

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1994 MTWCC 60

WCC No. 9310-6907

WCC No. 9310-6915

R. KIM WUNDERLICH

Petitioner

vs.

LUMBERMENS MUTUAL CASUALTY COMPANY

Respondent/Insurer for

BUTTREY FOOD AND DRUG

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The trial in these two consolidated matters was held on January 10, 1994, in Great Falls, Montana, the Honorable Mike McCarter, Judge of the Workers' Compensation Court, presiding. Petitioner, Mr. R. Kim Wunderlich (claimant), was present and represented by Mr. Richard J. Martin. Respondent in WCC No. 9310-6907, Skaggs Alpha Beta, was represented by Mr. Thomas A. Marra. Respondent in WCC No. 9310-6915, Lumbermens Mutual Casualty Company, was also represented by Mr. Thomas A. Marra. Claimant was sworn and testified on his own behalf. Paula Wunderlich, Jon Rogers, Kip Anderson and Terry Blackwell were also sworn and testified. Exhibits 1 through 10 were admitted into evidence. The parties stipulated that the depositions of the claimant, Jon Rogers, and Terry Blackwell shall be considered by the Court.

The issue in WCC No. 9310-6915 concerns claimant's entitlement, if any, to a penalty and attorney fees. He alleges that acceptance of his claim for occupational disease was unreasonably delayed. The principal issue in WCC No. 9310-6907 is claimant's entitlement, if any, to permanent partial disability benefits under section 39-71-703, MCA. Claimant also seeks attorney fees and costs in WCC No. 9310-6907.

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

1. Claimant is 32 years old, is married and has four children. He is a high school graduate and has also completed one quarter of college at Northern Montana College. At the time of trial he had enrolled for the 1994 winter term at Flathead Valley Community College, where he plans to pursue a two year degree in land surveying.
2. Claimant first began working for Buttrey Food & Drug (Buttrey) in Cutbank, Montana, as a stockboy in February of 1981. Claimant also worked for a short time at the Buttrey store in Havre. In September 1982 he was hired by the Buttrey warehouse distribution center in Great Falls, where he worked until July 27, 1992.
3. Claimant worked at a variety of positions at the Buttrey warehouse in Great Falls, including hauler, loader, meat selector, cigarette stocker, supervisor and assistant dock supervisor. At the time of his injury he was an assistant dock supervisor. However, that position, as well as the other positions he worked, required continuous lifting of cartons and cases weighing up to one hundred pounds.

OCCUPATIONAL DISEASE CLAIM

4. During his employment with Buttrey, claimant filed workers' compensation claims for injuries to his low back occurring on October 17, 1982, March 6, 1986, December 5, 1988, and February 17, 1991. Each injury was slightly greater in intensity and duration. Claimant received chiropractic treatment after each injury.
5. On July 28, 1992, while riding his bike home from work, claimant experienced severe lower back pain. As described by claimant in a recorded statement he provided to claims adjuster Jon Rogers (Rogers), claimant was

just comin' up an incline, so I stood up into the pedals to pedal up the hill, and the lower part of my back went out, or it hurt and I collapsed onto the handlebars, and was able to put it into the lowest gear and continue home. And once I got home, I was pretty much stuck in bed.

(Ex. 2 at 387.) When asked if he had back problems at work that day, claimant stated: "Um, that's a tough one, because being -- having back injuries, I've had pain before and I work with pain constantly. However, its not this kind of pain, it's a -- my back hurts, but it's not, I don't know how to explain it." ***Id.***

6. Since July 28, 1992, claimant has been unable to return to work at Buttrey.
7. On July 31, 1992, claimant signed an "Employer's First Report of Notice of Occupational Injury or Occupational Disease" form.
8. Following the July 28, 1992, episode, claimant was first treated on July 31, 1992 by Dr. Paul Dolan, an internist. Dr. Dolan submitted his Attending Physician's First Report on

August 4, 1992 (Ex. 4 at 100101 and 500009), noting that "the pt. had MRI scan yesterday at Deac. which suggested some slight bulging in three discs, I believe that was L2, 3 and 4 but not any distinct evidence of radiculopathy."

