

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 52

WCC No. 9406-7075

GERALD HEREIM

Petitioner

vs.

STATE COMPENSATION INSURANCE FUND

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Claimant, who suffered a series of work-related low-back injuries between 1975 and 1991, and had low-back surgery on a protruding disk in 1992, seeks medical and indemnity benefits from the insurer liable for injuries he suffered in 1975 and 1983.

Held: Claimant failed to prove causal connection between his disabling condition and his 1975 or 1983 injuries. Physician testified he could not attribute nerve root scar tissue, now the cause of claimant's pain, to these particular injuries. Though claimant testified his pain began following the 1975 accident, his medical records and work history belie this claim. Moreover, the first medically documented complaint of leg pain was after claimant's 1984 injury, which was worse than prior injuries. Claimant also failed to prove that his present condition disables him from employment.

Topics:

Causation: Medical Condition. Where physician testified he could not attribute claimant's present medical condition, resulting from nerve root scar tissue, to claimant's 1975 or 1983 accidents, and where claimant suffered deterioration of his back condition after several other subsequent injuries, including low-back surgery in 1992, claimant failed to prove causal connection between 1975 or 1983 injuries and his present medical condition. Medical and work records also suggested that present pain arose after 1984 injury for which this insurer is not liable.

Injury and Accident: Causation. Where physician testified he could not attribute claimant's present medical condition, resulting from nerve root scar tissue, to claimant's 1975 or 1983 accidents, and where claimant suffered deterioration of his back condition after several other subsequent injuries, including low-back surgery in 1992, claimant failed to prove causal connection between 1975 or 1983 injuries and his present medical condition. Medical and work records also suggested that present pain arose after 1984 injury for which this insurer is not liable.

The trial in this matter was held on November 17, 1994, in Billings, Montana. Petitioner, Gerald Hereim (claimant), was present and represented by Mr. Geoffrey R. Keller. The Respondent/Insurer, State Compensation Insurance Fund (State Fund), was represented by Ms. Susan C. Witte. Claimant testified on his own behalf. Juanita Hooper, a certified rehabilitation counselor, testified on behalf of claimant. The deposition of Dr. Robert C. Wood was submitted for the Court's consideration. Exhibits 1 through 21 were admitted.

Issues Presented: Claimant suffered a series of work-related low-back injuries between 1975 and 1991. In 1992 he had low-back surgery on a protruded disk. In this case he asks the Court to find that the State Fund, which insured claimant with respect to the 1975 and 1983 injuries, is liable for his surgery and for future medical bills related to his low back. He further requests temporary total disability benefits during his convalescence from surgery and permanent partial disability benefits. Finally, he asks for a penalty, attorney fees and costs.

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

FINDINGS OF FACT

1. At the time of trial claimant was fifty (50) years old. (Tr. at 55.) He has a GED. (Tr. at 56.)
2. From 1962 to 1965, the claimant was in the Army. (Tr. at 57.) After discharge from the Army he worked as a shipping and receiving clerk from 1965-1970. (Tr. at 58.)
3. In 1970 claimant went to work as a route salesman and delivery man for Briggs Distributing (Briggs). (Tr. at 63.) His job duties included loading beer products on delivery trucks and unloading them at retailers. He also stocked shelves for retailers. He was required to lift beer kegs, weighing approximately one hundred and sixty (160) pounds, and cases of beer, weighing approximately twenty-five (25) pounds each. (Tr. at 60-62.) On the average, he delivered one hundred (100) kegs per week. (*Id.*)

4. In 1985 claimant was laid off work by Briggs for economic reasons. (Tr. at 74-77.) Claimant then sought and obtained a job with Dunham Distributing (Dunham), a company that competed with Briggs. (Tr. 76.) He continued working for Dunham until 1988, when he was terminated because of "missing money." (Tr. at 81.)

5. While working for the two beer distributors, claimant suffered six (6) injuries to his low back. The first occurred in 1975, the last in 1987.

