did **not** find his testimony concerning critical elements of his case, specifically the nature and extent of his pain and the nature and extent of his disability,

wholly credible. After listening to all of the evidence in this case, including claimant's testimony, and observing claimant's demeanor at trial, I find that claimant is an extremely angry man driven by a desire for revenge against his former employer, and that his testimony concerning the demands of his time-of-injury job, the extent of his pain, and his ability to perform his time-of-injury job was exaggerated.

3. From June 6, 1972 until June 1994, claimant worked at a flour mill in Billings. At the time of his initial employment, the mill was owned and operated by Peavey Flour Mills. In 1983 Peavey sold the mill to Conagra. In 1984 Conagra sold it to Cereal Food Processors (Cereal Foods), which still owns and operates the mill. The mill is a processing plant which mills grain into flour.

4. The mill has six floors and is divided into two halves, reflecting two milling operations which operate simultaneously but separately. A "miller" is in charge of the mill as a whole. An assistant miller is assigned to each of the two milling operations. The mill operates 24 hours a day. Employees work eight hour shifts. Hence, on any given shift there is one miller and two assistant millers in charge of the mill operations. Thus, the mill employs six assistant millers.

5. Claimant was hired in 1972 as a sweeper to clean the floors of the mill. His cleaning responsibilities included shoveling flour which spilled onto the floors of the mill as a result of "chokeups."

6. A chokeup occurs when flour becomes compacted in a duct which carries the flour, thereby obstructing the duct. The obstruction is eliminated by opening the duct and spilling the compacted flour onto the floor of the mill, thereby clearing the duct to permit the continued transportation of flour. The flour which is spilled on the floor is then shoveled into holes in the mill floor designed for that purpose or into carts or bags. If shoveled into carts or bags, the flour is then taken to and dumped into the holes in the floor. (Tr. at 294-95.)

7. Claimant was promoted to smutter in 1974. As a smutter he was responsible for cleaning and tempering grain, as well as cleaning up spilled flour from the floor of the mill. "Tempering" was done by soaking the grain in water to soften it prior to milling.

8. In 1976 claimant was promoted to assistant miller. The assistant miller monitors and adjusts milling machinery during the milling process, performs routine maintenance on machinery, collects and tests flour samples, puts in additives, and clears ducts of chokeups. (*Id.* at 97, 351.)

9. The assistant miller also helps clean up flour spills, sharing that responsibility with the smutter and, earlier on, the sweeper. The sweeper position was eliminated in 1984. (*Id.* at 94-95.)

10. Approximately once every one to two weeks, assistant millers are required to change rolls, sifters, and belts on milling machinery. (*Id.* at 104-7, 296.) Rolls are large cylinders with serrated edges. They weigh several hundred pounds apiece. (*Id.* at 105.) They are used in pairs much like a wringer on an old wringer-washing machine. (*Id.*) Grain is fed into the rolls, which crushes the grain. (*Id.*) The rolls are changed using electric chain hoists which lift the roll in and out of the machine. (*Id.* at 105-6.) Rolls are transported to and from the machinery using a dolly. The evidence presented in this case did not clearly establish the weight pushed, pulled or lifted with regard to the rolls. Estimates of the weight of the hoists ranged from 30 pounds to 70 pounds. (*Id.* at 115, 193, 356.)

11. The assistant miller is also required to remove and clean sieves from a sifter designed to strain unwanted particulates from the flour.

12. In light of conflicting evidence, and the importance of that evidence to the resolution of this case, there is a further discussion of the physical requirements for the job of assistant miller later in this decision.

13. As an assistant miller, claimant was often required to work overtime.

14. Claimant worked a rotating shift as an assistant miller. He worked from 8:00 a.m. to 4:00 p.m. for two weeks, 4:00 p.m. to midnight during the next two weeks, and then midnight to 8:00 a.m. during the third two week period. (Kuntz Dep. at 181.) This schedule was significant to his decision in June 1994, to stop working as an assistant miller.

Claimant's Back Injuries

15. Between 1974 and 1988, the claimant suffered at least eight back injuries or strains.

16. The first occurred in 1974. Claimant experienced an onset of right leg pain but could not recall any specific incident which triggered it. (Kuntz Dep. at 68-69.) He did not have back pain (*id.*) but upon examination, Dr. Perry M. Berg diagnosed a mild herniated disk at L5-S1. (Ex. 2 at 100; Ex. 48 at 160). Claimant attributed his condition to work, filed a claim for workers' compensation, and was paid medical benefits. (Kuntz at 68-69.) There is no evidence that he lost time from work.

17. Claimant then injured his back in 1977. His attending physician, Dr. Arthur Foeste, filed a first report of injury indicating claimant "picked up a sack of feed, turned and felt pain in **right** thigh and leg, and now in back." (Ex. 2 at 97, emphasis added.) Dr. Foeste diagnosed claimant's condition as a "possible herniated disc Right L4-5." (*Id.*) Claimant filed a workers' compensation claim. (*Id.* at 101.) Claimant did not recall losing any time from work on account of that injury. (Kuntz Dep. at 78.)

18. Claimant again injured his back on December 10, 1980, while dragging sacks of flour. (Ex. 2 at 66.) On January 5, 1981, Dr. Berg diagnosed claimant's condition as "[a]cute lumbosacral strain, resolving." (Ex. 2 at 68.) Claimant did not recall the incident and did not

recall losing any time from work. (Kuntz Dep. at 80.) Indeed, he testified that after 1974 he had "pain all the time." (*Id.*)

19. On October 6, 1981, claimant was admitted to St. Vincent Hospital for acute back strain. Dr. Berg's report states claimant "slipped at work, caught himself and then experienced acute low back pain followed by **right** sciatic type of pain." (Ex. 1 at 36, emphasis added.) According to Dr. Berg, this was claimant's first report of sciatic pain. (*Id.*; Ex. 48 at 180.) Dr. Berg diagnosed a "herniated nucleus pulposus right" and recommended conservative treatment. (Ex. 1 at 35.) On October 23, 1981, Dr. Berg reported that claimant was much improved, but was still experiencing mild **right** sciatic pain. Claimant was off work for approximately two weeks. He was released to return to work on October 27, 1981, and advised to start flexion exercises. (Ex. 48 at 161, emphasis added.)

