IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1995 MTWCC 2

WCC No. 9303-6721

STEVEN K. BURGLUND

Petitioner

vs.

LIBERTY MUTUAL NORTHWEST INSURANCE COMPANY

Respondent/Insurer for

UNITED PARCEL SERVICE

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Trial was held on claim for permanent partial disability benefits.

Held: Claimant is entitled to benefits under 39-71-705, MCA (1983). **But see *Burgland v. Liberty Mutual Northwest Ins. Company*, 1995 MTWCC 2A, where Court notes the parties had requested analysis under section 39-71-703, MCA (1983), not under section 39-71-705, MCA (1983), and withdraws these Findings and Conclusions, and *Burglund v. Liberty Mutual Northwest Ins. Co.*, 1995 MTWCC 25, where Court amends and replaces these findings and conclusions.**

The trial in this matter was held on October 13, 15, and 22, 1993, in Kalispell, Montana, and December 1, 1993, in Helena, Montana. Petitioner, Steven K. Burglund (claimant), was present throughout and represented by Mr. Darrell Worm. Respondent, Liberty Mutual Insurance Company (Liberty), was represented by Mr. Larry Jones.

Witnesses at trial and by deposition: Claimant testified on his own behalf. Randy Kenyon, Jerry Auger, Mitch Noack, Kim Stevens, Bud Howe, Patrick Herron and Harold Wiltshire also testified. The depositions of Tim Tracy, O.T., Dr. Henry Gary, Dr. Alfred Swanberg and Dr. James Mahnke were admitted for the Court's consideration.

Exhibits: Exhibits 1 through 3, 5, 6, 11 through 37, 41 through 48, 57 through 66 and 69 through 73 were admitted by agreement of the parties. Exhibits 4, 8 through 10, 38 through 40 and 75 were admitted without objection. Exhibit 68 was not offered. Exhibits 49 through 56, 77 and 81 were admitted over objection. Exhibits 7, 67, 76, 78 and 80 were withdrawn. Exhibits 74 and 79 were admitted for demonstrative purposes only.

Issues presented: Claimant seeks permanent partial disability benefits pursuant to section 39-71-705 through 708, MCA (1983). He also requests attorney fees and a penalty.

Transcript citations: Citations to the transcript of the Kalispell proceedings are in the usual form of "Tr. at _ ." Citations to the transcript of the Helena proceedings appear as "HLN Tr. at _ ."

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. Claimant's date of birth is April 22, 1955, and he is presently thirty-nine years old.

2. Claimant graduated from high school. He also attended an electronics institute in the early 1970s. (Tr. at 35.)

3. For the past fifteen years claimant has been employed by United Parcel Service (UPS) as a package car driver. His duties throughout his employment have included deliveries and pick-ups of UPS packages, as well as "sort-and-load" of packages at the Kalispell UPS Center. Claimant's "sort-and-load" duties are preformed at the beginning of his work shift and involve the lifting of packages off a conveyer belt and transferring them several feet to two or three delivery trucks. (Tr. at 147-153.) This job typically lasts from two to two and one-half hours. (*Id.* at 122, 153.) Claimant then drives a delivery route in a "package car," (*Id.* at 206-207) delivering and picking up packages on that route. Packages weigh up to seventy pounds but the "average" package weighs far less, approximately fifteen to twenty-five pounds. (*Id.* at 229.) On his present route packages in the fifty to seventy pound range constitute only eight to ten percent of all packages delivered by claimant. (*Id.* at 158.) In 1991 claimant handled five hundred to six hundred packages on sort-and-load, and another three hundred to four hundred and fifty packages on his route. (*Id.* at 230-31.)

4. Prior to working for UPS claimant installed security equipment for a year or two and was a parts clerk at several auto supply stores.

5. On February 14, 1984, claimant suffered an industrial injury arising out of and in the course of his employment with UPS. He injured his back when he fell from a platform.

6. At the time of claimant's 1984 injury, UPS was insured by Liberty Mutual Northwest Insurance Company (Liberty). Liberty accepted liability for the claim in this matter and has paid various compensation and medical benefits.