November 12, 1975 Industrial Injury

6. Claimant's first industrial injury reportedly occurred on November 12, 1975. (Ex. 14.) Claimant slipped on a wet ramp while delivering beer and twisted his knee and back. (Tr. at 63, Ex. 14.) Claimant felt immediate knee pain but not back pain. (Tr. at 64-65.) The knee pain resolved, but over the next few days the claimant gradually developed pain in his lower back and he eventually went to the emergency room of St. Vincent Hospital. (*Id.*)

7. The emergency room record is for November 12, 1975, and reflects, "This patient delivers beer and he has noticed over the **past three to four days** that he has been having increasing pain in the lower back area and when lifting cases of beer. There was no sudden onset of this and more gradual origin." (Ex. 2 at 2; emphasis added.) The claimant's testimony and the emergency room record establish that the industrial accident did not occur on November 12, 1975, as reported in the employer's first report (Ex. 14), but several days earlier.

8. At the time of the emergency room examination, claimant was complaining of low-back pain. (Ex. 2 at 14.) On examination, the treating physician found "considerable paravertebral muscle spasm." (*Id.*) Straight leg raising, which tests for nerve root pinching or constriction (Wood Dep. at 28), was negative. X-rays taken at the time indicated that there was some narrowing of the disk space at L4-5, but it was "not a very striking finding." (Ex. 2 at 3.) The treating physician diagnosed claimant's condition as paravertebral muscle sprain of the lumbar spine and prescribed Parafon-Forte and Wygesic. (Ex. 2 at 2.)

9. Claimant returned to work after five (5) days. (Tr. at 66.) There is no evidence that claimant was medically restricted as a result of his 1975 injury.

10. The State Fund insured Briggs Distributing at the time of the 1975 injury. It accepted liability for the accident and paid at least the physician bill for the emergency room visit. (Ex. 2 at 4.)

11. Between November 12, 1975, and May 27, 1983, claimant sought treatment for lower-back complaints on only one occasion. That was on July 16, 1976, when claimant

went to St. Vincent's emergency room seeking a refill of the prescription for Parafon-Forte. (Ex. 3 at 1.) The ER note indicates that claimant had an episode of low-back pain ten (10) days previous, had strained his back again and was seeking to renew his pain medication. (*Id.*)

12. At trial, claimant contended that his pain never totally went away following his 1975 industrial accident. (Tr. at 67.) He further testified that at times he experienced pain down both his legs. (*Id.*) Having heard and observed claimant's testimony at trial, and considered later medical reports which will be referred to hereinafter, I find that claimant's testimony in this regard is not credible. I am not persuaded that he suffered any continued pain in either his back or legs following his return to work in 1975, and find it more likely that his 1975 injury resolved without residual symptoms. His claim is not aided by the 1976 ER visit since the ER note for that date indicates a second strain and, in any event, he sought no medical care between that time and May 27, 1983, a period of seven (7) years.

May 27, 1983 Industrial Injury

13. Claimant suffered a second industrial injury on May 27, 1983. According to the employer's first report, claimant picked up a floor door and pulled his lower back. (Ex. 15.) According to claimant, he felt a "tugging" and sharp pain in his back. (Tr. at 69.) He was able to complete his work shift. (*Id.*)

14. Claimant was treated for this injury by Dr. S. C. Elliott at St. Vincent's emergency room the day after the accident. (Ex. 4 at 2, 4.) The emergency room record for that day reads in pertinent part: "Bent over yesterday to lift up a door - got sudden pain in low back - then lifted heavy boxes afterwards: **No hx [history] of chronic back pain** - No pain or numbness in leg." (*Id.* at 1, emphasis added.) Dr. Elliott's dictated note states that claimant had experienced a sudden onset of back pain while lifting a door. Of significance to the finding made in paragraph 12 is that claimant had no history of back pain and no leg pain. (*Id.*)

15. Dr. Elliott's examination included straight leg raising bilaterally, which was negative. (*Id.* at 2.) Claimant's x-rays looked normal except for a spina bifida occulta at S-1, a finding of no apparent significance. (*Id.* at 2.) Dr. Elliott diagnosed a lumbar strain (*Id.* at 2) and recommended further treatment only if claimant failed to improve. (*Id.*)

16. Claimant returned to work four (4) or five (5) days after his injury. (Tr. at 71 and 94.) There is no evidence of medical restrictions being placed on him.

17. Claimant did not seek any follow-up treatment between his second and third industrial injury.

18. The State Fund was the workers' compensation insurer at the time of his second injury. It accepted liability for the claim and paid the medical bills for the ER visit. (Ex. 4 at 4.)