20. Claimant was examined by Dr. Berg on August 9, 1982, after straining his back two weeks earlier. (*Id.* at 162.) Dr. Berg's office note states that prior to August 9 the claimant had "gotten along quite well with occasional right sciatic type of pain. Currently he's experiencing pain in the right calf and sometimes in the thigh and buttock." (*Id.*) In a follow-up visit on August 23, 1982, Dr. Berg reported that claimant "continues to have considerable **right** calf pain which is almost continuous." (*Id.* at 163, emphasis added.) Dr. Berg recommended a back brace. (Ex. 48 at 163.) In a follow-up visit on September 20, 1982, Dr. Berg reported claimant was doing well. (*Id.* at 170.)

21. In the fall of 1982, claimant suffered a further back strain or injury. This time it was not work related. On October 23, 1982, he was hospitalized with complaints of pain in the back and right leg. He was treated by Dr. Peter V. Teal, who diagnosed a "[h]erniated disc L5 S1 right side." (Ex. 47 at 224.) Dr. Teal's records reflect the following:

He went hunting this fall and dragged an antelope a considerable distance last weekend after shooting it and developed severe low-back pain, this time with a lot of pain in the right lower extremity, in fact the extremity pain was worse than the back pain. He states that it goes all the way down into his toes and occasionally he has some tingling in his foot, but no loss of sensation and no weakness. He continued working this week, although he missed one day and then the pain got so bad that he presented at the Emergency Room early this morning for admission.

(*Id.*) X-rays revealed "narrowing at L5-S1 but no other abnormalities." (*Id.* at 222.) Claimant was discharged from the hospital on November 1, 1982, and continued to improve. Dr. Teal released him to return to work on November 29, 1982. (Ex. 48 at 170; Teal Dep. at 6.)

22. Since the fall of 1982, Dr. Teal has been claimant's treating physician.

23. Claimant called Dr. Teal on December 3, 1982, to report a "sharp and burning pain in the heel and foot." (Ex. 48 at 170; Teal Dep. at 7.) Dr. Teal's office note does not indicate

which heel and foot were involved, however, in light of prior notes indicating right leg pain a few months earlier (Ex. 48 at 168), it is reasonable to infer that it was on the right side.

24. Thereafter, Dr. Teal had no contact with claimant until 1987.

25. Claimant's next back injury occurred on January 20, 1987, and was work related. On that date claimant slipped and twisted his back while lifting a bag of malt. (Ex. 2 at 60.) Claimant sought treatment at the St. Vincent Hospital Emergency Room on February 7, 1987, reporting pain in his **left** leg. (Ex. 47 at 216, See also Tr., Vol. 1 at 100-101.) This was the first time he experienced left leg pain. He was not hospitalized and did not recall losing any time from work (Kuntz Dep. at 91), although a letter from the insurer's adjuster indicates he missed two weeks of work. (Ex. 2 at 59.)

26. Dr. Teal examined claimant again on March 3, 1987. He reported that claimant "has improved now and in fact he is back to his usual status of some chronic aching low back pain." (Ex. 1 at 25, emphasis added.)

27. During his deposition, claimant was asked whether he had returned "to that point where you were having some periodic low-back pain and leg pain, **the same as you've had ever since 1974?**" Claimant answered, "That's correct." (Kuntz Dep. at 92, emphasis added.)

28. Claimant's next injury was on November 30, 1988. He did not recall the injury, (Kuntz Dep. 93), and there is no indication he filed a workers' compensation claim on account of the injury. However, Dr. Teal's records reflect that he saw claimant on December 13, 1988, and that claimant reported having reinjured himself on November 30, 1988, while pulling a lever at work. (Ex. 1 at 25.) Dr. Teal diagnosed "acute lumbar strain with pre-existing mild osteoarthritis" and reported that claimant had "aching pain mostly in the **left** calf. (*Id.*, emphasis added.) Dr. Teal took x-rays, which showed degenerative changes at L3-4 and L4-5, prescribed pain medication and muscle relaxants, and referred claimant to a physical therapist. (*Id.*; Teal Dep. at 9-10.)

29. Barbara Boyett, P.T., of the Physical Therapy and Sports Medicine Center, saw claimant on December 16, 1988, to fit him with a back brace and to instruct him in a therapeutic exercise program. Claimant reported his physical symptoms to the therapist:

Patient states that he injured his back on November 30th while attempting to pull a lever towards him with his right arm. He states that he is improving[,] his only complaint at this time is **left** calf and shin pain. He describes this as an aching sensation.

(Ex. 48 at 1, emphasis added.) Claimant returned to the Center on January 3, 1989, for back school and education in proper body mechanics. (*Id.* at 2.)

30. Approximately ten months later, on September 5, 1989, claimant returned to Dr. Teal complaining of "pain down into his **left** leg in the calf and in the thigh" over the previous few weeks. (*Id.* at 172, emphasis added.)

31. Claimant next saw Dr. Teal on January 29, 1990. He indicated he had been having difficulties with his left extremity for several months:

He tells me that he forgot to inform me several months ago that he was having numbness and tingling in the two lateral toes of his **left** foot. More recently it has turned into a kind of a pulling drawing feeling and he has some constant aching there. He also has some **left** leg pain. He is not nearly in as much pain as he was three or four weeks ago when he made this appointment.