7. Claimant was first treated for injuries on February 29, 1984, by Dr. Alfred V. Swanberg, who specializes in internal medicine. (Swanberg Dep. at 6.) Following his initial examination of claimant, Dr. Swanberg diagnosed claimant as suffering from bruised back muscles. (*Id.* at 14-16.) The doctor took claimant off work for one week and prescribed Flexeril, a muscle relaxer. (*Id.* at 15.)

8. On March 7, 1984, Dr. Swanberg re-examined claimant. At that time he diagnosed claimant as suffering from "LUMBOSACRAL STRAIN, CONTUSION OF LOW BACK." (*Id.* at 17 and Dep. Exhibit (unnumbered); capitalization in the original.) Claimant did not have radicular pain and Dr. Swanberg did not believe that he had suffered a disc injury or a vertebral fracture. (*Id.* at 20.) He expected claimant's condition to resolve within twelve weeks. (*Id.* at 17-20.)

9. Between February 14, 1984 and March 7, 1984, claimant was also treated by a chiropractor. (*Id.* Exhibit (unnumbered).)

10. On March 7, 1984, claimant told Dr. Swanberg that he was feeling better and wanted to return to work on March 12, 1984. (*Id.* at 17.) Dr. Swanberg approved a return to work and told claimant to contact him if he had any continuing back difficulties. (*Id.*) Claimant did not thereafter seek treatment from Dr. Swanberg for his low-back condition. (*Id.*)

11. After claimant's return to work in 1984, he continued working as a full-time package car driver. (Tr. at 211.) He either returned to a route in the East Kalispell metropolitan area, hereinafter called the "[E]ast Kalispell [R]oute", or shortly after his return he transferred to the East Kalispell Route. (*Id.*) The claimant was not sure whether he was assigned that route before or after his injury. (*Id.*) The route was claimant's first permanent assignment; prior to that time he had been filling in for other drivers on vacation. (*Id.*)

12. Following his return to work claimant continued to experience intermittent low-back pain.

13. On February 16, 1988, claimant was examined by Dr. Henry Gary, who is a neurosurgeon. At that time the claimant reported that he had been experiencing low-back pain intermittently for two years, but his pain had increased since October of 1987. Since October his pain had extended into his buttocks and right leg to about the knee. (Gary

Dep. of July 13, 1993 at 8-9 and Ex. 1.) Dr. Gary diagnosed claimant's condition as a herniated disc at the L5-S1 level. (*Id.* at 9.)

14. Between February 1988 and February 1991, claimant's back and leg pain increased. (*Id.* at 33.)

15. On February 18, 1991, Dr. Gary performed a lumbar laminotomy and a foramenotomy at the L5-S1 vertebral level. (*Id.* at 29 and Ex. 6.)

16. Based on the following evidence, the Court is persuaded that claimant's herniated disc and February 1991 surgery were related to his 1984 injury:

> a. On March 5, 1991, Dr. Gary wrote a letter to Liberty in which he stated, "It is my opinion that Mr. Burglund's herniated disc was a result of his injury of February 14, 1984. I further feel that he would most likely have had to eventually to [sic] come to surgery regardless of the type of work he performed." (Ex. 62.) Dr. Gary reiterated this opinion in his deposition. (Gary Dep. of September 29, 1993 at 6.)
>
> b. Dr. Mahnke testified at his deposition that he agrees with that opinion. (Mahnke Dep. at 12.) Dr. Mahnke also opined that Dr. Swanberg's initial diagnosis of a lumbosacral strain is consistent with Dr. Gary's later diagnosis of a bulging and then ruptured disc at the L5-S1 level.
>
> c. Dr. Swanberg was not asked to give an opinion on whether claimant's 1984 injury caused his herniated disc.
>
> d. The opinions of Dr. Gary and Dr. Mahnke were not contradicted.

17. Following his February 18, 1991 surgery, the claimant was off work until June 1, 1991, at which time he returned to work as a package car driver. Both Dr. Gary and Dr. Swanberg released claimant to return to work without any restrictions. (Tr. at 130-131, 215-217, and 392.)

