IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2002 MTWCC 29

WCC No. 2000-0133

IN THE MATTER OF MICHAEL ABFALDER

TRAVELERS INDEMNITY COMPANY OF ILLINOIS

Petitioner/Insurer for

CEREAL FOODS PROCESSORS

Employer

vs.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer for

CEREAL FOODS PROCESSORS

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

AFFIRMED 7/10/03

Summary: In 1994, the claimant was diagnosed as suffering an occupational back disease as a result of his continuous heavy lifting. His occupational disease claim was accepted by Nationwide. He continued working and suffered flareups from three specific incidents which were accepted as compensable aggravations by the employer's subsequent insurer, which was Travelers. Over the years, claimant also suffered flareups unrelated to specific incidents. After each flareup he returned to work with the same physical restrictions imposed in 1994. In December 1999, his employer imposed additional requirements on his work which were outside his restrictions, then laid him off because of his restrictions. Claimant's treating physician opined that claimant's post-1994 incidents were temporary aggravations but acknowledged that the subsequent incidents did to some degree worsen his condition. An IME physician also opined initially that the incidents were temporary aggravations but during deposition testimony concluded that the incidents contributed to and worsened his condition. The insurer for the subsequent injuries seeks indemnification from the OD insurer.

Held: The OD insurer is liable. While the subsequent aggravations contributed to claimant's overall condition, the degree to which they contributed was neither material nor substantial. Claimant was laid off because of a change in the requirements of his job, not because of any change in his condition or restrictions. While he suffered numerous exacerbations over the years, he was motivated to work and would have continued working indefinitely but for the change in his job.

Topics:

Occupational Disease: Last Injurious Exposure. Subsequent aggravations of an occupational disease do not relieve the insurer responsible for an occupational disease from further liability where the subsequent aggravations do not increase claimant's physical restrictions and claimant is able to continue working with the same restrictions. Under those circumstances the aggravations are not "material and substantial."

Occupational Disease: Subsequent Injury. Subsequent aggravations of an occupational disease do not relieve the insurer responsible for an occupational disease from further liability where the subsequent aggravations do not increase claimant's physical restrictions and claimant is able to continue working with the same restrictions. Under those circumstances the aggravations are not "material and substantial."

Constitutions, Statutes, Regulations and Rules: Montana Code Annotated: section 39-71-303(2), MCA. Where an occupational disease is based upon repetitive trauma, the occupational disease is continuing. A "new" occupational disease based on a continuation of the same sort of repetitive trauma does **not** begin merely because claimant may have been pronounced at maximum medical improvement.

Occupational Disease: Subsequent Disease. Where an occupational disease is based upon repetitive trauma, the occupational disease is continuing. A "new" occupational disease based on a continuation of the same sort of repetitive trauma does **not** begin merely because claimant may have been pronounced at maximum medical improvement.

1 The trial in this matter was held in Billings, Montana on November 27, 2001. Michael Abfalder (claimant), was present and represented by Mr. Victor R. Halverson. Travelers Indemnity Company of Illinois (Travelers) was represented by Ms. Sara R. Sexe. Nationwide Mutual Fire Insurance Company (Nationwide) was represented by Mr. Kelly M. Wills.

2 Exhibits: Exhibits 1 through 4 were admitted without objection.

3 Witnesses and Depositions: Claimant testified at trial. Gary David Wattles also testified. In addition the deposition of claimant, Susan Elaine Abfalder (claimant's wife) and Steven Rizzolo, M.D. were submitted for the Court's consideration. The Court was also present by phone for the telephonic testimony of Dr. Thomas Lee Schumann. That testimony was in

two parts, the first part (Schumann Dep. I) on May 11, 2001, the second (Schumann Dep. II) on May 25, 2001. Transcripts for both days were prepared and submitted to the Court.

4 Issues Presented: The sole issue in this case is: Which insurer is liable for claimant's compensation and medical benefits after December 1999?

5 Having considered the Pretrial 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

6 From September 1978 until December 1999, the claimant was employed by Cereal Foods Processors (Cereal Foods) and its predecessor company at its Billings, Montana plant.

7 Claimant was initially employed as a sweeper for Cereal Foods. His primary duties were to sweep the floors and scavenge flour from the floor, putting it into 100-pound bags. (Abfalder Dep. at 14-15.) He held that job for three to four years. (*Id*. at 15.) Thereafter he held a number of different jobs, most of them involving significant lifting of bags of flour.