(*Id.* at 172, emphasis added.) Dr. Teal opined that claimant's condition on this date was not a new injury but rather a "continuation" of his previous problems. (Teal Dep. at 13.)

32. Claimant again returned to Dr. Teal on August 27, 1990, complaining of pain in his left leg:

Patient has had treatment for back and **left** leg pain in the past. Recently, he's had a recurrence of **left** leg pain without back pain associated. He notices the leg pain is worse after he has been on his feet. Sitting bothers him. Standing is a little bit better but lying down is the best position for him. He denies any increased pain on coughing and he's having no numbness in his foot or toes this time which he has had in the past. He says his back snapped a few days ago and he is feeling a little better since. Patient has also had one episode of cramping in the right calf and some soreness there since that episode.

(Ex. 48 at 173-04, emphasis added.) Dr. Teal referred claimant for additional physical therapy. (*Id.* at 174.)

33. Pursuant to Dr. Teal's referral, claimant went to physical therapy on August 27, 1990. He reported the following symptoms:

Patient is a 41 year old male who reports pain in his left leg mainly in the **left calf and left hamstrings**. He reports they go on for a long time, he has been here before in 1982 and 1988. He saw Dr. Teal twice this year. He reports pain on a constant low degree which increases while laying down, resting and he reports a hard time going to sleep. It decreases while walking around, laying down on a hard surface. Patient reports he uses pain killers, Tylenol and Anced. His profession is a flour mill worker and off and on he is doing heavy lifting. He is still working at the moment.

(*Id.* at 3.)

34. Dr. Teal saw claimant more than a year later on November 5, 1991. Claimant complained of pain in his low back and **both** knees. (*Id.* at 174.) Dr Teal believed the pain in his knees was referred pain from his back. (Teal Dep. at 15-16.) During this visit, Dr. Teal also noted that claimant had a marked list to the right side. He attributed the list to inflammation in claimant's lumbar area, associated with his disk problem. (*Id.*)

35. Thereafter, Dr. Teal did not see claimant until November 21, 1994. (Teal Dep. at 61; Ex. 23.)

36. Between November 1991 and November 1994, a period of three continuous years, claimant did not seek medical care for his back. He testified that he continued to have some discomfort but that it was not severe enough to seek medical care. (Tr. at 110-11.)

Claimant's Termination of his Employment as an Assistant Miller

37. Between November 1991 and November 1994, the claimant became angry at his employer and severely depressed. His anger and depression were due to his expectation that he would obtain a middle management position at the mill and his disappointment with his failure to do so.

38. Claimant graduated from high school in 1967, then served in the Marines for four years. (Tr. at 89.) Upon his discharge from the military he returned to Billings and enrolled in Eastern Montana College in September 1971. (*Id.* at 90.) He stopped attending Eastern full time after one year and went to work for the Peavey Flour Mill. (*Id.*)

39. While working for Peavey, claimant continued his college education, graduating in 1982 with a degree in business management. (*Id.* at 95.)

40. Following his graduation from college, claimant hoped to obtain a middle management position with a milling company, however, he was unsuccessful in his efforts to do so. (*Id.* at 95-96; Kuntz Dep. at 16-17.) He was profoundly disappointed with his lack of success. (Tr. at 253-54.)

41. In late 1993 claimant experienced significant indigestion, irritability, loss of appetite, frustration, and insomnia. (*Id.*) His symptoms were manifestations of depression. (Tr. at 254.) He sought counseling, saw a psychiatrist, and also consulted his family physician. (Ex. 48 at 82-150.)

42. In early 1994 the claimant learned that there would be an opening for an assistant warehouse foreman, a management position, at the mill. (Tr. at 254-55.) After learning of the opening, claimant asked several medical providers to write letters stating that it would be in his best interest to stop working rotating shifts. (*Id.*)

43. Dr. Byorth, Dr. Schaefer, and Steve Tobin wrote letters in late March and early April recommending that claimant be placed on regular day shifts because of sleep disturbance,

peptic symptoms and depression. (Ex. 48 at 100, 131 and 148.) Dr. Byorth is apparently claimant's family physician (*id.* at 82 to 106); Dr. Schaefer is a psychiatrist who in early 1994 prescribed antidepressant medications for claimant (*id.* at 138-50); and Steve Tobin is a counselor who saw claimant on three occasions between January 1994 and March 1994 and who continued counseling him thereafter. (*Id.* at 107-37.)

44. Claimant clearly had his eye on the assistant warehouse foreman job when he requested the letters. Immediately after submitting the letters, claimant asked the mill manager to help him obtain the assistant warehouse foreman job. (Tr. at 255.) A note penned on Steve Tobin's letterhead by the mill manager, Clayton Knopp, on April 14, 1994, states that claimant asked the manager "to pull strings" to get him the job. (Ex. 48 at 132.) In his deposition claimant acknowledged that he could not continue working as a miller and wanted to work only day shifts because the assistant millers worked rotating shifts. (Kuntz Dep. at 181-82.)

45. Claimant was told that the assistant warehouse foreman position would be filled on the basis of departmental seniority rather than plant seniority. (Kuntz Dep. at 243; Ex. 48 at 132.) While he had plant seniority, he did not have seniority in the warehouse department.

46. Claimant did not get the promotion. He became angry. He was also upset over the fact that one of the letters he submitted from his doctors and counselor had been seen by a secretary. He contemplated bringing a legal action on account of that breach of confidentiality. An April 26, 1994 note of Steve Tobin reflects that claimant "said his boss Messed up on confidentiality w [with] letters he gave to them! Planning to see a Lawyer Tomorrow." (Ex. 48 at 110, caps in original.) Claimant confronted the plant manager. When asked at trial, "You got into somewhat of a screaming match with Mr. Knopp, correct?", he replied, "I suppose, yes." (Tr. at 255.) In a counseling session with Steve Tobin on April 20, 1994, he told Tobin that he was "angry @ a lot of things at work & home" and that he hated work at the mill. (Ex. 48 at 109; Tr. at 255-56.)