9. On August 10, 1992, claimant was informed by his supervisor, Ron Myre, that his claim was denied. Claimant then contacted the claims adjuster, Jon Rogers⁽¹⁾, who agreed to take a statement from claimant and suggested that a letter from claimant's doctor might be helpful.

10. On August 10, 1992, Dr. Dolan sent a letter to Mr. Rogers stating in part that "[a]lthough the onset of pain was while the patient was riding his bike, I do not feel this is the etiology of the patient's pain and I think this is clearly related to his employment." (Ex. 4. at 600031.⁽²⁾)

11. On August 19, 1992, Rogers sent claimant a letter denying the claim under both the Workers' Compensation Act and the Occupational Disease Act. (Ex. 2 at 400.) The letter notified the claimant that he could contact the Department of Labor and Industry (DLI) if he did not agree with the decision.

12. On August 26, 1992, Dr. Dolan again wrote to Rogers, stating, "By no means do I think that pedaling his bicycle was the precipitating factor to his back injury. Frankly, I don't see how this could even be a point of contention." (Ex. 4 at 600032.)

13. On September 30, 1992, Rogers scheduled an independent medical examination of claimant. The IME was scheduled with Dr. Stephen Johnson, a Missoula neurologist. (Ex. 2 at 367.)

14. Dr. Johnson examined claimant on October 12, 1992. In a letter to Jon Rogers he noted that claimant had mechanical low-back pain related to degenerating discs at the L5, S1 and to lesser extent L4, 5 level. He also stated that "[t]he acute episode does not constitute a job injury, but it certainly **could** come under the "occupational disease" category." (Ex. 3 at 000007; emphasis added.) Dr. Johnson's medical report, which was enclosed with his letter, concluded that the bicycle incident was the "last straw" but noted that claimant had a history of heavy, occupational lifting and that "[a] good case can be made that he has an "occupational disease" affecting his low back." He recommended that claimant find another occupation. (Ex. 4 at 600034-5.)

15. On November 3, 1992, Rogers sent a letter to claimant notifying him that he had received Dr. Johnson's report and based on the report Lumbermens was continuing to deny liability for the claim "both as an injury and as an occupational disease." (Ex. 2 at 324.)

16. Claimant was examined by Dr. Dale Schaefer, a neurosurgeon in Great Falls, on November 9, 1992. Dr. Schaefer also recommended that claimant find another occupation. He further commented:

As I gather from reading his notes there is some disagreement as to whether or not this represents a work related injury. To me this argument seems quite silly. It is clear that over the course of at least ten years this gentleman has suffered at least five exacerbations of low back pain all described in very similar terms all in the very same location and all of which he has recovered from with conservative treatment and returned to his job. There is a clear pattern that each injury causes a bit more time off work and takes a bit longer to recover from. I do not see how this recent exacerbation could be considered anything other than a work related injury and I did discuss this with Mr. Wunderlich. I also told him that in my opinion that when he recovers from this injury he would be well apprised to seek a different type of employment. Certainly one that does not require a great deal of heavy lifting. It is my opinion that if he returns to this type of work after recovering from this recent exacerbation he will undoubtedly have further difficulties with his back which may be much more difficult to control in the future. [Emphasis added.]

(Ex. 4 at 600037-8.) A copy of Dr. Schaefer's report was date stamped as received by Intermountain Claims in November, 1992. (Ex. 2 at 275.)

