

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 9

WCC No. 9405-7059

GERARD WILSON

Petitioner

vs.

LIBERTY MUTUAL FIRE INSURANCE

Respondent/Insurer for

UNITED PARCEL SERVICE

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in this matter was held on August 30, 1994, in Helena, Montana. The petitioner, Gerard Wilson (claimant), was present and represented by Mr. Richard J. Pyfer. Respondent, Liberty Mutual Fire Insurance Company (Liberty), was represented by Mr. Larry W. Jones. Claimant testified on his own behalf. Shawn Briggs, Maureen Wilson, Curt York, Tom Beneventi, Gregg Ford and Shelley Porch also testified. The depositions of Dr. Allen Weinert, Stan Colton, Ron Kenney, Dr. Robert Chambers, and Scott Oleson were submitted for the Court's consideration. Exhibits 1-4, 14, 16-34, 36-37, 39-42 and 44-47 were admitted by stipulation of the parties. Exhibits 35 and 38 were withdrawn. Exhibit 43 was refused. Exhibit 15 was admitted in its incomplete state. Exhibits 5-13 were admitted for the limited purpose of showing a sequence of events.

Issues presented: Claimant seeks permanent partial disability benefits with respect to back injuries of April 16, 1986 and December 27, 1988. He also asks for an award of attorney fees and a penalty.

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

FINDINGS OF FACT

1. At the time of trial, claimant was 36 years old. He has a high school education. (Tr. at 106.)

Work History

2. Claimant began working for United Parcel Service (UPS) in 1979, as a part-time "porter." (Id. at 51.) In 1981, he became a full-time package-car driver for UPS. (Id. at 52.) He continued to work for UPS until March 6, 1990, when he quit his job in a fit of anger. His work history since that time is as follows:

a. Delivery truck driver for Sweetheart Bakery from April 1, 1990 to November 1, 1990. (Id. at 153.)

b. Attendant at Town Pump from November 1990 to October 1991. (Id. at 153.)

c. Delivery driver for Airborne Express from September 1991 to October 15, 1992. (Id. at 153.)

d. Bus driver for Treasure State Transit from November 1991 until May 1993. (Id. at 155-56.)

e. Stocker for Wal-Mart from October 1992 until June 1, 1993. (Id. at 102-3, 153.)

f. Truck driver for Allen Oil from June 1, 1993 to present.

April 16, 1986 Back Injury and Treatment

3. On April 16, 1986, claimant suffered a back injury while working for UPS. He lifted a package and felt "a major pop" in his "upper back." (Id. at 55.) He was unable to finish his work-shift.

4. At the time of claimant's April 1986 injury, UPS was insured by Liberty, which accepted liability for his claim.

5. On April 17, 1986, claimant was examined by Dr. Kenneth Carpenter, an orthopedic surgeon. Dr. Carpenter noted tenderness over the area of the T10-T11 vertebrae. His initial impression was that claimant had a tear of the interspinous ligament and possible muscle avulsion. (Ex. 45 at 24.)

6. Based on the course of claimant's subsequent recovery, Dr. Carpenter's initial diagnosis is doubtful. Dr. Carpenter did not testify. However, Dr. Robert Chambers, an orthopedic surgeon who conducted an independent medical examination of claimant in 1993, made the following observation in his report:

Mr. Wilson confirms the initial medical record with respect to his 1986 injury, including the fact that his pain was completely relieved by 28 April, 12 days after his initial injury. This would suggest that Dr. Carpenter's diagnosis [sic] of a tear of the interspinous ligaments, and his concern with respect to a possible muscle avulsion, was incorrect.

(Ex. 44.)

7. In any event, Dr. Carpenter prescribed physical therapy and an exercise program and released claimant to do light, sedentary work but no lifting. (Ex. 45 at 26.)

8. Eleven days later, on April 28, 1986, claimant told Dr. Carpenter that he was doing better and that his pain was gone. (Ex. 45 at 24; Ex. 44.) Dr. Carpenter released him "to return to full duties." (Ex. 45 at 24.)

9. On April 29, 1986, claimant returned to work. After an hour or less, he again experienced pain in his upper back and had to cease work. (Tr. at 55; Ex. 45 at 5, 8 and 14.)

10. Claimant was examined by Dr. Michael Strekall, a family practitioner, later the same day (April 29th). Dr. Strekall detected muscle spasms in the thoracic area and diagnosed "[m]uscle strain, aggravated [sic] from previous injury." (Ex. 45 at 8.) Dr. Strekall initially prescribed bed rest for several days but then released claimant to return to light-duty, sedentary work after he learned that claimant attended a softball game on the evening of April 29th. (Ex. 45 at 6, 8 and 13.)