47. Claimant then went to see Dr. David Drill, who is apparently a physician retained by Cereal Foods. He saw Dr. Drill on April 28, 1994, and reported he was depressed and that his treating physicians felt that "part of his depression is working various shifts." (Ex. 48 at 48.) Dr. Drill observed, "Perhaps being on straight days would influence his mental outlook and I think is worth a try." (*Id.*) He wrote a prescription stating, "Please put pt [patient] on straight days. This is felt to be medically nec [necessary]." (Ex. 48 at 53.) Dr. Drill also filled out a WORK INJURY DISPOSITION FORM directing Cereal Foods to "[p]lease have him on days only." (Ex. 48 at 54, emphasis in original.)

48. As a result of Dr. Drill's directive, Clayton Knopp met with claimant on May 3, 1994, and handed him a letter directing him not to report to "work on the third shift tonight." (Ex. 20; Tr. at 256-57.) The letter further informed claimant that the only day job available at the plant was a trucker position. (*Id.*) Claimant *screamed* at Knopp that he could not work as a

trucker because of a back injury he had **in 1974**. (Tr. at 257.) Claimant felt he was being pushed out of work. (*Id.*)

49. The next day, May 4, 1994, claimant went to Dr. Drill and requested a work release so he could work 12 hours a day to fill in for a friend for a week or two. (Ex. 48 at 48.) Dr. Drill approved the request. (*Id.*)

50. On May 10, 1994, claimant reported to Steve Tobin that he had "[t]alked w/ [with] an attorney, who said work owes him a job. Did not get the job he wants." (Ex. 48 at 112.)

51. Claimant then went on vacation in early June. During his vacation he heard from a fellow employee that he would be offered the warehouse trucker position upon his return from vacation. (Kuntz Dep. at 209-11.) The warehouse trucker position primarily involves stacking pallets with bags of flour and grain and sorting pallets. (Ex. 50 at 31-34.) Because the term "trucker" is misleading, the position will hereinafter be called "warehouseman", which is the alternative name for the position. (*Id.* at 31.) On a frequent basis, the warehouseman is required to lift, push and pull bags weighing up to 110 pounds. (*Id.*) The job is considered medium to very heavy. (Tr. at 367.)

52. After hearing that he was going to be transferred to a warehouseman position, which was a day shift position, claimant apprised Dr. Teal of the physical requirements for the job, asked the doctor whether he could do it, and asked him to write a letter concerning his ability to do the job. (Kuntz Dep. at 211.)

53. Dr. Teal wrote a letter dated June 14, 1994, stating that on account of claimant's history of back problems and degenerative changes of the low-lumbar spine "[I]t is inadvisable that he try to hold a job that would require a lot of heavy lifting and carrying especially if he was to do it in a bent forward position." (Ex. 21.)

54. Claimant provided the letter to Clayton Knopp just before he was to return to work from vacation. (Kuntz Dep. at 212.) Knopp's response was in the form of a letter dated June 20, 1994, in which he advised the claimant not to report to work on June 21, since Dr. Teal's letter indicated that he would not be able to perform the essential functions of a warehouseman. (Ex. 22.)

55. There followed an exchange of correspondence between Knopp and Dr. Teal. On June 21, 1994, Dr. Teal wrote to Knopp, telling him that he had "advised Mr. Kuntz to avoid heavy lifting in a bent forward position" and that "he can lift 50 pounds from floor to waist level if he keeps the load close to his body." (Ex. 23.) Dr. Teal also indicated that claimant could perform "frequent and repeated lifting of 10 or 20 pounds." (*Id.*) On June 30, 1994, Knopp wrote to Dr. Teal, enclosing a job description for the warehouseman position and asking which of the essential functions claimant could and could not do. (Ex. 24.) On July 7, 1994, Dr. Teal responded, "I think that Mr. Kuntz could fulfill most of the requirements of the job

described as trucker." (Ex. 48 at 199.) He went on to qualify that statement by indicating that he could have difficulty lifting on account of problems with his shoulder and wrist. (*Id.*)

56. However, on June 29, 1994, claimant, through an attorney, wrote to Knopp stating that claimant was unable to perform the job of warehouseman:

As you know, Mr. Kuntz has been medically restricted, at least temporarily, from engaging in shift work, and he is permanently restricted from engaging in activities "that would require a lot of heavy lifting." We agree with your assessment that Mr. Kuntz is not able to perform the job of trucker [warehouseman].

(Hooper Dep. Ex. 4 at 34.)

57. Claimant never returned to work at Cereal Foods and asserts in this proceeding that his 1987 back injury precludes him from physically performing the duties of assistant miller.

58. Claimant acknowledged that he ceased working as an assistant miller on account of his depression and not on account of any problems he was having with his back. He also concedes that his depression was not related to his back condition. (Tr. at 55-56.)

59. Claimant acknowledged that as of late January 1996, he was still angry at Cereal Foods on account of his failure to obtain the assistant warehouse foreman job, and that he was even hostile toward John Erker, the Cereal Foods manager who succeeded Clayton Knopp and whom claimant had never even met. (Tr. at 302-03.) After observing claimant at trial, the Court finds that he is still angry at Cereal Foods and that he is determined to somehow get even with his former employer.