May 23, 1984 Industrial Injury

19. Claimant's third industrial injury occurred on May 23, 1984. Claimant's hand cart hit a small rock while he was delivering a keg to the Brunswick Bar in Hysham, causing him to jerk his back. (Tr. at 72 and Ex. 16.) Claimant felt immediate pain in his lower right back. (Tr. at 72-73.)

20. Dr. Richard Hurd treated claimant in St. Vincent's emergency room on May 24, 1984, and diagnosed an acute muscle spasm. (Ex. 5 at 2.) The emergency room assessment reads, "low back pain **radiating into left leg**. Lifting yesterday." (*Id.*, emphasis added.) Dr. Hurd's dictated note indicates that claimant had a mild twinge of pain going down the right thigh initially. (*Id.* at 3.) He took claimant off work and ordered bed rest for three (3) to five (5) days. (*Id.*)

21. The insurer for Briggs Distributing at the time of this industrial injury was Travelers Companies, which accepted liability for the claim. Claimant was off work long enough to receive temporary total disability benefits. (Tr. at 74.) Travelers also paid claimant's medical bills.

22. Three months after this injury, on August 31, 1984, claimant sought treatment from Dr. J. R. Dorr, an orthopedic surgeon. (Ex. 6 at 1.) Dr. Dorr's office note for that day reads in pertinent part:

He [claimant] states that eight or nine years ago, he took a flop when he was taking some beer down a ramp. . . . **This eventually healed and really he did not have significant back trouble after that unless he did a lot.** If doing a lot, he would note occasional stiffness or bothersome, **but most of the time, he was getting by well until May 30, 1984.** At that time, he was delivering a keg of beer to a bar in Hysham. He stepped on a rock and felt something pull in his back, and he has noted that since that time, he has been having some prolonged stiffness, aching pain with some pain into the back of his legs. . . . He does not get true burning or shooting pains down the legs.

(*Id.*, emphasis added.) Dr. Dorr noted that claimant's back x-rays were unremarkable. (*Id.*) He opined that claimant had early degenerative disk disease. (Tr. at 73 and Ex. 6.) He did not take claimant off work or issue any work restriction for claimant.

23. The medical bills for visits to Dr. Dorr were paid by Travelers.

May 15, 1985 Industrial Injury

24. Claimant suffered his fourth industrial injury on May 15, 1985, at the Chrome Bar in Absarokee, Montana. (Tr. at 74.) The employer's first report indicates that claimant pulled a back muscle while wheeling kegs upstairs. (Ex. 16.)

25. Dr. Angelos treated claimant at St. Vincent's emergency room three (3) days later. (Ex. 7 at 2.) The emergency room assessment for this injury reads, "Was carrying kegs up steps Wednesday & heard something pop in low back - c/o low back pain & aching down both legs to knees. Pain increases when he coughs." (*Id.*) Dr. Angelos diagnosed his injury as disk syndrome. (*Id.*) Claimant's x-rays at that time were normal. (*Id.* at 3.) Dr. Angelos recommended five (5) or more days of bed rest. (*Id.*)

26.. The workers' compensation insurer at that time was U. S. Fidelity & Guaranty (USF&G), which accepted liability for the injury and paid benefits.

27. Claimant returned to work without any limitations or restrictions.

28. Claimant did not seek medical treatment between his fourth and fifth industrial injuries.

October 12, 1985 Industrial Injury

29. Claimant suffered his fifth industrial injury on October 12, 1985, at the Lost Village Bar in Roberts, Montana. (Tr. at 78.) This injury occurred while claimant was hanging a neon sign at the bar. (Ex. 18.) Claimant testified that he had immediate shoulder pain. (Tr. at 79.) He then gradually developed back pain. (*Id.*)

30. Claimant was treated at Billings Deaconess Hospital for a muscle spasm and was discharged with prescriptions for pain medication. (Ex. 8.)

31. EBI/Orion was the workers' compensation insurer for Dunham Distributing at that time. It accepted the claim and paid benefits.

32. Claimant returned to work with no restrictions or limitations.

33. Claimant did not seek treatment between his fifth and sixth injuries.

April 20, 1987 Industrial Injury

34. Claimant suffered his sixth industrial injury on April 20, 1987, while he was moving a keg at the Pizza Hut and twisted in the wrong direction. (Ex. 19.) He testified that he felt immediate pain in the lower right side of his back. (Tr. at 80.)