18. Claimant returned to his East Kalispell Route and to his sort-and-load duties.

19. The nature and extent of claimant's post-surgery physical limitations are central to the present dispute. The Court has evaluated both the medical and non-medical evidence in determining claimant's limitations.

20. On July 16, 1992, Dr. Gary wrote a letter regarding claimant's impairment and medical restrictions. The letter was in response to an inquiry from claimant's attorney and stated:

> He [claimant] would carry a 10% permanent partial impairment rating for his herniated disc and residual symptoms, this is an impairment rating of the whole man.
>
> In any type of work Mr. Burglund needs to have some limits as to the amount of lifting, certainly not lifting anything over 20-25 pounds with any frequency and not lifting anything over 50 pounds very infrequently would be reasonable limits.

(Gary Dep. of July 13, 1993, Ex. 8.) The fifty pound limit mentioned by Dr. Gary was less than the seventy pounds claimant was required to lift in his job.

21. In the fall of 1992, UPS laid claimant off from work on account of Dr. Gary's July 1992 letter. (Tr. at 231.) UPS properly viewed Dr. Gary's letter as precluding claimant from lifting in excess of fifty pounds, therefore disqualifying claimant from continued employment. (*Id.* at 342-343.)

22. In the fall of 1992, Liberty attempted to pay claimant permanent partial disability benefits but he rejected them for reasons outlined in a letter of his attorney:

> Enclosed are Workers' Compensation benefit checks which you sent to Steve in care of our office.
>
> You will recall my conversation with you early on in Steve's recent ordeal advising you that Steve will not accept the Workers' Compensation benefits and asking that you stop forwarding payments. The reason for this is he believes he has been ineligible for such benefits during the entire time he was involuntarily laid off s**ince he has at all times been physically able to perform the job duties.**

(Ex. 48; emphasis added.)

23. After his UPS layoff, claimant applied for unemployment insurance benefits. In a letter to the Department of Labor and Industry (DLI) on December 3, 1992, he wrote:

> I am ready able and willing to return to work for United Parcel Service. There is no valid medical reason for keeping me off the job.

(Tr. at 233; Ex. 12.)

24. On November 12, 1992, Dr. Gary qualified his medical restrictions, indicating that the restrictions were ones generally applicable to "people with bad backs" and did not necessarily apply to claimant. Dr. Gary recommended a physical capacities evaluation to further define claimant's physical restrictions. His letter read in relevant part:

> This letter is in response to our telephone conversation today. In my letter to you of July 16, 1992 I gave you some limits as to what I felt Mr. Burglund could do. These are certainly estimates and not absolutes. They are not based on any scientific facts but just generalizations from people with bad backs. Exactly where he falls as far as his limits, this would need to be assessed by a physical capacities evaluation.

(Gary Dep. of July 13, 1993, Ex. 9.)

25. On November 24, 1992, claimant underwent a physical capacities evaluation by Tim Tracy O.T. (Tracy). (Tracy Dep. at 6-7 and Ex. 2.) Claimant did not report any pain in performing the physical tasks prescribed by Tracy and did not demonstrate any pain behaviors. (Tracy Dep. at 20-24.) Tracy concluded that claimant was physically able to work as a UPS package car driver. (Tracy Dep. at 34-35.)

26. Dr. Gary reviewed Tracy's evaluation and concluded in a letter written to the UPS insurance adjustor on January 5, 1993:

> From the physical capacity evaluation done by Mr. Tim Tracy it would appear that Mr. Burglund is capable of returning to work for the UPS in his previous capacity without restrictions.

(Gary Dep. of July 13, 1993, Ex. 10.)

27. As a result of Dr. Gary's January letter, claimant was permitted to return to work. His layoff lasted approximately two months. (Tr. at 179-180.) He has worked continuously since that time.