Claimant's Subsequent Employment

60. After his separation from Cereal Foods, claimant worked several temporary jobs. He drove cars to different locations for an automobile dealership, he moved furniture on one occasion, and he drove a beet truck during harvest. In December 1994 he found full-time employment as a custodian for the Billings School District 2. (Tr. at 231-33.)

61. Claimant was initially employed by the school district as a Custodian 1 at Skyview High School. (Tr. at 232-33.) He cleaned approximately fifteen rooms utilizing a vacuum cleaner. He also cleaned chalkboards, washed windows, dusted desks, emptied garbage, and cleaned bathrooms. (*Id.*) The job did not bother his back. (*Id.* at 236.)

62. During the summer of 1995 claimant worked on a grounds crew for the school district. (Tr. at 237.) He sprayed weeds, mowed lawns, helped sod for a day, and loaded concrete mix for 10 to 15 minutes. (*Id.* at 239-40.) The latter job involved heavy labor but was of short duration. (*Id.*)

63. In the fall of 1995 the claimant was promoted to Custodian 2 and was transferred to Lewis and Clark Middle School in Billings. (*Id.* at 241.) His job is much the same as his job

at Skyview except he does more sweeping and dusting and less vacuuming. (*Id.* at 242.) He also cleans bathrooms. (*Id.* at 461-62.) He has no physical problems performing his custodial duties. (*Id.* at 242.)

64. Claimant has applied for a promotion to Custodian 4, which is a year round job and involves somewhat heavier duties, including the moving of desks and file cabinets which weigh as much as 175 pounds. (*Id.* at 243, 469-71.) If he secures the promotion he will work during summers and do extensive cleaning. (*Id.*) Claimant testified that he would need the approval of Dr. Teal before accepting the position. (*Id.* at 246.)

65. The physical requirements for Custodian 1 and 2 are within the 50-pound weight restriction imposed by Dr. Teal. (Tr. at 456; Ex. 50 at 1-6.) Claimant's own testimony demonstrates that he can handle the physical demands of the job. Claimant's job performance is rated as good by his supervisor. (Tr. at 456.)

Claimant's Assertion that He Cannot Perform the Duties of Assistant Miller

66. At the time he ceased working as an assistant miller, the claimant was performing all of the duties of that position; he had not received medical attention with respect to his back for over three years; and he was not regularly taking any medication for his back pain. (Tr. at 110; Kuntz Dep. at 227.) His last medical visit in 1991 did not reveal left-leg pain, only bilateral aching in his knees which Dr. Teal opined was referred pain from his low back. (Finding of Fact 34.)

67. Nonetheless, claimant now asserts that he is physically incapable of performing the duties of an assistant miller. He first made that assertion in December 1995, a year and a half after he stopped working as an assistant miller. (Tr. at 275.) While at his attorney's office in December 1995, he had a telephone conversation with Dr. Teal. During that conversation he told Dr. Teal that he did not think he could work as an assistant miller. (*Id.*)

68. There is no credible evidence of any material change in the claimant's low-back condition between June 1994 and present. He has not had difficulty performing his custodian jobs. He testified that he experienced some low-back and leg pain immediately following a functional capacity evaluation (FCE) conducted on October 23, 1995. (Ex. 1 at 7; Kuntz Dep. at 187-88.) In his deposition he was asked which leg hurt and he replied, "**My right leg.**" (Kuntz Dep. at 188, emphasis added.) Claimant had a history of right leg pain prior to his 1987 injury. According to claimant, his back was better after leaving Cereal Foods, at least until the FCE, but has been worse since the FCE. (*Id.* at 187, 189.) He testified that since the FCE he has had constant mild pain in his back. (*Id.* at 189.) Notwithstanding this testimony, I am not persuaded that his back hurts him any more now than in the past. As indicated in the second finding of fact, I do **not** find claimant to be a credible witness on the matters critical to this case. Specifically, I did not find him credible

with respect to his claims that his condition is worse now than in June 1994 and that he cannot perform the duties of an assistant miller.

69. When asked at trial whether he is "physically able to do the assistant miller's job at Cereal Foods Processors today?", claimant said that he is not. (Tr. at 248-49.) When asked why not, he replied:

As sometimes during my 22 years I experienced extensive pain, and I've had to work underneath that pain and, no, I don't think I could do the job effectively under those kind of circumstances.

(*Id.* at 249.)

70. Claimant's answers to similar questions asked of him in his deposition are more elucidating in the context of his contentions in this case:

Q Okay. Mr. Kuntz. Do you feel that you are still physically able to do the work of an assistant miller?

A No.

Q When was it that you became physically unable to do the work of an assistant miller?

A Back in the Eighties, when I first started having back problems, I knew that I eventually wasn't going to be able -- you know, that it wasn't going to get any better, it was going to get worse.

Q Right. But when was it that you became physically unable to do the job of an assistant miller?

A I don't think that I was ever physically able to do it after my injuries, because you cannot function correctly when you're -- e when you have to take time off from work because, you know, of consistent back problems.

Q So since 1974, you believe you have not been physically able to do the job of an assistant miller?

A Not without pain, and I don't believe that anybody should have to work with pain.

(Kuntz Dep. at 97-98, emphasis added.)

71. Claimant characterized the assistant miller job as strenuous and as requiring the lifting of more than 50 pounds and the constant shoveling of flour spills. There was conflicting evidence concerning the demands of the job. Claimant and five of his co-workers -- Russell Miller, Kerry Wilks, Harry Singh, Walter Seaberger, and Daniel Hill -- testified as to the nature of the job. After sorting through the testimony, and assessing the credibility of the

witnesses, I find the following facts with respect to the physical demands of the job and claimant's performance of the job at the time he ceased working as an assistant miller:

. Lifting of more than 50 pounds was not required. When shoveling grain into sacks, the worker determined how much to put in the bag and was not required to fill it with more than 50 pounds. Bags of malt and other additives weighed 50 pounds. (Tr. at 354-55.)