8 In early February 1994, claimant was working as a table man or trucker.[(1)] His job required him to continuously lift 50-pound bags from a conveyer belt, carry them about 3 feet and put them on pallets. (Ex. 2 at 223; Trial Test.) Claimant was working 10-hour days and lifting between 2,000 and 2,500 bags. (Ex. 2 at 223.)

9 On the night of February 7, 1994, claimant woke up with acute low-back pain. (*Id*.) On February 8, 1994, he went to see Dr. David Drill, an internist. (Ex. 1, Drill at 1.) Dr. Drill diagnosed acute back strain. (*Id*.)

10 On February 11, 1994, claimant filed a workers' compensation claim. (Ex. 2 at 223.) The claim was made on a form published by the State Compensation Mutual Insurance Fund. (*Id*.) However, Cereal Foods' insurer was Nationwide, not the State Fund. (Pretrial Order, Uncontested Fact 2.) The claim found its way to Nationwide, which accepted liability for the claim as an occupational disease. (*Id*.) The parties agree that Nationwide paid appropriate compensation and medical benefits due him at the time. (*Id*.)

11 On March 10, 1994, Dr. Drill limited claimant to a 40 hour work week. (Ex. 1, Drill at 4.) His office note of that date sets out the following warning he gave the claimant's supervisor:

[I]f he [the supervisor] works this man 7 days a week, 12 hours a day doing this type of work, he is going to end up with an Industrial Accident that is going to cost the company a large amount of money.

(*Id*.) Notwithstanding the warning, Cereal Foods continued to work claimant seven days a week albeit only for eight hours a day. (*Id*.) As a result, claimant suffered further pain and back spasm and on March 28, 1994, Dr. Drill took claimant off work entirely. (*Id*. at 4-5.)

12 On April 20, 1994, Dr. Drill approved claimant's return to light-duty work, and on May 13, 1994, he approved part-time work gradually working up to full time. (Ex. 1, Drill at 8-9.)

13 While the information provided the Court is somewhat imprecise and confusing, it appears that claimant went back to work in April 1994 and continued working until December 1994, limiting his work to 40 hours a week. (Ex.1, Drill at 3; Ex. 2 at 183.)

14 Dr. Donald H. See, a physiatrist, evaluated claimant at the insurer's request on November 15, 1994. In a letter dated the same day, he indicated that claimant had been able to work 40 hours a week during the previous six months but was unable to work more hours. (Ex. 1, See at 3.) He noted claimant's symptoms at the time his examination as

consist[ing] of aching pain and burning pain felt arising in the low back radiating into the left lumbar region and spreading down the left lateral buttock and thigh and with cramping in the left calf and numbness in the left ankle and foot shading towards the lateral side of the foot.

(*Id*. at 2.) Concerning claimant's ability to continue to perform his job duties, Dr. See went on to say:

1. It is my opinion that Mr. Abfalder is unable to increase his work schedule beyond a forty hour week. Although he has been able to maintain this current schedule for the past six months, the long-term prognosis I believe is quite uncertain. I do not expect there is any reasonable potential for him to improve and there is much potential for his clinical condition to deteriorate.

2. In regard to additional medical treatment, this consists primarily of matching his job demands with his physical limitations. If he becomes increasingly symptomatic, he will necessarily have to either discontinue work or be placed on more rigid limitations. Symptomatic treatment with anti-inflammatory medication and other pain medication can have some limited benefit. Additional physical therapy I believe has either no role or very limited benefit. His current clinical condition does not present indications for surgical intervention.

3. As described earlier in this report, Mr. Abfalder has significant degenerative disc disease in the lumbar spine with some subjective symptoms of S1 nerve root irritation but without neurologic deficit. His current job requirements are certainly pushing him to the very limit as far as his spine condition is concerned.

4. My record review and interview with the examinee indicates that workers at Cereal Foods Processors in many instances are required to work up to twelve hours a day, seven days per

week with their only relief being vacation time. This schedule coupled with the work demands in the medium to heavy range is absolutely guaranteed to result in numerous industrial injuries.

(*Id*. at 3.)

15 Dr. See limited claimant to lifting 50 pounds and a 40-hour work week. (*Id*. at 4-5.) Dr. Drill concurred in the limitations. (Ex. 1, Drill at 10).