28. Claimant is able to perform his job with little physical discomfort and his job performance is unaffected by his job injury.

a. While claimant presented evidence that he was "overallowed" on his route after his surgery, he failed to persuade the Court that he was overallowed on a regular basis or that he was overallowed on account of his back condition. Being "overallowed" means that the UPS driver uses more than the suggested amount of time to complete his or her route. UPS engineers calculate the amount of time typically needed to complete the driver's deliveries. That time is called a "plan day." Claimant was overallowed on some days during 1991 and late 1992. (*Id.* at 356, 365.) He also was overallowed on some days in early 1990. (*Id.* at 365.) In the summer of 1993, Mitch Noack (Noack), claimant's supervisor, rode with claimant for three days to assist claimant in correcting his overage. (*Id.* at 374 and 433.) When Noack asked claimant what the problem was, claimant answered that it was just his attitude. (*Id.* at 374.) Claimant did not complain of back problems. (*Id.* at 434.) Since that time, claimant's performance has been exceptional. (*Id.*)

b. Claimant testified that UPS installed a special mat, called an aero mat, in his truck to help him cope with his back condition. However, other evidence showed that the aero mats were installed in ninety percent of the UPS delivery trucks a couple of years ago to keep the packages dry and off of the floor. (*Id.* at 351.)

c. Claimant also has a lumbar seat, which supports his back when he drives. However, lumbar seats have been installed in UPS trucks nationwide. The seat was not installed in response to claimant's back condition. (*Id.* at 352.)

d. On January 8, 1992, claimant filled out a medical history form as part of a Department of Transportation annual physical. He completed paragraphs 9A and 11 as follows:

> 9A. Have you any disease or illness? **NO** Have you any deformity? _____ Have you any disability? ________ If "Yes", what? ______________________________
>
> 11. Have you any defect which might result in disablement or incapacitate you? **NO** If "Yes", what? ______________________________

(Tr. at 218-219; Ex. 5.)

e. On January 8, 1992, Dr. Swanberg performed a Department of Transportation physical examination of claimant. Claimant did not report any back pain to Dr. Swanberg. (Swanberg Dep. at 12-13, 26.) During that examination Dr. Swanberg found claimant's back, pelvis and spine to be normal. (*Id.* at 10.)

f. Dr. Gary was asked about claimant's job. He testified that ". . . the ideal job for a patient with a bad back is one in which they don't have to sit all day long, stand in one place all day long or do extremely heavy physical work all day long." (Gary Dep. of September 29, 1993 at 21.) However, when asked what limitations he would presently put on the claimant, Dr. Gary responded, " I placed some limitations on him and they were too rigid for him and he took them off, so I do not have any definite limitations on him right now." (Gary Dep. of July 13, 1993 at 50.)

g. While claimant testified that after his surgery he asked to be taken off sort-and-load on account of pain (Tr. at 162), his supervisors testified that he told them that he just needed a break because sort-and-load is stressful. (*Id.* at 353, 373, 393, 434.) They also testified that other employees sometimes request to be taken off sort-and-load due to the stress created by the fast pace. (*Id.* at 353.) The Court finds the supervisors' testimony credible and notes that claimant returned to the sort-and-load.

h. Claimant has seniority over twenty-three other employees at the Kalispell UPS Center. Consequently, he has priority when bidding on job openings. (*Id.* at 347.) When particular routes become available because of a vacancy, he has priority over those other twenty-three employees in asking for a transfer to the open route. Since his surgery the claimant has not availed himself of his seniority to obtain a less physically demanding route. The Columbia Falls route, which is presently assigned to claimant, was open for bidding in June of 1991 but claimant did not seek a transfer to that route until it again became open in March of 1993. (*Id.* at 348.) The Columbia Falls route is easier than his previous route. (*Id.* at 377.) Also, the West Shore Route opened up in 1992. (*Id.* at 403.) That route is an easier one than claimant's current Columbia Falls route, and the driver of the route does not have to work the sort-and-load. (*Id.* at 404.) Nonetheless, claimant did not bid that job. (*Id.* at 404.) The West Valley Route also came open for bid on July 17, 1991. That route is physically easier than both the Columbia Falls and West Shore Route. (*Id.* at 405.) Claimant did not bid on the West Valley Route and it went to a driver with less seniority. (*Id.* at 407.) By passing over transfers to less physically demanding jobs, claimant has

demonstrated that he is comfortable working at his present job, including the sort-and-load.