11. On May 1, 1986, claimant was examined by Dr. William Batey, a family physician who practices with Dr. Strekall. Dr. Batey noted muscle spasm and diagnosed "acute back strain." He approved claimant for light-duty work as long as claimant could work in a standing position. (Chambers Dep. Ex.: Dr. Batey's record of May 1, 1986.)

12. On May 2, 1986, claimant was again examined by Dr. Strekall, who noted that claimant was improving and that he no longer had muscle spasms. Dr. Strekall confirmed his original diagnosis of thoracic muscle strain, which he characterized as "mild to moderate and improving." (Ex. 45 at 7.)

13. Claimant was also seen by Dr. Carpenter on May 2nd. Dr. Carpenter confirmed the back strain diagnosis of Drs. Strekall and Batey, prescribed physical therapy, rest, and Naproxyn (a non-steroidal anti-inflammatory drug), and took claimant off work for five (5) days. (Id. at 24-5.)

14. On May 7, 1986, claimant returned to Dr. Carpenter. (Id. at 25.) Dr. Carpenter noted a significant decrease in claimant's pain. (Id.) He also noted that physical therapy was benefitting claimant and prescribed additional therapy. (Id.) He released claimant to return to light-duty work on May 12, 1986.

15. On May 21, 1986, Dr. Carpenter saw claimant for a final time with respect to the 1986 injury. (Ex. 45 at 25.) Dr. Carpenter's note for that day reads: "He is doing well at this time. He is almost pain free. The therapist needs to work with him on some more vigorous strengthening for one week, and then he'll return to work at that time." (Id.)

16. On May 30, 1986, Dr. Carpenter released claimant to return to work full time (Id. at 25) and claimant returned to his full duties as a package car driver.

Aftermath of 1986 Injury

17. Claimant did not seek treatment for any back complaints between May 30, 1986 and his second injury, a period of two and one half years. During that interim, claimant underwent a United States Department of Transportation (DOT) physical examination. The examination took place on April 20, 1988. In response to a health history questionnaire, which asked claimant inter alia whether he had ever suffered from back trouble, claimant reported that he had. (Id. at 19.) However, in follow-up questions by the examining physician, claimant reported with respect to his back that there was "nothing on going." (Id. at 16.)

December 27, 1988 Back Injury and Treatment

18. On December 27, 1988, claimant suffered a second back injury when he slipped and fell on a UPS customer's slippery driveway. He landed on his back and hit his head and elbows. (Tr. 62; Ex. 45 at 3.)

19. Liberty was still UPS's insurer at the time of the second injury and accepted liability for the claim.

20. On December 28, 1988, claimant took off work and sought treatment from Dr. Batey. (Ex. 45 at 3 and 10.) Upon examination, Dr. Batey noted some tenderness in the lower lumbar region. However, he also noted that claimant did not appear to be in any significant amount of pain. (Id. at 3.) He prescribed "[r]est, heat and Motrin for the next few 2-3 days" and indicated that claimant could then return to work "if he feels like he is able." (Id.)

21. Dr. Batey again examined claimant on January 4, 1989. (Id. at 3.) Claimant told Dr. Batey that his pain had persisted but that he had returned to work. (Id.) The doctor diagnosed lumbar strain and prescribed Feldene, an anti-inflammatory and analgesic drug. (Id.) Dr. Batey also indicated his intent to refer claimant to another physician if his condition did not improve. (Id.)

Aftermath of 1988 injury: 1989-1990

22. More than another year and a half elapsed before claimant again sought any medical consultation with regard to back complaints.

23. During the one-and-a-half year hiatus, claimant underwent another DOT physical examination. That examination took place on March 26, 1990, and was performed by Dr. Batey. Claimant did not report back trouble at that time. Dr. Batey noted "no problems" and that claimant was "doing well." (Ex. 45 at 4.) In later correspondence he noted that claimant had certainly reached maximum healing by March 26, 1990, as "there were no problems noted at that time." (Chambers Dep. Ex.: August 16, 1993 letter of Dr. Batey.)

24. Dr. Batey also examined claimant on September 19, 1990, with respect to an eye problem. He noted no changes in claimant's health since the March 1990 DOT examination and also approved claimant for a fire fighter physical examination. (Ex. 45 at 4; Tr at 157.)