. While assistant millers were required to shovel spilled flour, the shoveling was not constant. Often the job consisted of routine checks and was not strenuous. Moreover, most of the shoveling could be assigned to a smutter. (Tr. at 408-09.)

. On repair days the claimant changed belts. Only occasionally did he help change the rolls. There was no credible evidence that when helping with the rolls the claimant experienced any back problems attributable to that work. (Tr. at 105-06.)

. Claimant did occasionally complain about a sore back or leg but he also complained about many other things. Harry Singh testified that claimant complained about everything. (Tr. at 400.) I found Singh's testimony credible and it was consistent with my own impression of claimant.

. Claimant worked at a faster and more furious pace than others. He took stairs two at a time, jumped on the lift, and on occasion slid down handrails. Because of his aggressive approach to his duties, the Court has a clear impression of claimant making his job harder than it needed to be, yet he was still performing it satisfactorily without medical care or medication in the Spring of 1994.

. The Court found Walter Seaberger's description of the job especially credible and persuasive. (Tr. at 411-22.) Seaberger has worked at the mill for 38 years. Fourteen years ago he suffered a back injury and had surgery. He is much older than claimant. He testified that since the mill was remodeled in the mid-1980s, work has become much easier. His smutter does 75% of the shoveling when spills occur. When he shovels he fills the bags only half full. He paces himself and noted that at times work is so slow that he has time to read. The Court notes that since his surgery he has not had leg or back pain, however, his testimony is significant in that it indicates that the pace and labor required for the job are not nearly as extreme as painted by the claimant.

72. Two vocational experts testified in this case. Juanita Hooper testified on behalf of claimant, Brenda Williams on behalf of Nationwide.

. Hooper concluded that claimant could not return to work as an assistant miller but her conclusion was based on the lifting restrictions placed on claimant by Dr. Teal and her understanding of claimant's job. (Tr. at 318-22; Hooper Dep. at 33-34, 58,

63.) She did not perform her own evaluation of the job and did not visit Cereal grains. Based on Dr. Teal's lifting restrictions, she considered claimant capable of performing medium-duty jobs. (Tr. at 318.)

. Williams, on the other hand, performed an on-site analysis of the assistant miller position, visiting the Cereal Foods mill about four times. (Tr. at 350.) She had also visited the mill on at least two prior occasions. (*Id.*) She prepared a job description and presented it to the current plant manager, John Erker, who verified it by signing it. He also testified to its accuracy. (Tr. 359, 436-39.) While Erker was not at the mill during claimant's employment there, he arrived in July 1994, only one month after claimant's employment terminated. (*Id.* at 438.) He testified that since his arrival there have been no changes in the assistant miller's duties. There was no credible evidence that the job changed between claimant's termination and Erker's arrival. Williams concluded that the assistant miller position is medium duty. (Tr. at 352.)

. The Court finds Williams' analysis and Erker's testimony credible and persuasive.

73. Dr. Teal gave several opinions regarding claimant's ability to perform his time-of- injury position and other positions in the mill. At first, in his letter to Clayton Knopp dated July 7, 1994 (Ex. 48 at 199), he seemingly approved the claimant for the warehouseman position. (Teal Dep. at 22.) The warehouseman position requires constant lifting of heavy bags and is considered a heavier position than that of assistant miller.

74. Dr. Teal later disapproved both warehouseman and assistant miller on October 30, 1995, after claimant had undergone a functional capacities evaluation. (Teal Dep. at 25.) But thereafter he approved the assistant miller position after receiving a letter from Lisa Gray, a claims adjuster working for the insurer, indicating the claimant would be assisted in some lifting by the use of a hoist. (Teal Dep. at 25.) Dr. Teal ultimately disapproved the assistant miller job after discussing the physical requirements of the job with claimant and his attorney:

A I talked with you [claimant's attorney] and I talked with Mr. Kuntz about the job description and about the requirements of the job of Assistant Miller, and after talking with Mr. Kuntz, it was apparent **from his description of the job** that it was more active and would put more stress on the back than the job description indicated, that the hoist situation, using the hoist, was an awkward and somewhat difficult process and that it was a heavy piece of equipment itself, and based on that conversation, I changed my mind and said I didn't think that Mr. Kuntz could tolerate that job and should not go back to work as an Assistant Miller.

....

Q (By respondent's counsel) Okay. When you changed your mind and disapproved the job, what was the basis for that change in your opinion? I mean, what was the specific information given to you that caused you to change your opinion?

A I changed my opinion because I thought I'd been wrong the first time. After going back over his chart, after talking with him about what he was capable of doing and what the job description that I was given actually involved, I felt it would be inadvisable for him to do that.

Q Well, what new information did you have?

A The new information I had was his - - Well, you don't have to have new information to change your mind.

Q I understand.

A So new information that I had was -- The only new info I would have had would be my discussion with him of the job description, and - - Well, I guess that's the only new information I would have had.

Q Okay. And how did his description of the job to you differ from the information contained on the job analysis?

A I don't remember exactly, except that he indicated to me that there was more stress, more heavy work involved with this, even with the use of a lifting device, than I was aware of.

(Teal Dep., 26, 37-38; Ex. 34; Ex. 36.) It is apparent from the above testimony by Dr. Teal that his ultimate conclusion was based on **claimant's** description of his job duties. As previously found, claimant's descriptions were exaggerated and do not accurately reflect the essential requirements of the job.

75. Dr. William Shaw, who is board certified in occupational medicine, performed an independent medical examination of claimant at the request of the insurer. The exam took place on January 22, 1996, and lasted approximately two hours. (*Id.* at 189.) Dr. Shaw took a detailed history from claimant, physically examined him, and reviewed his medical records.