17. On March 29, 1993, the occupational disease dispute was referred to the Montana Department of Labor and Industry (DLI), which arranged for claimant to be examined by an occupational disease panel. (Wunderlich Dep. Ex. 14.) Claimant was examined on May 4, 1993. The panel concluded that claimant was suffering from an occupational disease as a result of his employment that precludes him from returning to work at his same occupation. (Ex. 2 at 236-238.) Answering specific questions put to him by the DLI, the panel physician (Dr. Ronald M. Peterson), concluded:

1) I do believe that the patient is suffering from a disease that is a result of his employment.

2) I believe the employment can be traced as the proximate cause as outlined in the five criteria.

3) I do not believe that the patient is permanently unable to do any type of work but I do believe that he is unable to do his previous work on a permanent basis. I do not believe that there is a nonoccupational component to his current status.

(*Id.*) The panel report was date stamped as received by Intermountain Claims on June 18, 1993.

19. On July 8, 1993, the DLI issued an Order of Determination finding that the claimant is suffering from an occupational disease and is entitled to benefits under the Occupational Disease Act. (Ex. 2 at 219.)

20. In an August 9, 1993 letter, Jon Rogers notified the claimant that Lumbermens was accepting liability for claimant's occupational disease claim. The letter also advised claimant that Lumbermens would be paying claimant retroactive temporary total disability benefits and that future bi-weekly temporary total disability benefits would also be paid.

21. On September 3, 1993 claimant's counsel demanded a 20 percent penalty on the retroactive wage loss and medical benefits. The insurer denied the request.

22. The decision to deny the occupational disease claim during the period of July 28, 1992 to August 9, 1993, was made by Lumbermens. The basis for the decision was never credibly explained by Lumbermens' witnesses. Claims adjuster Rogers testified that initially it was denied because the claim was for an injury rather than an occupational disease, and based on a single incident. However, the claim was denied as both an injury **and** an occupational disease, and the denial was reiterated even after Rogers and Lumbermens received medical opinions stating that claimant's low- back condition was caused by an occupational disease. Lumbermens' presented no evidence that it obtained any medical evaluation which disputed the medical opinions of Dr. Dolan or Dr. Schaefer. Dr. Johnson, who examined claimant at Lumbermens' request, did not support the denial and indeed indicated that "[a] good case can be made that he has an "occupational disease" affecting his low back." (See Finding of Fact No.13.) In the face of the three uncontroverted medical opinions the insurer's liability under the Occupational Disease Act was reasonably clear long before the medical panel report. Lumbermens' delay in accepting liability under the Occupational Disease Act was unreasonable.

UPPER BACK INJURY CLAIM

23. On June 11, 1987, claimant injured his upper back and neck while at work. Claimant was loading a truck when a case of tissue weighing approximately 80 pounds tumbled out of the truck. Claimant reached to catch it and felt pain between his shoulders. He sought medical treatment on the same day from chiropractor N.S. Trospen, who noted that claimant's complaint was, "I've got a knot in the middle of my back; hurts in the neck, middle and lower back." (Ex. 4 at 600001.)

24. At the time of this injury Buttrey was self-insured. It accepted liability for petitioner's claim but in this proceeding contests claimant's request for further benefits.

25. Claimant was off work a total of 19 days, from June 11, 1987 until June 30, 1987. Dr. Trospen approved his return to work with no restrictions. (Ex. 4 at 600002.)

26. Claimant continued to receive chiropractic treatments during July and early August 1987. His last treatment was on August 7, 1987. (Ex. 4 at 600003-4.)

27. Dr. Trosper's diagnoses of claimant's condition was "paravertebral strain/sprain of the spine with associated myalgia, myofascitis and neuralgia of the plexus distribution (guarded)." (Ex. 4 at 100011).

28. Chiropractor Mark Stoebe's medical records reflect later complaints of mid- and upper-back pain. The first such mention, however, is in a December 6, 1988 record and was after claimant suffered another injury on December 5, 1988. His predominant complaint at that time was low-back pain. Dr. Stoebe continued to treat claimant following this new injury until April 21, 1989. (Ex. 4 at 600005-12, 6000015-16.)