25. Then on October 26, 1990, claimant sought out and was examined by Dr. Harris Hanson, an orthopedic surgeon. The consultation was in connection with a new incident. Dr. Hanson's office note for that day reads: "Patient states he felt a pop in his back a couple of days ago and now having more pain." (Id. at 26.) At trial claimant could not recall any specific incident which precipitated the consultation and related his back pain to a "different style of carrying" involved in his employment at Sweetheart Bread. (Tr. at 159.) The Court did not find claimant's explanation satisfactory or credible. It is inconsistent with the "pop in his back" report made to Dr. Hanson and claimant had a specific recollection of the much older popping incident in 1986.

26. As stated in Finding of Fact 2a, by the time of Dr. Hanson's October 1990 examination, claimant had changed jobs.

1991 to 1992 Hiatus

27. Following Dr. Hanson's October 1990 examination, claimant did not seek medical care respecting back trouble until May 26, 1993. In the meantime, he underwent yet another DOT physical examination. The exam was performed on March 23, 1992, by Dr. J.I. Kremer. The examination did not disclose any on-going back trouble. (Ex. 33.)

1993 Back Complaints

28. On May 26, 1993, claimant again sought Dr. Batey's care for back pain. At that time claimant stated very specifically that his back pain has been persistent since the 1986 and 1988 injuries he suffered while "working for UPS." (Ex. 45 at 1-2.) He stated that he had suffered "[n]o recent injuries since 1988." This is the first record of claimant stating that he had persistent back pain from the two (2) industrial injuries. He made no similar statement when examined by Dr. Batey in 1990, and the statement sounds almost scripted. Dr. Batey prescribed pain medication and physical therapy. (Id.)

29. Claimant returned to Dr. Batey on June 9, 1993, and reported no improvement of his back pain. (Id. at 2.) Dr. Batey referred him to Dr. Alan Weinert, Jr., who specializes in physical medicine and physiatry.

30. Dr. Weinert has treated claimant's back complaints with physical therapy and an exercise program.

Claimant's Current Back Condition and Diagnosis

31. At trial claimant described his back symptoms as follows:

A. Well, after '88 my lower back, it's just constant. It's something that doesn't go away. It bothers me all the time. As where the '86 injury to my upper back is something that is not constant but it flares up with activity, and it causes me a lot of pain. So I've just reduced my activities to almost the level of zero other than work.

Q. How would you describe the pain that you feel in your low back?

A. Very constant, very uncomfortable, nuisance.

Q. What would be the type of pain that you get? Use words to describe that.

A. It's very — When I sit for a long time I just get sharp pains in my back.

Q. Do they radiate ever?

A. Yeah, I feel like my legs get weak. When I'm not walking and there is no blood flow it just feels like my legs are getting real heavy and dead weight.

(Tr. at 85-86.)

Q. As far as your restrictions go, what problems do you have with sitting on your current job?

A. It hurts. I have to drive a lot. I go not far out of town. An average trip, you know, is anywhere between 30, may be the longest trip was 60, 70, 80 miles. The sitting bothers me a lot.

Q. What parts of your back bother you there with the sitting?

A. My lower back, like I stated earlier, it's constant and the sitting, it flares up and it just keeps getting worse and worse until I can get out of the truck and walk around and get the blood flowing.

(Id. at 93.)

32. According to Dr. Weinert, claimant's complaints are primarily in the low back. (Weinert Dep. at 23-2.)

33. Dr. Weinert diagnosed claimant as suffering from chronic discogenic pain. Dorland's Illustrated Medical Dictionary (27th Ed.) defines discogenic as "caused by derangement of an intervertebral disk." That diagnosis was initially based in part on lumbar spine x-rays taken on January 4, 1989 and March 26, 1990, which Dr. Weinert interpreted as demonstrating "mild disc space narrowing at the L4-5 and to a greater degree L5-S1 levels" along with "mild retrolisthesis of L5 on S1, approximately 1 mm." (Weinert Dep. Ex., September 7, 1993 consultation report.) Dr. Chambers, who reviewed the x-rays, disagreed (Weinert Dep. Ex. 2), and during his deposition, Dr. Weinert conceded that "I would probably concur that there isn't a great deal of evidence of disc space narrowing at the L4-5 and L5-S1 levels." (Weinert Dep. at 33-34.) He also agreed with a radiologist report that lumbar x-rays taken on September 7, 1993, were normal and showed "no evidence of disc space compromise" or other "abnormalities." (Ex. 45 at 29.) Nonetheless, Dr. Weinert adhered to his discogenic pain diagnosis. (Weinert Dep. at 34.)