16 In December 1994, Cereal Foods increased the lifting requirement for claimant's position from 50 to 110 pounds on account of its use of 110 bags of flour for the export market. (Ex. 2 at 183, 185.) Since the additional lifting was outside claimant's restrictions, Cereal Foods laid claimant off work. (*Id*. at 183, 185, 195.)

17 Claimant was off work for several months. Then, in the summer of 1995, the lifting requirements for his job reverted to 50 pounds and Cereal Foods notified him that he could return to work if he verified his lifting restriction at 50 pounds. (*Id*. at 143.) He apparently did so and returned to work as a table man (trucker) on an 8-hour day, 40- hour a week basis.

18 During the winter and spring of 1995-1996, claimant worked in "bulk feed," a lighter job. He then returned to work as a table man. Upon return to the table man job, which was a heavier position, he experienced some soreness for several weeks. But, as he testified, he got "used to it again."

19 On December 30, 1996, claimant tripped and twisted his back while at work. (Ex. 2 at 224.) By this time, Cereal Foods was insured by Travelers. Claimant filed a claim with Travelers and it was accepted.

20 Following the December 30, 1996 injury, claimant was initially seen by Dave Johnson (Johnson), a physicians' assistant, on January 14, 1997. As reported by Johnson, claimant "wrenched his low back" and was experiencing pain mainly "in the low lumbar region." (Ex. 1, Johnson at 1.) In his history Johnson summarized claimant's prior back problems, including his six months off work in 1995. (*Id*.) Claimant reported that prior to the December 30, 1996 injury

he has had occasional low back pain, in fact, he states at least 3 or 4 times a week and he also gets some cold sensation or numby tingly sensation of the left leg and foot, that often as well.

(*Id*.) Johnson restricted him to light duty and scheduled claimant to followup with Dr. Thomas Schumann, who specializes in occupational medicine.

21 Dr. Schumann thereafter saw claimant on January 20 and 27, 1997. On January 20th he released claimant to return to work "with restrictions of not to lift over approximately 25-50 pounds and must be permitted to change posture regularly." (Ex. 1, Schumann at 2.) On

January 27, 1997, he found claimant to be at maximum medical improvement and approved his return to his regular job, reimposing claimant's pre-December 30th permanent restrictions limiting him to lifting 50 pounds regularly and to 8-hour work days and 40-hour work weeks. (*Id*. at 3.) He noted that claimant had a preexisting impairment of 5% on account of his preexisting back condition and that the impairment was not increased by the December 30th incident. (*Id*.)

22 In late April of 1997, claimant experienced some increase in his low-back pain and again returned to Dave Johnson on April 30, 1997. Johnson's report noted that claimant "has problems off and on . . . . He does reasonably well at times, and other times he really suffers low back stiffness and discomfort." (Ex. 1, Johnson at 4.) By May 7, 1997, Johnson reported: "Mr. Abfalder's back has now settled down once again. He feels as well now as he did before his recent back flare-up." (*Id*. at 6.)

23 Five months later, on October 14, 1997, claimant's back pain again led him to return to Johnson. In his office note, Johnson wrote: "He states actually since his last visit some time ago, he has never been 100% well. When questioned further, he states **he has had back ache most days for the past 3-4 years or so."** (*Id*. at 7.) Dr. Schumann thereafter saw him and imposed lighter restrictions, but by November 6, 1997, claimant indicated his back was "as good as it was prior to his last exacerbation of low back pain" and Dr. Schumann again released claimant to return to his regular job with the same restrictions which had been in effect since 1995. (Ex. 1, Schumann at 8.) At the same time, however, Dr. Schumann recommended claimant "consider a career change to a less physically demanding career." (*Id*.)

24 On January 29, 1998, claimant was suffering another flareup (increase in pain) and returned to Dr. Schumann on that date. Claimant reported "that since he was last here in early November he did well up until the last couple of weeks." (*Id*. at 9.) By February 10, 1998, claimant reported "his back feels significantly better" and that he could go back to work. (*Id*. at 12.) Dr. Schumann again released him to his regular job with the same restrictions as in 1995. (*Id*.)