35. Dr. Angelos treated claimant at St. Vincent's emergency room on April 21, 1987. (Ex. 7 at 6.) He noted that claimant was complaining "of low back pain, radiating into Lt leg — into foot — legs weak & ache." (*Id.*) He diagnosed, "back strain, possible disc." (*Id.*) Claimant's x-ray showed a slight disk space narrowing at L5-S1. (*Id.* at 7.)

36. EBI/Orion was still the insurer for Dunham Distributing at the time of this incident. It accepted the claim and paid all benefits.

37. Claimant did not recall whether he lost time from work as a result of this injury. In any event he returned to work and continued working for Dunham until he was terminated in 1988.

38. There is no evidence that claimant was medically restricted as a result of the injury.

39. Claimant did not seek medical attention between his last industrial injury in April of 1987 and December of 1991.

Subsequent Employment and Injuries

40. Following his termination of employment with Dunham, claimant went to work as a taxi driver for City Cab. (Tr. at 82.) He testified that he took the taxi job rather than stay in the beverage business "because I just couldn't lift anymore." (*Id.*) His testimony in this regard was not credible. He admitted that following dismissal he looked for work with other beverage distributorships but was not offered a job. No credible evidence was presented that he had been looking for work prior to his dismissal by Dunham. The circumstances of his dismissal would likely have limited his employment opportunities with other beverage distributors.

41. Claimant worked for City Cab until 1989, when he went to work for Yellow Cab. (Tr. at 85.) He worked for Yellow Cab until May of 1994, when he left because he did not get along with the owner. (*Id.* at 85, 106 and 107.)

42. In December of 1991, claimant was pushing out a dent in the trunk of one of his taxis and hurt his back. (Tr. at 89.) He felt pain in his low back and down his right leg. (*Id.* at 90.)

43. Claimant was initially treated by Dr. Barbara Curry at Billings Deaconess Medical Center on December 16, 1991. (Ex. 9 at 3.) At that time he complained of pain in "his right

buttock, going into his right leg." (*Id.*) Dr. Curry's diagnostic impression was "[a]cute low back pain." (*Id.*)

44. Claimant's leg pain did not improve and he returned to the emergency room the next day, December 17, 1991, where he was examined by Dr. Rick Lamb. (Ex. 10 at 3.) Dr. Lamb noted that claimant's "pain is in his right hip, extends down the midportion of the right gluteus into the posterior aspect of the right upper thigh down to the right knee." (*Id.*) He diagnosed sciatica. (*Id.*)

45. Claimant returned once more to the emergency room on December 23, 1991, and again saw Dr. Lamb. (Ex. 10 at 10.) Dr. Lamb's note for that date reads in part, "He has a history of having had lower back *surgery* **but this area is not bothering him**. The pain is located deep in the muscle of the right buttock and extends down the posterior aspect of the leg ending at the knee." (*Id.*, bold and italics added.) There is no evidence that claimant had back surgery before 1992. The Court finds it likely that the doctor meant that claimant had a history of low-back problems rather than surgery. Dr. Lamb reaffirmed his diagnosis of sciatica and recommended follow-up treatment by Dr. Scott. (*Id.* at 13.)

46. On December 26, 1991, claimant saw Tim Sanders, a physician's assistant to Dr. Robinson at the Billings Clinic. (Ex. 11 at 1.) At that time he was complaining of severe pain in is right leg. The office note for that day reads in part:

This gentleman presents with pain going down the back of his right leg. He states he has a history of low back pain off and on for the past nine years where his discs go out and he has been seen in the ER several times in the past nine years but never seen by one of us for his problems. He developed back pain a month ago and approximately two weeks ago developed severe pain going down the back of his right leg. . . . He has never had the pain going down the back of his leg. He has just had significant back pain for many years.

(*Id.*) Right straight leg raising was positive. Claimant was also complaining of shoulder pain. (*Id.* at 2.) An MRI was scheduled. (*Id.*)

47. An MRI taken on January 2, 1992, disclosed "moderate posterior bulging of the L5, S1 nucleus pulposus." (Ex. 11 at 4.)