29. Claimant was seen again by Dr. Stoebe on February 19, 1991, following another incident at work. He was complaining of low back and hip pain. However, during the following course of treatment he also complained of mid-back soreness. He was treated, apparently, into May 1991 for this injury. In a May 7, 1991 letter to claims adjuster Jon Rogers, Dr. Stoebe referred to claimant's mid-back pain as follows:

I last saw Robert Wunderlich for treatment in my clinic on May 2, 1991 for continuing care of his low back pain. He additionally has developed some mid back stiffness from trying to do his job and avoid further aggravating his low back. In mid March he slipped on his right toe which aggravated his problem for about three days. He was returned to work on March 10, 1991 without restrictions. At his last visit I scheduled him for one more fillip in about three weeks.

(Ex. 4 at 600020.)

30. There is also periodic mention of complaints of headaches, neck and mid-back pain in the records of physical therapist Jolene Monheim (Monheim). However, Monheim treated claimant after the latest incident of July 28, 1992, and the records reflect that claimant's predominant complaints related to his lower back. (Ex. 4 at 600039-47.)

31. Claimant testified that while working he had daily pain in his upper back and shoulders. However, his testimony indicated that back pain and stiffness was a common problem among warehouse employees, who commonly lift 32,000 pounds in a day. (Tr. at 101.)

32. Claimant was evaluated by Dr. Bill J. Tacke, a Great Falls physiatrist in 1993. Dr. Tacke's assessment of claimant was as follows:

ASSESSMENT:

1) Degenerative disc disease L4-5 and L5-S1 - MRI was reviewed with him. Physical exam and this study show no specific sign of nerve root compression although that certainly cannot be ruled out.

2) Chronic myofascial pain syndrome - this patient through the years with his repeated back injuries has developed a significant myofascial pain problem that has

flared up more significantly each time an injury occurs. Although he has been symptom free between [sic] this is a cumulative process along with the accumulation of his degenerative disc disease. In working through his physical therapy program he is gaining good control over this condition and, therefore, improving in functional skills.

3) Impaired mobility - improving.

4) Past history of recurrent lumbosacral strains with some component of thoracic and cervical strain - all now involved as components of the myofascial pain syndrome.

5) Muscle tension headaches - the end result of flare-up when his myofascial pain syndrome is out of control. [Emphasis added.]

(Ex. 4 at 600053.)

33. Dr. Stoebe performed an impairment rating evaluation for claimant's upper neck and back condition on October 21, 1993. Dr. Stoebe assigned claimant an 8 percent whole man impairment for his upper back and neck injury, consisting of total cervical range of motion impairment at 3 percent and total thoracic range of motion impairment at 5 percent. Dr. Stoebe also concluded that claimant was at maximum medical improvement. (Ex. 4 at 600023-600025).

34. The Court notes that the impairment rating was provided directly to claimant's attorney in letter form **after** the filing of claimant's petition requesting additional benefits with respect to the 1987 injury.⁽³⁾ It also notes that Dr. Stoebe did not testify. In light of the other medical records indicating subsequent aggravation of the mid- and upper back, including Dr. Stoebe's own records, the Court gives little weight to his impairment evaluation.⁽⁴⁾

35. We further note that the medical records show lengthy periods between chiropractic treatments and also show multiple injuries. Dr. Tacke's evaluation, as well as Dr. Stoebe's records, suggest that claimant's low-back injuries involved some injury component to his thoracic and cervical area. Dr. Stoebe's records show that after 1987 the claimant's mention of mid- and upper-back pain or stiffness followed new injuries involving his lower back. In his May 7, 1991 letter, Dr. Stoebe related claimant's complaints of mid-back stiffness to his efforts to compensate for his January 1991 low-back injury. Dr. Tacke suggested that the recurrent strains suffered by claimant have cumulatively contributed to an overall myofascial pain syndrome which encompasses claimant's upper and mid-back, as well as his low-back. The medical evidence does not support claimant's assertion that he suffered an impairment or disability on account of his 1987 injury, and his current complaints of upper and mid-back pain appear to be a part of his overall occupational disease caused by repetitive injuries and lifting.