25 Claimant again worked steadily for several months until September 10, 1998, when he had to cease working because of low-back pain. (Ex. 2 at 227-28.) At the time, Cereal Foods had reassigned claimant to a different job. Claimant, who saw Dr. Schumann on September 10, 1998, reported:

Michael [claimant] indicates that since he was last here last February, he has done well at work. He indicates, however, that two people quit, and he was assigned to fill bags, a job which he has previously had difficulty with due to prolonged standing. He indicates that he did it for four hours yesterday morning and had to tell them that he was unable to continue. Again this morning he did it for 2 hours and had significantly increased back pain. He has taken ibuprofen and gotten some rest. He indicates that his back is feeling a little better

this afternoon. He believes that he could continue doing his old job but notes that he does not tolerate standing for long periods of time at the pack or operating the foot pedal with one foot.

(Ex. 1, Schumann at 15.)

26 A first report was filed with respect to the matter (Ex. 2 at 227) and the claim was accepted by Travelers, which was still insuring Cereal Foods.

27 By October 6, 1998, Dr. Schumann again approved claimant to return to work with the same restrictions as in 1995; he specifically approved the trucker or table man position, although he reiterated his previous advice that claimant "look for a less physically demanding job." (Ex. 1, Schumann at 18.) Dr. Schumann reserved judgment regarding the "packer" position claimant had been doing on September 9th and 10th, noting that the position had "caused increased problems." (*Id*.) He set up a job site evaluation for the packer position. (*Id*.)

28 Shortly after October 6th, claimant returned to work in the table man position. (*See* Ex. 1, Schumann at 19.)

29 In early January 1998, claimant was once again reassigned to a packer position. A week into that job, claimant returned to Dr. Schumann and expressed concern over continuing the job even though he had not experienced any "particular change in his back." (*Id*.) Dr. Schumann spoke with claimant's supervisor and recommended that claimant be allowed to "change positions frequently and sit/stand as needed using a tall stool if working as a packer." (*Id*.) He did not disapprove of claimant working as a packer and retained the other 1995 restrictions on his work. (*Id*.)

30 On April 23, 1999, claimant suffered a significant increase in low-back pain "for no specific reason that he can identify." (Ex. 1, Schumann at 21.) He was restricted to lighter duty for a week, then resumed his full duties. (*Id*.)

31 Claimant continued working until October 5, 1999, at which time he experienced yet another significant increase in back pain, causing him to again return to Dr. Schumann on October 8, 1999. (*Id*. at 22.) The circumstances of his increased pain are described in Dr. Schumann's note as follows:

Michael [claimant] indicates that Tuesday night at work he moved some palates of flour using a manual floor jack. He estimates these palates probably weighed about 1500 pounds each. He did not experience pain while doing that but did have increased low back pain after he got home that night and was unable to sleep. His back was significantly stiffer the next day and he comes in now for follow up.

(*Id*.; *See also* Ex. 2 at 230.)

32 A first report of injury was filed indicating that claimant experienced an acute onset of low-back pain on October 5th but that it was "unknown if due to new injury or prev or disease." (*Id*. at 229.) Travelers, which still insured Cereal Foods accepted liability for the claim.

33 Claimant did not return to Dr. Schumann for followup and on October 28, 1999, returned to work in his regular job. (Ex. 1, Schumann at 22.; Ex. 2 at 229.) Based on claimant's return to work and lack of followup, on November 17, 1999, Dr. Schumann reported that claimant was at maximum medical improvement (MMI), had "reached his pre-aggravation status," and had sustained no additional impairment. (Ex. 1, Schumann at 24.)

34 Following claimant's return to work on October 28th, Cereal Foods installed new equipment at its plant and reduced its warehouse employees from 10 full-time and 1 part-time workers to 8 full-time workers. However, as a result of the reduction, it required the remaining workers to work overtime hours. (Ex. 2 at 89.) Claimant's job was encompassed in the reduction of force. Since he was restricted from working overtime hours, on December 3, 1999, Cereal Foods placed him on an indefinite leave of absence. (*Id*. at 89-90.) He has never been recalled to work.