76. During the history portion of the examination, claimant told Dr. Shaw that he has suffered leg and back pain ever since 1974. (Tr. at 156.) Between 1974 and 1982, he described his condition as "okay, but in pain." (*Id.* at 157.) Based on claimant's report, Dr. Shaw had the impression that after his accident in 1982 the claimant's level of pain increased and generally remained at the same level until 1988. (*Id.* at 158.) Claimant reported that he then suffered an injury in 1988 which worsened his pain, but that his condition thereafter improved to the same level as prior to that injury. (*Id.*)

77. Claimant apparently did not tell Dr. Shaw of his 1987 injury during the examination. (Ex. 48 at 151-59.) However, Dr. Shaw indicated that claimant was not an accurate historian with respect to dates (Tr. at 189), thus he may have meant 1987 rather than 1988. In any event, the Court does not give any significance to his identification of a 1988 rather than 1987 injury. The importance of the history he provided is with respect to the significance of the injury.

78. Dr. Shaw's examination of claimant was essentially unremarkable. The neurological examination revealed nothing to suggest that nerves were being compromised, inflamed, or irritated in the lower spine. Claimant had mildly limited range of motion of the back but nothing to indicate a significant impairment. There was no evidence of atrophy. (Ex. 48 at 155; Tr. at 166-68.)

79. Dr. Shaw's impression after examining claimant was that he had a history of mechanical low-back pain and sciatica for over 20 years. He felt that claimant was not a surgical candidate and that the conservative measures used to treat claimant in the past had been appropriate. (Tr. at 168.)

80. Dr. Shaw opined to a reasonable degree of medical certainty that claimant is not precluded from performing the job of assistant miller at Cereal Foods. (Ex. 48 at 151-56.) He formed his opinion after reviewing a job analysis for the position and personally visiting the Cereal Foods mill to observe the work of an assistant miller. Dr. Shaw was at the mill on two occasions. He spent four hours observing the assistant miller position and actually performed some of the tasks himself. (Tr. at 183.) He testified that going to the mill confirmed his opinion that the assistant miller position is medically appropriate for claimant. (Tr. at 185.)

81. Dr. Shaw testified in person at trial and I found his testimony credible and persuasive.

82. I am **not** persuaded that claimant is physically unable to perform the duties of an assistant miller. To the contrary, I am persuaded that he is just as capable today of performing those duties as he was in 1994, 1984 and even 1974. While he suffered several acute exacerbations of his back condition over the years, he testified that his most significant back injury was in 1981. (Tr. at 271.) In his deposition he also testified that after the 1987 injury he had returned to a similar condition as he has suffered ever since 1974:

Q So again, after the 1987 injury, did you return to that point where you were having some periodic low back pain and leg pain, the same as you've had ever since 1974?

A That's correct.

(Kuntz Dep. at 92.)

83. I have no doubt that claimant has suffered some back and leg pain over the years, but for substantial periods, including 1991 to 1994, he has performed his job without incident,

without medical attention, and without medication. There is no credible evidence that his back condition has changed for the worse since 1994. While he claims that his baseline pain increased after a functional capacities examination in 1995, I note that the examination was conducted while claimant was engaged in or contemplating litigation, and I believe that in testifying in this matter he has exaggerated and distorted his condition to benefit his litigation: I am not persuaded that his report of increased pain is true. The fact that for 22 years the claimant performed his job despite some background back and leg pain and several acute episodes, speaks louder than medical and vocational opinions where the latter have been rendered after the fact and have, in large part, been predicated on what the claimant asserts concerning his subjective pain and his ability to do his job.

84. I also am not persuaded that there is a reasonable likelihood that claimant's condition will deteriorate in the future to such extent that he will become physically incapable of performing the job of assistant miller. As set forth in the following findings, and alluded to in earlier findings, his baseline condition has been essentially static since the early 1980s, if not since 1974, despite later exacerbations.

Disability due to 1987 injury

85. Even though I have concluded that claimant is not disabled from working as an assistant miller, I must still determine whether claimant is entitled to an indemnity award, § 39-71-705 to -709, MCA (1987), on account of possible loss of earning capacity in the future and without regard to present earnings. *Ramsey v. Duncan*, 174 Mont. 438, 441, 571 P.2d 384 (1977).

86. The springboard for claimant's contention that his 1987 injury is disabling, is his assertion that his 1987 injury was a new and different injury causing an onset of left leg pain which has persisted to present.

87. Since 1974 claimant has had right leg pain. (Tr. 93.) When asked about back problems in the "'70s and early '80s", the claimant said, "Mainly it was in my right leg during all that time. My leg would get restless, I would feel pain in my leg and I would know that, you know, I'd strained my back a little bit or whatever." (*Id.* at 93-94.) He could not specifically recall low-back pain associated with the right leg pain. (*Id.* at 94.)

88. Despite Nationwide's reading of claimant's deposition testimony as indicating he had left leg pain prior to 1987 (see Nationwide's Proposed Findings of Fact, Conclusions of Law and Judgment at pp. 12-13), I find that claimant's general reference to his having "leg" pain prior to 1987 was just that -- a general reference -- and that it does not prove he had left leg pain prior to 1987. Moreover, the medical records clearly document the existence of right leg pain prior to 1987, but not left leg pain.

89. The onset of left leg pain is specifically documented with respect to claimant's January 20, 1987 injury. (See Findings of Fact 25, 28, 29, 30, 31, 32, 33.)

90. However, claimant's condition following his 1987 and 1988 injuries improved. In Dr. Teal's last report prior to 1994, he reported that claimant was complaining of pain in his low back and *both* knees. (Finding of Fact 34.) There is no report of left leg pain. Thereafter, claimant did not seek medical care for his low-back or leg pain until after he had locked horns with his employer. He worked continuously for three years without loss of time. He worked for three years without resort to pain medication.