36. Even assuming claimant were to establish that he suffers disability on account of the 1987 injury, he failed to establish any loss of earning capacity due to his upper and mid-back condition. Terry Blackwell, Ph.D., a rehabilitation counselor, testified on behalf of claimant. However, he testified as to claimant's loss of earning capacity due to his overall condition, including his occupational disease. Dr. Blackwell was not able to determine what if any loss of earning capacity claimant suffered on account of his upper and mid-back condition. He could not do so because the medical records did not provide information concerning limitations attributable to the upper and mid-back condition. (Tr. at 180.)

36 37. Claimant is not entitled to permanent partial disability benefits with respect to his June 11, 1987 industrial accident.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.
2. In WCC No. 9310-6915 the claimant seeks a penalty on account of Lumbermens' delay in accepting his occupational disease claim.

As an initial matter, the Court has found that Lumbermens' delay was unreasonable. An insurer cannot rest its denial solely on an assertion that a claimant has the burden of proof and that it is therefore entitled to put claimant to the test. Otherwise, no denial would be unreasonable. It is also no answer that claimant could have invoked the medical panel procedures at an earlier time. Claimant pursued his own claim, unrepresented by counsel, for several months, and even initiated mediation in November of 1992. (See Ex. 2 at 294.) The insurer and its claims adjusters have, or should have, expertise in workers' compensation matters. They must apply that expertise fairly and reasonably. In this case they did not do so. While the July 28, 1992 episode of low-back pain was triggered while claimant was riding his bicycle home, subsequent medical reports made it abundantly clear that claimant's job, and several prior work-related low back injuries, were the root of his low-back condition. An insurer cannot simply ignore uncontroverted medical opinions, at least where the underpinnings of those opinions are not tied to claimant's credibility. In this case, the nature of claimant's job and his prior work-related injuries were not in dispute. While the insurer makes much of claimant belatedly stating that he "may have had a minor lifting injury early in the day [July 28, 1992] feeling slight twinges of pain while moving goods" (Ex. 4 at 600036), an issue of credibility as to what occurred on July 28, 1992, hardly undermines the history on which the occupational disease diagnosis was made. The insurer's persistent denial in the face of the medical reports, and its smug insistence that it was claimant's responsibility to pursue his occupational disease remedies, were unreasonable.

However, as Lumbermens has pointed out, there is no penalty provision in the Occupational Disease Act. Does the penalty provision found in the Workers' Compensation Act at section 39-71-2907, MCA, nonetheless apply to occupational disease cases adjudicated by the Court?

Section 39-71-2907, MCA, is codified in part 29, which specifically pertains to the powers, procedures and operations of the Workers' Compensation Court. It was initially enacted in 1975 as a part of the statutes establishing the Court. 1987 Mont. Laws ch. 537, § 3. On its face it is not limited to proceedings brought under the Workers' Compensation Act. It provides in relevant part that the Court "may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay. . . ." Since it does not limit the Court's power to "benefits due" under the Workers' Compensation Act, the section plainly encompasses situations where the Court has jurisdiction to award benefits under the Occupational Disease Act. Our analysis, however, does not end here.