48. Dr. Mary Gaddy, a neurologist, examined claimant on January 3, 1992, with respect to his shoulder pain. (Ex. 12 at 1.) At that time claimant reported that he was getting "a jolting sensation into his left arm down to the first and second fingers with tingling and burning in the shoulder." (*Id.*) However, he reported that his radicular leg pain was resolving. (*Id.*)

49. Dr. Gaddy referred claimant to Dr. Robert C. Wood, who is an neurosurgeon. (Wood Dep. at 3; Dep. Ex. 1.) Dr. Wood examined claimant on January 7, 1992. (Wood Dep. at 3.) He determined that claimant had a cervical disk protrusion, and on January 16, 1992, claimant underwent a cervical diskectomy, bilateral foraminotomy and fusion at the C6-7 level. (Wood Dep. at 4 and Dep. Ex. 5; Tr. at 90.)

50. Claimant's recovery from the cervical operation was uneventful. However, claimant returned to Dr. Wood on March 12, 1992, complaining of low-back and leg pain. (Ex. 13 at 5.)

51. On March 16, 1992, Dr. Wood performed a "right lumbar 5 hemilaminotomy and removal of protruded disk." (Ex. 13 at 89; Tr. at 90.) During surgery, Dr. Wood found a protruded disk on the right at L-5. (*Id.* at 5.) He also found scarring of the nerve root. He testified that the scarring indicated that there had been a previous significant trauma to that area. (*Id.* at 5-6.) The scarring was at least three (3) months old and antedated claimant's December 1991 injury, but Dr. Wood was otherwise unable to determine how old the scarring was. (*Id.*) He was able to determine that the scarring all occurred at one time. (*Id.* at 8, 32.) Dr. Wood testified that he was unable to relate the scarring to any one of claimant's industrial injuries. (*Id.* at 12, 31-32.) He said, however, that the traumatic event that caused the scar would have caused significant back pain "at the time" and may or may not have caused leg pain. (*Id.* at 6 and 8.)

52. The reason for the March 16, 1992, lumbar surgery was a protruded disk, not the scarring which was found during surgery. (Wood Dep. at 19, 22-23, 33.) The protrusion occurred when claimant injured himself in December 1991. (*Id.* at 20, 22, 33.)

53. Claimant's lumbar condition and surgery did not in themselves preclude claimant from returning to work for a beer or beverage distributor. Concerning lifting restrictions a year following surgery, Dr. Wood testified:

Well, it depends on the patient. If he's only had one lumbar spine operation, we would generally tell the patient that he would not have to be on a permanent lifting restrictions. This patient was in a gray zone, because he had one operation in the lumbar spine and one in the cervical spine. So I would have told Gerald that he had to be a little bit wary with his heavy lifting from here on in because he's already had two spine operations and he would be at risk to have more trouble in the future if he did continue to do heavy lifting.

(Wood Dep. at 10.) Dr. Wood added that returning to beer delivery was also unwise because claimant's "spine was just not built to withstand the trauma of the heavy work of delivering the beer." (*Id.* at 11.) "We must remember . . . this is a relatively small man,

140-some pounds, and a spine that was designed for average lifting, but certainly not extremely heavy lifting. I think that he got into an occupation that he really wasn't designed to do mechanically, and that's how he got all the back injuries." (*Id.* at 13.)

54. Claimant was released to return to work on July 30, 1992. (Tr. at 90). He returned to work for Yellow Cab in August 1992 and continued working for Yellow Cab until May 1994. (Tr. 85, 91.)

55. In May of 1994, claimant started delivering bottles of water for Grayson Water. (*Id.* at 86.) Claimant quit his job at Grayson because he was not getting paid. (*Id.* at 87.)

56. Claimant currently works as a general maintenance person, which pays \$8 an hour. (Tr. at 88.) He works between 7 1/2 to 8 hours per day. (*Id.*)

Relationship of Claimant's Low-Back Problems to His 1975 and 1983 Industrial Injuries

57. Claimant argues in his proposed findings of fact, conclusions of law, and judgment and in his reply brief, that the scarring found during the 1992 lumbar operation was caused by his 1975 injury and that he was permanently partially disabled as the result of the scarring. In the Pretrial Order he contends, in the alternative, that the 1983 injury caused or aggravated scarring, but he has not pursued that contention further.