29. As illustrated by his recreational activities, claimant remains in excellent physical condition:

a. Since his surgery he has continued to participate in the Flathead Nordic Ski Patrol. In December of 1992, he was involved in four rescue operations. (*Id.* 257-58, 261-68; Exs. 20, 23-26.)

b. He has continued to engage in white-water rafting. (*Id.* at 240-41, 243-53, 272-75; Exs. 17 and 29.)

c. During the summer of 1991, claimant was a deck-hand on a sailboat and participated in regularly scheduled sailboat races on Flathead Lake. During these races claimant raised and lowered sails and pulled ropes to operate the mast and sails. Claimant participated in up to eleven races that summer. (*Id.* at 243-46; Ex. 17.)

d. During the summer of 1992, claimant again participated in the sailboat racing on Flathead Lake. Claimant participated in up to eight sailboat races. (*Id.* at 276-77; Ex. 30.)

e. Claimant has continued to hunt. During the week of October 13-19, 1991, claimant went moose hunting in British Columbia. He walked in woodlands and swamps. (*Id.* at 253-254; Ex. 17.) After returning from the moose hunt, claimant worked for a week at UPS and then took the following week off to hunt antelope in eastern Montana. (*Id.* at 254-56; Ex. 17.) During the week of October 24-31, 1992, claimant again hunted antelope in eastern Montana. (*Id.* at 276-77; Ex. 30.)

30. Claimant testified that his job causes low-back pain and that he "constantly" has pain in his leg. (*Id.* at 154.) He also testified that he has numbness in his left foot. (*Id.* at 154-55.) According to claimant, his job exacerbates his pain and numbness. (*Id.*) The Court did not find this testimony credible. As previously found (Finding of Fact 29. h.) the claimant is comfortable performing his job duties and does not suffer significant pain or discomfort in doing so.

<u>Loss of Earning Capacity</u>

31. Claimant contends that his chances of working for UPS through retirement age are diminished because his physical condition has declined and he is working in pain. The Court is not persuaded that claimant is working in pain or that his chances of working at

UPS through retirement age are diminished. Claimant is in no danger of losing his job before retirement age. He has enough seniority to transfer to less physically demanding routes if he chooses to do so. (See Finding of Fact 28.) His seniority also protects him from lay-off due to economic reasons. (Tr. at 215.)

32. Claimant and Dr. Gary testified that several aspects of his job actually help his back condition. Dr. Gary testified that physical activity was beneficial to claimant's condition. (Gary Dep. of September 29, 1993 at 21.) Claimant testified that delivering packages helps his back and that driving does not bother him. (Tr. at 154.) He stated that walking short distances also helps him.

33. At the time of trial claimant was earning $17.69 per hour. (Tr. at 116.)

34. Claimant contends that his pre and post-injury labor markets are limited to unskilled, entry level jobs. (*Id.* at 47.) He further urges that virtually all of the higher paying jobs in the Flathead Valley labor market are excluded from his labor market because of his physical restrictions. (*Id.* at 58.)

35. Randy Kenyon, a certified rehabilitation counselor, testified on claimant's behalf. Mr. Kenyon described claimant's work at UPS as unskilled because claimant has not acquired any transferrable skills. (*Id.* at 34-35) He also testified that claimant's activities and training prior to working for UPS are irrelevant (*Id.* at 35-36), but the Court does not find that testimony convincing. The claimant's education and employment prior to his UPS employment show that he is intelligent and has learning capacity greater than that required for his present employment.

36. Dr. Gary testified that the physical capacities of individuals with the type of injury suffered by the claimant are highly individualistic (*Id.* at 49) and that the UPS position is neither the best nor the worst job for someone with a bad back (*Id.* at 54).