The Department of Labor and Industry, not the Workers' Compensation Court, has original jurisdiction to resolve cases of disputed liability under the Occupational Disease Act, section 39-72-611, MCA. Specific provision is made for awarding attorney fees, section 39-72-613 (1), MCA. The Court's jurisdiction in such cases is limited to judicial review of Department decisions, section 39-72-612, MCA, and to awarding attorney fees in cases appealed to it, section 39-72-613 (2), MCA. The scope of judicial review is specified in section 39-72-612 (2), MCA, which states that the Court may overrule the Department only if its determination is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 39-72-612 (2), MCA. No provision is made for an award of a penalty by either the Department or the Court. Thus, the Department has original jurisdiction to award benefits in disputed liability cases but may not award a penalty. Section 39-71-2907, MCA (1991), refers to situations where there is delay "prior or subsequent to **the issuance of an order by the workers' compensation judge granting a claimant benefits. . . .**" (Emphasis added.) This language strongly indicates that the penalty is intended to apply in cases where the Court has jurisdiction to award benefits. Lacking jurisdiction to do so in disputed

cases arising under the Occupational Disease Act, and in light of the specific jurisdictional provisions of the Occupational Disease Act, including the limited scope of judicial review, we conclude that the penalty provisions of section 39-71-2907, MCA, do not apply here.

There is an additional reason to deny the penalty. As indicated in the preceding paragraph, section 39-71-2907, MCA, refers to "the issuance of an order . . . granting benefits" as one of the predicates for imposition of a penalty. Read literally, the language would preclude imposition of a penalty unless the Court issues an actual decision ordering the insurer to pay benefits. The Supreme Court has determined that such a literal reading would nullify the "unreasonably delayed" language in the section and limit the section's application to refusal of benefit cases; the section was therefore deemed ambiguous. ***Handlos v. Cyprus Industrial Minerals***, 243 Mont. 314, 794 P.2d 702 (1990). It then held as follows:

[W]e conclude that the penalty under sec. 39-71-2907, MCA, is available where an insurer unreasonably delays paying a claim until the claimant takes the case to trial. We hold that sec. 39-71-2907, MCA, allows the Workers' Compensation Court to award a penalty when payment of benefits has been unreasonably delayed until mid-trial.

243 Mont. at 317.

The Court indicated that "the legislature may wish to reword" the statute, and in fact it did so in 1991. Prior to the amendment the section read in relevant part:

39-71-2907. Increase in award for unreasonable delay or refusal to pay. (1) When payment of compensation has been unreasonably delayed or refused by an insurer, either prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant compensation benefits, the full amount of the compensation benefits due a claimant between the time compensation benefits were delayed or refused and the date of the order granting a claimant compensation benefits may be increased by the workers' compensation judge by 20%.

The section, as amended in 1991, now reads:

39-71-2907. Increase in award for unreasonable delay or refusal to pay. (1) The workers' compensation judge may increase by 20% the full amount of benefits due a claimant during the period of delay or refusal to pay, when:

(a) the insurer agrees to pay benefits but unreasonably delays or refuses to make the agreed-upon payments to the claimant; or

(b) prior or subsequent to the issuance of an order by the workers' compensation judge granting a claimant benefits, the insurer unreasonably delays or refuses to make the payments.

The 1991 amendments created a new, specific provision for an award of a penalty, with or without a Court order, where the insurer agrees to pay benefits but then unreasonably delays or refuses to pay the agreed upon benefits. § 39-71-2904 (1)(a), MCA. However, it also carried over the old language, putting it in a separate subsection. § 39-71-2904 (1)(b), MCA. Whether the legislature intended by its amendment that the old language be construed strictly or merely carried over the old ambiguity is a matter of statutory interpretation that this Court need not address in this case since it is reluctant in any event to expand the holding in *Handlos* beyond its specific language. The Supreme Court's holding in *Handlos* was very specific and limited. It permits this Court to award benefits in cases where payments are unreasonably delayed until "mid-trial." It is not at all clear that the Supreme Court would construe the penalty provision to apply to cases where payment is made prior to trial or prior to the filing of a petition.

The claimant's request for imposition of a penalty in WCC No. 9310-6915 is therefore **denied**.

3. Claimant also requests an award of attorney fees in WCC No. 9310-6915. His request is made pursuant to section 39-71-612, MCA, and is based on the insurer's refusal to pay a 20 percent penalty as he demanded.