35 Dr. Steven Rizzolo, an orthopedic surgeon, saw claimant on March 8, 2000, at the request of Travelers. Dr. Rizzolo reviewed claimant's medical records and examined him. Claimant talked about his October 5, 1999 exacerbation, telling Dr. Rizzolo "**without equivocation that he feels now the same as he did prior to this recent aggravation of his chronic condition**." (Ex. 1, Rizzolo at 7, emphasis added.) Claimant told the doctor "that for many years he had increasing back pain at work, sometimes it being quite severe, but he tried to keep working so he could get his full retirement." (*Id*.) At the time of the examination, claimant was depressed because of the loss of his job. Dr. Rizzolo noted that he was willing to go "back to his old job if given the opportunity but feels that perhaps he couldn't work for that employer anymore and may better be suited for another job." (*Id*.) At the time of his exam, Dr. Rizzolo opined that claimant's "current symptoms are a result of an occupational disease with multiple aggravations following work-related injuries. He is now, and has been for approximately two months, back at maximal medical improvement **at his steady state**." (*Id*. at 9, emphasis added.)

36 Despite claimant's indication that he had returned to his prior state of health and a finding of MMI following the October 1999 incident, Dr. Rizzolo concluded that claimant should be restricted to "lifting up to 25 pounds occasionally, 10 pounds frequently." (*Id*.) Noting the claimant's depression, Dr. Rizzolo also suggested psychological counseling. (*Id*.)

37 In reply to a request by Travelers concerning the significance of claimant's post-1994 injuries, on April 6, 2000, Dr. Rizzolo wrote:

As per your March 27, 2000 correspondence I have reviewed the chart on Mr. Abfalder. It is my opinion that his work injury of 12/30/96, as well as 10/5/99, were temporary aggravations of his 2/1/94 occupational disease.

(Ex. 1, Rizzolo at 13.) On June 30, 2000, he wrote to Travelers regarding the September 1998 incident, concluding, "I do believe that his September 10, 1998 is also a temporary aggravation of his February 1, 1994 disease. His current disability is a result of the sequelae of his 1994 occupational disease." (*Id*. at 16.) He went on to say:

It appears that on each of his flare-ups he returns back to a chronic baseline. I, therefore, do not think that the claims of December 30, 1996, September 10, 1998, and October 5, 1999 constitute a "permanently injurious exposure". **I do not believe that they resulted in an increase in disability and that these episodes do not result in the initial increase in degree of disability.** I don't necessarily feel that this is part of the natural progress of his injury in February 1, 1994, but they are temporary flare-ups. **I don't believe that these exposures mentioned above materially or substantially contributed to his current symptomatology or underlying disease process. I believe his physical condition would likely be the same now if the above-mentioned incidences have [sic] not occurred.**

(*Id*. at 16-17, emphasis added.)

Claimant's Testimony

38 Claimant in his testimony indicated that the December 30, 1996 injury was significant and that he felt progressively worse after that injury. His testimony was supported by his wife.

Dr. Schumann's Testimony

39 Dr. Schumann testified by telephone, with the Court listening and participating. The doctor was claimant's treating physician from December 1996 onward. He had access to claimant's prior medical records and treated claimant for each of the three incidents which gave rise to the later claims against Travelers. He testified that each of the three incidents was a temporary, not a permanent, aggravation of claimant's underlying back condition; that none of the incidents increased claimant's impairment or disability, and that following each incident the claimant essentially returned to his pre-aggravation status. (Schumann Dep. I at 15-16; 28, 29; Schumann Dep. II at 14-26 ; Ex. 1, Schumann at 25-26.) Reading his testimony in full, it is clear to the Court that the doctor did not consider the three incidents medically significant to claimant's condition and disability. His opinions are supported by office notes and correspondence made contemporaneous with his treatment of claimant. (See 21, 24, 30, 31, 33.)

40 Upon cross-examination, Dr. Schumann acknowledged that the cumulative effect of various incidents since 1994 had some effect on claimant's condition and "contributed, at

least to some extent, to his current disability." (Schumann Dep. II at 78.) "[E]ach of these instances would have contributed to some extent as it did probably every day he went to work." (*Id.* at 76.) In cross-examination about the significance of the three incidents for which Nationwide accepted liability, Dr. Schumann testified:

Q. (By Mr. Wills) Doctor, in retrospect, looking back at the injuries, the '96, the '98 claims, and '99 injury, you'd agree that each of these injuries contributed to some extent in a permanent way to his current disabling condition, correct?

A. That is a hard question. You know, probably, possibly, somewhere in there. But on the other hand, not necessarily. A person with a normal back and an injury like that does not necessarily create permanent damage.