37. According to Mr. Kenyon, the claimant's earning capacity, if he were to lose his job at UPS, ranges from $4.25 to $7 hourly based on entry level wage for unskilled labor. (Tr. at 48-49.) Mr. Kenyon testified that claimant is unable to perform higher paying unskilled jobs which pay $11 to $13 per hour. He gave as examples two positions at the Columbia Falls Aluminum Plant and certain jobs in the logging industry. (*Id.* at 44.) The positions at the Aluminum Plant were those of utility laborer and pot line laborer. Dr. Gary indicated that he would advise claimant against doing those jobs. (Gary Dep. of September 29, 1993 at 22-24.) Dr. Gary also agreed that jobs as a logging truck driver or logger would be inappropriate for claimant. (*Id.*)

38. While Aluminum Plant and logging jobs were "theoretically" available to claimant prior to his injury, they were not realistically a part of claimant's normal preinjury job market. Claimant's job history does not include heavy labor positions or long-haul truck driving.

While he may have been capable of performing those jobs prior to his injury, his job history does not indicate that the jobs were ones which he would have reasonably pursued. Based on his job history, education and physical capacity, claimant's preinjury job market was in local delivery, automotive parts sales, and security equipment installation.

39. The Court is persuaded that the claimant is presently physically able to perform the jobs within his preinjury normal labor market. The performance of his present job is unaffected by his injury and the Court is persuaded that he will be able to continue to perform his job duties satisfactorily at the same level as preinjury. **Whether his condition may deteriorate in the future is a matter of speculation.**

40. Claimant has suffered no loss of earning capacity.

41. Dr. Gary provided claimant a ten percent (10%) impairment rating. While half of that rating was attacked by Liberty, Dr. Gary's explanation of his basis for the rating (Gary Dep. of July 13, 1993 at 42-45) satisfies the Court that the impairment rating was properly based on the American Medical Association's Guide to the Evaluation of Permanent Impairments.

42. Liberty's refusal to pay claimant at least a five percent (5%) impairment award was unreasonable. It provided no evidence which would show that at least a five percent (5%) award was inconsistent with the AMA Guide. Liberty's refusal to pay any additional amount was reasonable. Its challenge to Dr. Gary's basis for the other five percent (5%) raised a colorable issue. Claimant's entitlement to anything in addition to an impairment award was debatable.

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 1983 version of the Workers' Compensation Act governs this case.

2. The claimant has the burden of proving by a preponderance of the evidence that he is entitled to compensation. ***Ricks v. Teslow Consolidated,*** *162 Mont. 469, 512 P.2d 1304 (1973);* ***Dumont v. Aetna Fire Underwriters,*** *183 Mont. 190, 598 P.2d 1099 (1979).*

3. While Liberty contends that claimant's condition was caused by an occupational disease and not by his 1984 injury, the Court has found that claimant's herniated disc was in fact caused by his February 14, 1984 injury. (Finding of Fact 16.) That finding is based on claimant's history and the testimony of his treating physicians.

4. Claimant is seeking indemnity benefits pursuant to sections 39-71-705 through 708, MCA (1983). Although counsel for both parties argued the case as if section 39-71-703, MCA, (lost earning capacity) benefits were at issue, the Pretrial Order specifically defines the permanent partial disability benefits issue as arising under the sections 39-71-705 to 708, MCA, not under section 39-71-703, MCA. The discrepancy, however, does not affect the outcome of the case since the Court has found that claimant did not prove a loss in earning capacity.

5. The permanent partial disability benefits available under sections 39-71-705 through 708, MCA (1983), are commonly referred to as "indemnity benefits." They are based on the schedule of injuries set forth in section 39-71-705, MCA (1983). That schedule sets forth the maximum number of weeks of benefits payable on account of the loss of limbs and other body parts. In the case of a non-scheduled injury, such as a back injury, the maximum number of weeks of benefits is 500 weeks. § 39-71-706, MCA.