There are two reasons that claimant's request must be rejected. First, he has not prevailed on his penalty claim. Second, section 39-71-612, MCA, applies to only to disputes over "the amount of compensation due" under chapters 71 and 72 of Title 39, MCA. ⁽⁵⁾ A penalty is not "compensation," which in its ordinary sense means "indemnification; payment of damages; making amends; making whole, giving an equivalent or substitute of equal value." Black's Law Dictionary (5th Ed.) A "penalty" involves the "idea of punishment," particularly "pecuniary punishment." *Id.*

4. In WCC No. 9310-6907 claimant is seeking an award of 500 weeks of permanent partial disability benefits pursuant to section 39-71-703, MCA. Since the injury involved in this claim occurred in June, 1987, the 1985 version of 39-71-703 applies. See *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986).

Section 39-71-703, MCA (1985), provides:

39-71-703. Compensation for injuries causing partial disability. (1) Weekly compensation benefits for injury producing partial disability shall be 66 2/3% of the actual diminution in the worker's earning capacity measured in dollars, subject to a maximum weekly compensation of one-half the state's average weekly wage.

(2) The compensation shall be paid during the period of disability, not exceeding, however, 500 weeks in cases of partial disability. However, compensation for partial disability resulting from the loss of or injury to any member shall not be payable for a greater number of weeks than is specified in 39-71-705 for the loss of the member.

"In order to prevail under Section 39-71-703, MCA (1985), claimant must show an actual diminution in present earning capacity and such a loss must be measured on the open labor market." **Kuening v. Big Sky of Montana**, 231 Mont. 1, 4, 750 P.2d 1091 (1988).

In pursuing benefits the claimant argues that the testimony of his expert witness, a rehabilitation counselor, shifts the burden of proof to the insurer. The Court has already ruled that claimant bears the burden of proving his entitlement to benefits. The general rule is that the claimant bears the burden of proof. **Ricks v. Teslow Consolidated**, 162 Mont. 469, 483, 512 P.2d 1304 (1973); **Dumont v. Wickens Bros. Const. Co.**, 183 Mont. 190, 201, 598 P.2d 1099 (1979). Recently, the Supreme Court held that claimant's burden of proof extends to proof "that a causal connection exists between his work injury and his current condition." **Walker v. UPS**, 262 Mont. 450, 865 P.2d 1113 (1993). And, in **Sterns v. Dudley**, 228 Mont. 45, 50, 741 P.2d 407 (1987), the Supreme Court affirmed a decision of this Court awarding claimant permanent partial disability benefits for claimant's loss of earning capacity resulting from a finger injury but denying such benefits for a back injury due to claimant's failure to "establish what loss of earning capacity, if any, he experienced from his back injury." *Id.* at 50.

Claimant's citations of **Azure v. City of Billings**, 182 Mont. 234, 596 P.2d 460 (1979) and **Callihan v. Burlington Northern Inc.**, 201 Mont. 350, 654 P.2d 972 (1982) are not persuasive. **Azure** involved multiple tortfeasors who contributed to a single injury or condition. (Claimant was assaulted by an assailant and did not receive prompt care for head injuries because of police officers' negligent failure to have him promptly examined by a physician.) The plaintiff in such a situation need not prove what part of his injuries were caused by each tortfeasor, at least where the injuries are not divisible, because two tortfeasors causing a single harm are each liable for the entire harm. Where the injuries are "theoretically divisible" but not certainly so, then a corollary doctrine shifts the burden to the defendants to prove that damages in fact can be apportioned. *Id.* at 255-6.

Callihan also involved a tort action in which the plaintiff severely injured his back. He had suffered two previous back injuries but had bounced back from each one. The trial court instructed the jury as follows:

"Where a pre-existing condition exists which has been aggravated by the accident, it is your duty, if possible, to apportion the amount of disability and pain between that caused by the pre-existing condition and that caused by the accident. But if you find that the evidence does not permit such an apportionment, then the defendant is liable for the entire disability."