Q. Well, of course, we don't have a person with a normal back.

A. Obviously. Now we're trying to think of someone who, retrospectively, we're trying to go back years later and say: Okay, retrospectively, he had a worsening of his condition over this period of time. We all agree to that. What contributed to that worsening? Certainly wear and tear through the time of those incidents that were identified as injuries. Even though they weren't anything so dramatic as it changed the diagnosis, they each would have had some effect.

Q. Let me try and shortcut this, okay?

A. It's a hard question. I mean, really -

Q. They are. They are. We're in agreement that Mr. Abfalder's condition has materially and substantially worsened since he returned to work in 1995; is that correct?

A. That's correct.

Q. Let's just identify the things that you believe have contributed to this material and substantial worsening, okay? One is the aging process?

A. Yes.

Q. Another is the heavy nature of his work in the intervening five years?

A. That's correct.

Q. I think you said that that was a significant contributor to his current disabling condition.

A. Probably.

Q. And now the injuries that we've identified, both the reported injuries such as the one in 1966, '98 and'99, and then the unreported ones where he would just get up and be unusually sore the next day, correct?

A. Correct.

Q. Do you believe all of those contributed in some way to his current disability?

A. Probably.

(Schumann Dep. II at 75-77.)

Rizzolo Testimony

41 Upon skillful deposition examination by Nationwide's counsel, Dr. Rizzolo qualified his previous opinions, saying that claimant's subsequent injuries "seem gradually to make him worse" (Rizzolo Dep. at 22-24, quoted material at 24) and "materially, substantially, and permanently aggravated his condition" (*id*. at 67). Dr. Rizzolo also reaffirmed his conclusion that claimant's restrictions should be reduced in light of his overall history. (*Id*. at 37.)

Resolution

42 As in several recent aggravation cases, the principal issue in this case is whether claimant's disability commencing December 3, 1999, is the result his 1994 occupational disease or a natural progression of that disease, or whether later injuries materially and permanently aggravated his underlying occupational disease. Cutting through all of the testimony and opinions, the following facts are clear:

- Claimant's physical restrictions on December 3, 1999, were the same as his restrictions in 1995.
- Between 1994 and December 3, 1999, claimant suffered flareups in the absence of specific incidents.
- Following each of the incidents and flareups, claimant was able to return to his regular job.
- Following treatment for each of the incidents and flareups, claimant's physical restrictions were the same as in 1995.
- Claimant's impairment has not increased since 1995.
- Claimant's inability to continue working for Cereal Foods after December 3, 1999, was on account of an increase in the number of hours he was required to work. It was not due to any increase in restrictions or impairment, or to any deterioration of his low-back condition.

43 Dr. Schumann, who treated claimant for the 1996, 1998, and 1999 injuries indicated that the claimant's age and his continued heavy lifting, along with the three specific injuries, contributed to his current condition. But his testimony, as well as that of Dr. Rizzolo,

emphasizes the primacy of the original occupational disease with respect to the claimant's condition.

44 I have no doubt that the three subsequent injuries contributed to claimant's current disability. The question, however, is not whether they contributed but rather whether the contribution was significant and material to both his condition and disability. (See 49). The evidence in this case establishes that it was not. As I noted two paragraphs ago, claimant was able to continue working for Cereal Foods after each of the injuries and was laid off only because his employer changed the requirements of his job. Had the change been made in 1994 or 1995, he would have been laid off at that time. Thus, there is no nexus between claimant's post-1994 injuries and his inability to continue working after December 3, 1999.

45 Moreover, there is substantial evidence that claimant's occupational disease continued to progress despite the injuries. Dr. Schumann noted that claimant's getting older and his continued heavy lifting contributed to a gradual decline of his physical abilities. Significantly, over the years claimant experienced temporarily disabling flareups even absent specific incidents.

46 Certainly, as able counsel for Nationwide has demonstrated, claimant's motivation to continue working undoubtedly contributed to his ability to work until 1999. That motivation, however, persuades me that he could and would have continued working for Cereal Foods indefinitely but for the change in his job requirements. Given his history of flareups and continued employment, I find it improbable that a treating physician would have reduced his restrictions, even with further flareups, had his job remained unchanged. It was only after he had been laid off and was no longer working that his restrictions were increased, and even then they were increased by an IME physician, not a physician who had been treating claimant.