34. Dr. Weinert also attributed claimant's increased symptoms in 1993 to deconditioning, noting that claimant's back complaints increased when "he'd fallen off his exercise program." (Id. at 10.) The physical therapy and a renewed exercise program prescribed by Dr. Weinert significantly reduced claimant's complaints. (Id. at 10-12.)

35. Dr. Chambers performed an independent medical examination of claimant on March 9, 1994, and did a comprehensive review of claimant's medical history and records. At that time, other than claimant's complaints of soreness upon palpitation of his back, the examination was within normal limits. Dr. Chambers' diagnosis was "chronic back pain syndrome." (Chambers Dep.: May 9, 1994 Report at 7.)

36. In his deposition, Dr. Weinert agreed that chronic back pain syndrome "could accurately define Mr. Wilson's problems," noting that the diagnosis is a "descriptor more than anything else" for "[b]ack pain that is non-anatomically localized." (Weinert Dep. at 26.) Dr. Weinert based his diagnosis on his "clinical examination and medical history" rather than any specific objective findings. (Id. at 33-34.) Given the lack of objective findings, Dr. Weinert's initial misreading of lumbar x-rays, and Dr. Chamber's evaluation, I find Dr. Weinert's diagnosis doubtful. However, the specific diagnosis of claimant's condition is not critical to the outcome of this case.

Claimant's Ability to Perform His UPS Job

37. Based largely on a functional capacities examination administered by a physical therapist, Dr. Weinert limited claimant to medium-duty work and disapproved the UPS package car driver job claimant previously held. (Id. at 19.) Dr. Chambers, who concluded that claimant's current back trouble is unrelated to his 1986 and 1988 injuries, did not express an opinion concerning claimant's ability to perform the UPS job.

Relationship of Back Condition to 1986 and 1988 Injuries

38. In Dr. Chambers' opinion the 1986 and 1988 injuries were muscle strains which totally resolved. He considers them unrelated to claimant's current back condition.

39. Dr. Weinert initially related claimant's condition specifically to the 1986 injury even though that injury was to claimant's back at the thoracic level while his current problems are principally in the lumbar area. On September 24, 1993, Dr. Weinert responded to Liberty's questions concerning this causal relationship by stating:

In respect to whether Mr. Wilson's back pain is related to a specific injury or occupational disease, it seems that his initial back pain was related to his injury of 1986. Since that time, he has had intermittent low back pain with exacerbations of the initial condition. Therefore, I feel that his back condition is related to a specific injury in 1986 but he has had recurrent exacerbations at work. This would not classify as an occupational disease.

(Weinert Dep. Ex.: September 24, 1993 letter to Ms. Erika Ayers.)

40. During his deposition, however, Dr. Weinert attributed the claimant's current condition more broadly to his 1986 and 1988 injuries.

A. My conclusion was that Mr. Wilson's back pain was related to a specific injury in 1986 and that he's had recurrent exacerbation since that time and, therefore, it wouldn't qualify as an occupational disease.

Q. Doctor, I'd like to ask you to apply the standard of a reasonable degree of medical certainty, and I'd ask the question of [sic] based upon your initial examination and treatment of Mr. Wilson whether or not the problems that you were treating were related or were not related to his reported injuries to you of '86 and '88?

A. Yes, I do think that Mr. Wilson's ongoing or recurrent back problems are related directly to both his 1986 and 1988 back injuries.

(Id. at 13.)

Dr. Weinert did not explain why he initially limited his opinion to the 1986 injury or why the 1986 injury was significant in light of the different area of the back affected.

41. In reaching his opinions, Dr. Weinert relied heavily on the medical history given him by claimant:

Q. Applying that same standard, if you recall it, you understand that, that we would apply the same standard?

A. Yes.

Q. What is the basis for that determination, what do you base that on?

A. I think it's strongly based on historical information. Mr. Wilson had no prior history of seeking any medical attention or any prior history of back problems before his initial 1986 work-related back injury and subsequent injury in 1988.

(Id.)

Later Dr. Weinert emphasized that in reaching a diagnosis in claimant's case the most important consideration is the patient's history. (Id. at 27.) That history included claimant's report that he had experienced chronic back problems and pain since the injuries in 1986 and 1988. (Id. at 40, 52.)