58. Dr. Wood was unable to relate the scarring to either incident. His testimony establishes that it is medically possible that any of the six (6) injuries could have caused scarring. This evidence, taken together with the other evidence in the case, does not amount to a preponderance of evidence, or persuade me, that the claimant suffered nerve root scarring or any other permanent injury as the result of either his 1975 or 1983 industrial accident. The 1975 accident did not produce immediate back pain which would indicate acute injury, rather the onset of pain was gradual. In both 1975 and 1983, the claimant lost only a few days of work. Following the 1975 injury he did not have treatment for his back for eight (8) months, and the medical records indicate that an intervening incident triggered his visit to the emergency room in July 1976. Then he worked for another seven (7) years without incident. The diagnosis respecting both the 1976 and 1983 injuries was "strain." In terms of lost time from work, medical care, and symptoms, the 1984 injury would appear to have been more severe. Claimant's testimony that his low-back pain never went away after 1975 and that thereafter he experienced pain down both legs was not credible and is inconsistent with his medical history, which does not disclose any leg pain until 1984. In summary, claimant has failed to persuade me that in 1975 and 1983 he suffered anything more than back strain which fully resolved within a few days.

59. This Court also finds that even if the 1975 or 1983 industrial injury did cause claimant's scarring, they did not permanently disable claimant. Claimant continued to work

delivering beer. Except for acute episodes following specific strains, he did not need or seek medical care for his back. While he claims that his back worsened and that he decided to find lighter work, in fact he was fired from his job delivering beer and was forced to seek other employment. Finally, Dr. Wood's testimony indicates that scarring was not in and of itself sufficient reason to restrict claimant from working for a beverage distributor.

60. Because this Court finds that claimant has failed to prove that he suffered a permanent injury and disability as the result of his 1975 and 1983 industrial accidents, it does not address his evidence concerning loss of earning capacity.

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). Claimant alleges that his 1975 industrial accident or his 1983 industrial accident caused permanent injury and loss of earning capacity. Consequently, the 1975 and 1981 versions of the Workers' Compensation Act apply.

2. In this case, claimant has elected to seek permanent partial benefits under section 39-71-703, MCA, which in 1975 was RCM 92-703.1. That statute reads:

(1) Weekly compensation benefits for injury producing partial disability shall be sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the actual diminution in the worker's earning capacity measured in dollars, subject to a maximum weekly compensation of one-half ($\frac{1}{2}$) the state's average weekly wage.

(2) The compensation shall be paid during the period of disability, not exceeding however, five hundred (500) weeks in cases of partial disability; provided, however, that 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 section 92-709 for the loss of the member.

RCM 92-703.1 (1975). The 1981 version of this statute is essentially the same for the purposes of this case.

In 1975 permanent partial disability was defined in RCM 92-440 as:

. . . a **condition resulting from injury** as defined in this act that results in the actual loss of earnings or earning capability less than total that exists after the injured workman is as far restored as the permanent character of the injuries will permit. [Emphasis added.]

The 1981 definition of permanent partial disability is codified in section 39-71-116(12), MCA, and is essentially the same as the 1975 definition. However, it includes the following sentence, "Disability shall be supported by a preponderance of medical evidence." § 39-71-116(12), MCA (1981).

3. The claimant has the burden of proving that he is entitled to workers' compensation benefits, *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973), and he must prove his entitlement by a preponderance of the probative, credible evidence. *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.2d 1099 (1979). Even in subsequent injury cases involving shifting burdens of proof, the claimant must initially prove a causal relationship between his disabling condition and the industrial accident at issue. *Lee v. Group W Cable TCI of Montana*, 245 Mont. 292, 295, 800 P.2d 702, 705 (1990).

Claimant has failed to establish a causal relationship between his disabling condition and his 1975 or 1983 injuries. (In his proposed findings and his reply brief, he does not argue, even in the alternative, that he is disabled on account of the 1983 injury, rather he focuses exclusively on the 1975 injury.) The alleged disabling condition is the scar tissue on the L5 nerve root. Dr. Wood testified that there was no way he could attribute the scar tissue to any one of claimant's six (6) prior industrial accidents. To be sure, claimant has sought to provide a connection to the 1975 injury through his own testimony that following the 1975 accident he had continuous pain in his back and legs. His testimony, and therefore the attempted connection, were not credible. His medical records and work history belie his testimony and, having personally observed his testimony, I did not find his testimony convincing.