91. The claimant's testimony in this matter, as well as his continued work and lack of need for medical care or medication, indicates that since 1991, left leg pain has not been significant and his overall back condition, including leg pain, is essentially the same as it has been since the early 1980s. (Findings of Fact 69-71.) When asked during his deposition if between November 1991 and November 1994, "[W]ere you having the same symptoms that you've experienced ever since 1974?", he replied, "That's correct." (Kuntz Dep. at 94.) In a letter he submitted to Billings School District #2 in conjunction with his application for employment, he wrote,

My back has not given me any trouble for a long time. I have learned how to take care of it. I have twenty years of my life left to give an employer.

(Ex. 49 at 7.)

92. Dr. Shaw testified that the 1987 injury did not aggravate or materially change claimant's underlying condition:

Q. (By claimant's counsel) In your opinion, to a reason[able] degree of medical certainty, did the injury of January 20, 1987 aggravate a preexisting condition?

A. Can I get from you, [claimant's counsel], the definition of aggravation, please?

Q. I guess I could try to do that. And that is, did it cause -- did it cause a change in the underlying condition or a new symptom that was not there before?

A. I do not believe that it materially changed the underlying condition that Mr. Kuntz had. And that was the reason for my asking exacerbation versus aggravation. I understand aggravation to be a circumstance where the condition is materially and permanently altered; that is, the baseline changes.

As opposed to an exacerbation in which there is a temporary alteration in symptoms, but the individual would return to essentially the same baseline.

I would be of the opinion that the incident of 1987, '88, whichever the appropriate date is, was an exacerbation but not an aggravation; that is, it did not materially change the baseline that this man functioned at.

(Tr. at 194.)

93. Dr. Shaw conceded that claimant first reported left leg pain following the 1987 injury. (*Id.* at 194-95.) The Court queried Dr. Shaw as to why, if the left leg pain has persisted, this does not represent a change in his baseline condition. Dr. Shaw answered as follows:

Yes, sir. Individuals with chronic recurrent back pain that are -- that are not clearly radiculopathy; that is, when I speak to radiculopathy on that, I'm talking about an anatomic condition in which there is a specific bit of anatomy that is pressing on a nerve root that causes a characteristic pattern of signs and symptoms. In individuals who do not have this classic radiculopathy, it is very common for them to have intermittent back pain, intermittent leg pain, that is not classically radicular.

And those symptoms vary, they fluctuate, there are good days, there are bad days, sometimes it's worse here, sometimes it's worse there, but this is a very typical pattern of pain. And I think Mr. Kuntz's description of his pain over the years is really very typical of this chronic, recurrent, mechanical low back syndrome.

And I think that from certainly 1975 that has been the pattern that has been displayed throughout.

Now, in 1974 it sounds like his symptoms may have been more radicular. Sounds like he may have had a true radiculopathy at that time. It is hard to know.

But he was seen by a respected orthopedist and his symptoms sound a bit more radicular at that point.

They have not been so classically radicular since, and I think they have been much more consistent with a diagnosis of chronic mechanical low back syndrome.

And so that to me, as an examining physician, the fact that one time the pain is on the right, the other time the pain is on the left, is not so significant to me that there has been a measurable alteration of his underlying status.

(Tr. at 195-96.)

94. As previously stated, I found Dr. Shaw's testimony credible and persuasive.

95. Thus, I find that the claimant's 1987 injury was not material or significant on a permanent basis and did not increase his disability over what existed prior to the injury.

CONCLUSIONS OF LAW

1. The law in effect at the time of claimant's injury governs his entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Thus, the 1985 version of the Workers' Compensation Act applies.

2. 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).

3. Claimant seeks permanent partial disability benefits and has elected to proceed under sections 39-71-705 through 39-71-708, MCA (1985). The benefits available under sections 39-71-705 through 708, MCA (1985), are commonly referred to as "indemnity benefits." They are based on the schedule of injuries set forth in section 39-71-705, MCA (1985). That schedule sets forth the maximum number of weeks of benefits payable on account of the loss of limbs and other body parts. In the case of a non-scheduled injury, such as a back injury, the maximum number of weeks of benefits is 500 weeks. § 39-71-706, MCA.

4. To establish his entitlement to permanent partial disability benefits, claimant must show that there is a causal connection between his 1987 injury and his disability. *Walker v. UPS*, 262 Mont. 450, 454, 865 P.2d 1113, 1116 (1993) (citing *Brown v. Ament*, 231 Mont. 158, 752 P.2d 171 (1988)). Claimant's ability to continue working in his time-of-injury job does not preclude an award of permanent partial disability benefits. *Fermo v. Superline Prods.*, 175 Mont. 345, 348-50, 574 P.2d 251, 253-54 (1978); *Hafer v. Anaconda Aluminum Co.*, 198 Mont. 105, 111, 643 P.2d 1192, 1195-96 (1982). Nonetheless, claimant must still show that he has suffered some permanent detriment on account of the 1987 injury. He has failed to do so. The evidence preponderates in favor of a conclusion that claimant's overall condition was not materially, permanently changed by the 1987 injury, and that his disability was not increased by the injury. Therefore, he is not entitled to permanent partial disability benefits on account of the injury.

5. Since claimant has not prevailed in this action, he is not entitled to attorney fees or costs.

JUDGMENT

1. Claimant is not entitled to permanent partial disability benefits.

2. Claimant is not entitled to attorney fees or costs.

3. 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.

4. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

DATED in Helena, Montana, this 19th day of November, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. James G. Edmiston, III
Mr. Kelly M. Wills
Mr. Peter Stokstad
Date Submitted: July 1, 1996