42. Dr. Weinert also provided an impairment rating with respect to claimant's back condition. That rating was five (5%) percent. He then apportioned the five (5%) percent among three (3) separate injuries:

In apportioning this out in my best medical opinion, 3% would be for his initial injury of 4/16/86 and additional 1% could be assigned to his 12/27/88 injury as well as his March of 1990 injury.

(Weinert Dep. Ex. 1: December 27, 1993 Follow-up and Impairment Rating; emphasis added.) In mentioning the "March of 1990 injury," Dr. Weinert was apparently referring to the back complaints claimant had while working for Sweetheart. Those complaints in fact occurred in October of 1990 when claimant was examined by Dr. Hanson. In his deposition, Dr. Weinert attempted to expunge his apportionment:

Q. How was he injured on the job in March of 1990?

A. That may have been an oversight on my part. He related in history that he experienced an acute flare up and apparently saw Dr. Hanson when he was working at the bakery and apparently had to discontinue working at the bakery because of back pain. Apparently, that was not recognized as an injury, at least there's no record of an injury report, so, apparently, no impairment rating would be recommended if it was never recorded as such. That doesn't change the overall 5-percent impairment of the whole person but that apportionment may be incorrect.

(Id. at 39-40; italics added.) Dr. Weinert then "amended" his impairment rating to exclude the 1990 complaints:

. . . I guess to amend that today, I would say that that [the 5%] be absorbed in the first and second injuries.

(Id.)

43. Even after his amendment, Dr. Weinert did not explain why he apportioned three (3%) percent to the 1986 thoracic injury.

Resolution of Relatedness Issue

44. After reviewing all of the evidence in this case, including the medical opinions of both Dr.

Chambers and Dr. Weinert, I am not persuaded that claimant's current back troubles are attributable to his 1986 and 1988 injuries. The Court finds it more likely that, as Dr. Chambers testified, the 1986 and 1988 injuries were strains which wholly resolved within a few weeks.

45. In reaching my determination I am influenced by a number of medical factors, including the following:

a. None of the physicians who treated claimant between 1986 and 1990 rendered an opinion concerning the relationship of claimant's current condition to his 1986 and 1988 injuries. Dr. Batey was specifically asked for an opinion but replied that he was unable to provide one.

b. Dr. Weinert offered no basis for his attributing claimant's current low-back problems to a 1986 injury which affected the thoracic level.

c. In supporting claimant's claim in this case, Dr. Weinert retracted important opinions he had expressed prior to deposition. Specifically, he repudiated his original readings of prior x-rays and his apportionment of one (1%) percent impairment to a March 1990 injury.

46. In addition, the Court is influenced by several factors which are important to any medical assessment. Dr. Weinert testified that medical history is important. The Court finds that part of his testimony to be persuasive and has considered the historical facts set forth in the following paragraphs to be important. They demonstrate that claimant's testimony concerning continuous back trouble since 1986 was not credible.

47. Claimant testified at trial that following both his 1986 and 1988 injuries, he continued to experience back pain, which he relieved by an aggressive exercise program and "eating" Advil and Tylenol. (Tr. at 58-61, 64.) Claimant's wife, Maureen Wilson, supported that claim. Also, a former co-worker and friend, Shawn Briggs (Briggs), testified that he knew that claimant had back problems. (Id. at 75.) According to claimant, he did not report his complaints to his supervisors at work because he did not want to lose his job. (Id. at 36.) I did not find their testimony to be credible and it was contradicted by other substantial, credible evidence.

a. Claimant's testimony that he did not complain because he feared for his job is undermined by testimony showing that he was a vocal complainer while working for UPS. He not only complained about his own workload but also about the work- loads of other employees. (Tr. at 43, 192-93.) When unhappy with Dr. Strekall's release for him to return to work in 1988, claimant was very vocal in his criticism of Dr. Strekall and openly accused Dr. Strekall of being a biased, company doctor.

b. Briggs' testimony was not credible. He was terminated by UPS for padding stops (Id. at 77) and is a friend of claimant's. While those factors are not in themselves conclusive, the Court has considered them, along with other evidence and its personal observation of Briggs' demeanor.

c. Ronald Kenney (Kenney), another UPS co-employee, worked with claimant on sort and load and did not remember claimant complaining about his back. (Kenney Dep. at 5, 7-8.)

c. Scott Oleson (Oleson) was a co-employee who also worked as claimant's supervisor for one (1) year. He did not recall claimant complaining about back problems. (Oleson Dep. at 6, 24.)

d. Claimant testified that one of his supervisors, Stan Colton (Colton), told him after the 1986 injury that his injury was costing UPS too much money and "told me if it would continue that he didn't know if he could keep me on there or not." (Tr. at 58.) Colton testified that he had no recollection of such a conversation, denied that he would ever tell an employee such a thing, and said that he did not have access to claimant's medical bills. (Colton Dep. at 7.) Although Colton testified by deposition and his credibility could not be judged, I observed claimant's trial testimony and did not believe him.