201 Mont. 350, 357. The Court approved the instruction, analogizing the situation to that in **Azure**. It noted that a plaintiff should not go uncompensated merely because the evidence does not permit an apportionment of damages.

This is a workers' compensation case, not a tort case, and claimant has not cited the Court to any authority for extending these tort principles to workers' compensation cases. Moreover, neither case is analogous to the present one. **Azure** involved joint tortfeasors contributing jointly to a single injury. **Callihan** involved an action against the most immediate or most recent tortfeasor, who without question substantially contributed to the plaintiff's ultimate injury.

I am also not satisfied in this case that apportionment is impossible or even difficult. While claimant's vocational expert indicated that he could not apportion loss of earning capacity, he could not do so because he did not have sufficient medical information to determine what limitations, if any, stemmed from claimant's 1987 injury. The claimant presented no medical testimony either by way of deposition or at trial. Moreover, claimant went back to work for several years and testified that the reason he did not return to work at Buttrey was on account of his low-back condition.

Finally, the medical documentation presented to the Court fails to persuade me that claimant's present mid-back and upper-back pain were caused by the 1987 accident. The documentation suggests that claimant's mid-back conditions were aggravated in subsequent incidents in which he injured his low-back. Dr. Tacke's evaluation suggests that claimant's current mid- and upper-back condition is now intertwined with claimant's myofascial pain syndrome which in turn is the result of repeated lower-back injuries over the years.

In summary, claimant has failed to carry his burden of proof with respect to lost earning capacity. As the Court weighs the evidence, it actually preponderates against any claim of lost earning capacity on account of the June 11, 1987 industrial accident.

5. Since the claimant did not prevail on the issue of permanent partial disability benefits, the claimant is not entitled to attorney fees or costs with regard to that issue.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.
2. The claimant is not entitled to a penalty or attorney fees with respect to his 1992 occupational disease claim (WCC No. 9310-6915).
3. The claimant is not entitled to lost earning capacity benefits under section 39-71-703, MCA, with respect to his 1987 upper back and shoulder injury (WCC No. 9310-6907).
4. Claimant is not entitled to attorney fees and costs with respect to his permanent partial disability claim (WCC No. 9310-6907).
5. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

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

DATED in Helena, Montana, this 28th day of June, 1994.

(SEAL)

/S/ Mike McCarter
JUDGE

c: Mr. Richard J. Martin
Mr. Thomas A. Marra

1. Rogers is a claims adjuster working for Intermountain Claims, the independent adjusting company which adjusted the 1992 claim on behalf of Lumbermens.
2. Some of the pages in Exhibit 4 contain two different page numbers. The Court has used the 6000xx page numbers in this decision.
3. The petition in 9310-6907 was filed on October 4, 1993.
4. Claimant has not requested the Court to order payment of any impairment award.
5. Section 39-71-612, MCA (1991), provides:

39-71-612. Costs and attorneys' fees that may be assessed against an insurer by workers' compensation judge. (1) If an insurer pays or submits a written offer of payment of compensation under chapter 71 or 72 of this title but controversy relates to the amount of compensation due, the case is brought before the workers' compensation judge for adjudication of the controversy, and the award granted by the judge is greater than the amount paid or offered by the insurer, a reasonable attorney's fee and costs as established by the workers' compensation judge if the case has gone to a hearing may be awarded by the judge in addition to the amount of compensation.

(2) An award of attorneys' fees under subsection (1) may only be made if it is determined that the actions of the insurer were unreasonable. Any written offer of payment made 30 days or more before the date of hearing must be considered a valid offer of payment for the purposes of this section.

(3) A finding of unreasonableness against an insurer made under this section does not constitute a finding that the insurer acted in bad faith or violated the unfair trade practices provisions of Title 33, chapter 18. [Emphasis added.]