CONCLUSIONS OF LAW

47 This case is governed by the laws in effect at the various times of claimant's original occupational disease (1993) and his subsequent injuries (1995, 1997, 1999). *Buckman v. Montana Deaconess Hospital,* 224 Mont. 318, 321, 730 P.2d 380, 382 (1986). Changes in the law since 1993, however, do not affect the analysis in this case.

48 The parties in this case do not dispute that claimant's current disability is compensable. The sole question, as in *Belton v. Carlson Transport,* 202 Mont. 384, 658 P.2d 405 (1983) and *Caekaert v. State Compensation Mutual Ins. Fund,* 268 Mont. 105, 885 P.2d 495 (1994) is which of two insurers is liable for his disability and medical condition.

49 The claimant in this case suffers from an occupational disease diagnosed in 1994 and for which Nationwide accepted liability. That being so, *Caekaert* is the guiding case. In *Caekaert* the Supreme Court considered the circumstances under which an insurer

which is liable for an occupational disease is relieved from further liability by a subsequent disease or injury. In *Caekaert,* the Supreme Court laid down two tests for determining whether the claimant's condition and disability is the responsibility of the initial insurer. Paraphrased, those tests are:

1. Did a second injury or occupational exposure "materially or substantially contribute" to the claimant's current condition?

2. Was the later injury or exposure "a direct and natural result" of the initial occupational disease or injury?

Caekaert at 112, 885 P.2d at 499. The tests are alternative ways of looking at the subsequent injury/disease question. Whether a later injury or exposure is "a direct and natural result" of the initial occupational disease or injury is the flip side of the first question: if a second injury or exposure does not "materially or substantially contribute" to the claimant's condition, then the condition can be said to be " a direct and natural result" of the initial occupational disease or injury.

50 "Materially" means "to an important degree; considerably." *Random House Unabridged Dictionary*, 2nd Ed. (1993). "Substantial" means "of ample or considerable amount, quantity, size." (*Id*.) Applying these definitions is not easy. What is "considerable", "important", "ample", or "substantial" is a matter of degree. Reasonable persons -- reasonable judges -- may well disagree as to the application of the terms to specific circumstances. There is no clear, bright line for parsing cases.

51 In this case, I conclude that the claimant's 1996, 1998, and 1999 injuries did not "materially or substantially" contribute to either his current condition or his current disability. Certainly, claimant's injuries contributed to a some degree to his condition, as did his age and his continued work at Cereal Foods. But he continued to be able to do his job until his employer changed the job requirements. Had his job requirements not been changed he would have continued working. For how long? Who knows. But he would have continued working until he felt it impossible to do so. His history indicates that he could have continued working for a "substantial" time but for his employer's action. I therefore find and conclude that the claimant's subsequent injuries in 1996, 1998, and 1999 were neither material nor substantial and that his current condition and disability are the natural and proximate consequence of his 1994 occupational disease.

52 At trial, Nationwide argued in the alternative that claimant suffers from a new occupational disease relieving it of liability. It relies upon section 39-71-303(2), MCA, which provides:

When there is more than one insurer and only one employer at the time the employee was injuriously exposed to the hazard of the disease, the liability rests with the insurer providing coverage at the earlier of:

(a) the time the occupational disease was first diagnosed by a treating physician or medical panel; or

(b) the time the employee knew or should have known that the condition was the result of an occupational disease.

53 Initially, the argument is untimely since the contention was not made in the pleadings or Pretrial Order. Moreover, it is without merit. The occupational disease in this case is the consequence of repetitive trauma involving claimant's continuous lifting. It was diagnosed in 1994. Nationwide's argument that the original disease ended upon claimant reaching MMI in 1995 and that a new disease began thereafter makes little sense in the context of this case. Since the disease was a continuous process involving repetitive trauma, under that theory the claimant would reach MMI at the end of each day and a new occupational disease would commence the next morning.

54 In light of the above analysis, I conclude that Nationwide is liable for claimant's condition and disability after December 3, 1999.

JUDGMENT

55 Nationwide is liable for claimant's condition and disability after December 3, 1999. Accordingly, it shall reimburse Travelers for reasonable benefits it paid claimant after that date.

56 This JUDGMENT is certified as final for purposes of appeal.

57 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 30th day of May, 2002.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Sara R. Sexe
Mr. Kelly M. Wills
Mr. Victor R. Halverson, Jr.
Submitted: December 11, 2001

1. The job he held was referred to as both table man and trucker.