The facts of this case are inapposite to those found in other cases which have held that an earlier injury proximately caused a claimant's disability. For example, in *EBI/Orion Group v. State Compensation Mutual Insurance Fund*, 249 Mont. 449, 816 P.2d 1070 (1991), the Supreme Court affirmed a finding of the Workers' Compensation Court attributing claimant's disability to a 1985 injury. In that case, the evidence established that claimant did not suffer a new injury in 1986 and that his condition was attributable to a natural worsening of the condition which had been caused by the 1985 injury. In *Allen v. Treasure State Plumbing*, 246 Mont. 105, 803 P.2d 644 (1990), claimant suffered a significant back injury in 1974 and was off work for a year and a half. When he returned to work, he had to limit his activities. While he suffered another exacerbation to his back in 1977, his physician did not attribute his disability to any injury suffered in 1977 but to a gradual worsening of the condition which had been caused by the 1974 injury. 246 Mont. at 109, 803 P.2d at 646.

This case is also distinguishable from *Walker v. UPS*, 262 Mont. 450, 765 P.2d 1113 (1993). In that case the Supreme Court held that there was insufficient evidence to establish that flareups subsequent to claimant's initial injury were injuries within the

meaning of the Workers' Compensation Act. Here claims were filed and accepted respecting the subsequent incidents. More importantly, Dr. Wood's inability to attribute the scarring to any one of the incidents shows that the subsequent incidents were at least as significant as the one which occurred in 1975.

In this case, the allegedly disabling scar tissue could just as likely arisen as the result of one of the subsequent injuries. The evidence concerning the 1975 and 1983 injuries does not indicate that those earlier injuries were more severe than claimant's subsequent injuries or that his condition resulted from a gradual worsening of a condition caused by the earlier injuries. Claimant worked for a period of seven (7) years — from 1976 to 1983 — without any medical care respecting his back and without pain. One of the typical symptoms associated with such scarring is nerve root irritation and leg pain. The first medically documented complaint of leg pain was after the claimant's **1984** injury. In terms of lost time from work, medical care and symptoms, claimant's condition following the 1984 injury was worse than following his 1975 and 1983 injuries. Claimant has failed to establish that he is disabled on account of his 1975 or 1983 injuries.

4. Claimant also failed to establish by a preponderance of the evidence that his nerve root scarring is disabling. He continued to work as a beer salesman for a period of eighteen (18) years despite periodic injuries to his back. While he testified that he sought lighter work in 1988 on account of his bad back, the Court did not find his testimony credible and notes that he sought other work only after he was fired from his job with Dunham Distributing. He continued working after 1988 without apparent incident until 1991, when he reinjured himself and underwent surgery for a herniated disk. The herniated disk was the result of the 1991 injury and unrelated to the prior injuries. The nerve root scarring was an incidental finding during the surgery.

Dr. Wood did not support claimant's theory that the scarring is disabling. Even after the lumbar surgery, which did not include any resection or other procedure involving the scar tissue, Dr. Wood indicated that claimant's condition did not in itself preclude his return to work for a beer distributor. While he advised against such return, his advice was predicated on two additional factors: the surgery on claimant's neck and claimant's small physique, which, in Dr. Wood's opinion, made heavy labor inappropriate in the first place.

5. Claimant is not entitled to temporary total disability benefits during his recuperation from surgery since his surgery was attributable to a new injury which occurred in 1991.

6. Claimant is not entitled to payment for any part of his surgery or post-surgical care, or for any other medical care related to nerve root scarring, since the surgery was necessitated by a new injury which occurred in 1991 and he has failed to establish that his scarring is attributable to either his 1975 or 1983 industrial accidents.

7. Claimant is not entitled to permanent partial disability benefits since he has failed to establish that his condition (nerve root scarring) is attributable to his 1975 or 1983 injuries.

8. Claimant is not entitled to attorney fees, costs or a penalty since he has not prevailed in this matter.

JUDGMENT

1. The State Fund is not liable for claimant's medical bills.

2. Claimant is not entitled to permanent partial disability benefits on account of either his 1975 or 1983 injuries.

3. Claimant is not temporarily totally disabled as a result of either his 1975 or 1983 industrial injuries and is not entitled to temporary total disability benefits.

4. The claimant is not entitled to attorney fees or costs.

5. Claimant is not entitled to a penalty.

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

7. 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 26th day of June, 1995.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. Geoffrey R. Keller
Ms. Susan C. Witte