48. Claimant also testified in his deposition that he quit UPS in March 1990, because of his back problems and because of stress. (Wilson Dep. at 9.) However, other evidence shows that on March 7, 1990, claimant became angry about the number of packages he was supposed to deliver that day, tore off his UPS shirt, threw his shirt at one of his supervisors, and walked off the job. (Oleson Dep. at 10-16; Tr. at 120-121.) In a meeting on March 9, 1990, claimant apologized and asked for his job back. (Tr. at 177-178, 187-191.) UPS refused. In a March 9, 1990 application for unemployment benefits, claimant explained his discharge as follows:

Uneven work loads. Some drivers too many hours. Some drivers not enough. Personal problems at home. (Sick wife - having troubles pregnancy.) Sick brother and mother - was under a lot of pressure. On 3-6-90 had a heavy work load and ask for help. Help was there but was not given. Was told get in truck and go. Instead walked out 3-6-90. Was fired on 3-9-90.

(Ex. 2 at 1.) Later in the application, claimant stated that he "walk[ed] out of work under extreme pressure." (Id. at 2.) He further stated: "Combined with pressure at home and work I got so upset I walk[ed] out." (Id. at 3.)

49. Claimant's failure to mention back problems in medical visits during the intervals between the 1986, 1988 and 1990 incidents is inconsistent with his testimony that he had such continuous pain that he was taking excessive amounts of Advil and Tylenol. His intention in September of 1990 to seek a job as a fire fighter and take the prerequisite physical examination is also inconsistent with his claim.

Benefits

50. Based on Dr. Weinert's report of December 27, 1993, Liberty paid claimant a five (5%) percent indemnity award based on the doctor's impairment rating.

51. However, after receipt of Dr. Chambers' March 9, 1994 report, Liberty denied further liability for permanent partial disability benefits.

52. Claimant is not entitled to further permanent partial disability benefits since he has failed to show that his present back trouble is attributable to his 1986 and 1988 industrial injuries.

CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986). Thus, the 1985 version of the Workers' Compensation Act governs claimant's 1986 injury and the 1987 version of the Workers' Compensation Act governs claimant's 1988 injury.

2. Claimant has the burden of proving by a preponderance of the evidence that he is entitled to further 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). He has failed to carry that burden.

Permanent partial disability is defined under the 1985 Act as follows:

. . . a condition resulting from injury as defined in this chapter that results in the actual loss of earnings or earning capability less than total that exists after the injured worker is as far restored as the permanent character of the injuries will permit. Disability shall be supported by a preponderance of medical evidence. [Emphasis added.]

§ 39-71-116(12), MCA (1985). The 1987 Act defines permanent partial disability as:

. . . a condition, after a worker has reached maximum healing, in which a worker:
(a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119; and
(b) is able to return to work in the worker's job pool pursuant to one of the options set forth in 39-71-1012 but suffers impairment or partial wage loss, or both. [Emphasis added.]

§ 39-71-116(14), MCA (1987).

Under both laws, the claimant must show that his disabling condition is the result of his industrial accident. In this case, I am not persuaded that claimant's current low-back troubles are the result of either his 1986 or his 1988 industrial injury. For the reasons expressed in the Findings of Fact, Dr. Chamber's opinion that claimant's 1986 and 1988 injuries were temporary strains is more persuasive than Dr. Weinert's opinion linking claimant's current complaints to those prior injuries. Having failed to satisfy the definition of permanent partial disability, claimant is not entitled to further benefits.

3. Claimant is not entitled to attorney fees, costs or a penalty since the insurer's denial of further benefits was not only reasonable but correct.

JUDGMENT

1. Claimant is not entitled to permanent partial disability benefits respecting either his 1986 or his 1988 industrial injury.

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

3. Claimant is not entitled to a penalty.

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

5. Any party to this dispute may have twenty (20) days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

Dated in Helena, Montana, this 3rd day of February, 1995.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Richard J. Pyfer
Mr. Larry W. Jones