Benefits for less than total loss of a scheduled part "shall be proportionate to loss or loss of use." § 39-71-706(1), MCA (1983). The purpose of the indemnity benefits is to indemnify the injured worker for "possible" loss of future earning capacity, rather than any "actual" loss of earning capacity. ***Stuker v. Stuker Ranch,*** *251 Mont. 96, 98, 833 P.2d 105 (1991).*

Indemnity benefits are computed by determining a percentage of disability and multiplying the maximum number of weeks specified in the schedule by that percentage. ***McDanold v. B.N. Transport, Inc.****, 208 Mont. 300, 470, 679 P.2d 1188 (1984).* In determining disability, the Court must consider the claimant's age, education, work experience, pain and disability, actual wage loss, and possible loss of future earning capacity. ***Hartman v. National Union Fire Insurance,*** *236 Mont. 141, 145, 768 P.2d 1380 (1989); accord,* **Holton v. F.H. Stoltze Land and Lumber Co.,** *195 Mont. 263, 271, 637 P.2d 10 (1981).*

The Court has evaluated each of the factors as follows:

EDUCATION: Claimant has a high school education and certification from an electronics institute. Because claimant obtained his electronics certification so long ago and has not worked in the electronics field for more than fifteen years, his certification is obsolete. However, claimant's completion of the certification demonstrates his intelligence and his capacity to master technical subjects. The type of work he has chosen does not require the level of education he has achieved.

WORK HISTORY: Claimant worked for a short period installing security devices and as a parts counter employee at autoparts stores. Claimant has worked for UPS for the past fifteen years as a package car driver. Claimant's performance of his time-of-injury job has not been diminished by his injury.

PAIN & DISABILITY: Claimant has some low-back and leg pain but it is not serious and has not significantly interfered with his physical activities, including those required by his job. Indeed, his physical activities appear to benefit his condition. He is able to perform his job at his preinjury performance level.

Dr. Gary gave claimant a ten percent (10%) impairment rating of the whole person. However, claimant has no physical restrictions on his work or recreational activities. Claimant is more physically active in his recreation activities than many individuals who have had no back problems.

ACTUAL AND FUTURE WAGE LOSS: Claimant has no actual or future wage loss. He is working in the same position that he held at the time of his injury. He is earning more money than he made before his injury. Claimant has seniority and job security at his present job. Based on the evidence presented at trial, the Court is persuaded that the claimant is physically able to continue performing his job until he reaches retirement age.

Although claimant's injury may preclude him from employment as a utility laborer or a pot line laborer at Columbia Falls Aluminum Plant and from employment as a logger or long-haul truck driver, those positions were never part of claimant's preinjury labor market. He never performed heavy labor positions similar to those at the Plant, never engaged in any logging-related job, and never drove a long-haul truck. If heavy labor, long-haul truck driving, and logging jobs are included in Mr. Burglund's preinjury "normal" labor market, then they must be included in the preinjury labor market for virtually every able bodied worker, making the starting point of wage analysis in the $10 an hour and above range for nearly every worker irrespective of his or her actual job experience and wage history. The Court declines to adopt that starting point. The normal labor market for each worker must be assessed on an individualized basis taking into consideration the actual jobs performed and any normal career track.

AGE: Claimant is thirty-nine. His age has both advantages and disadvantages. "(T)he longer the person is on the labor market the more economic losses he will suffer, all other factors being equal. However, a younger individual who can be retrained or has transferable skills will be able to ameliorate some of his post-injury earning losses in the long run through additional training." ***Carroll v. Wells Fargo Armored Serv.****, 245 Mont. 495, 500, 802 P.2d 618 (1990).* In ***Stuker***, the Supreme Court regarded the claimant's age as being an advantage: "Stuker is a young man of thirty-six and can obtain additional training by his own choice." (***Stuker,*** *at 100*). In this case, the Court considers age a neutral factor. Based on the evidence it appears that claimant's injury is not a major impediment to his continued employment as a UPS package car driver. Claimant is unique in that he is in better physical condition than most people in his age group. He is highly motivated and in good physical condition. On the other hand, it also does not appear that he is incapable of further education should his injury become an impediment.

Determination

Having considered all factors, I find that claimant is twenty percent (20%) disabled and entitled to one hundred (100) weeks of disability benefits at his maximum permanent partial disability rate of $138.50.

If claimant's condition should change in the future, the claimant may seek additional benefits. ***Walker v. United Parcel Service,*** *262 Mont. 450, 865 P.2d 1113 (1993).*

6. Liberty has taken the position that no permanent partial disability benefits are due. Claimant is therefore entitled to reasonable attorney fees under section 39-71-612, MCA (1983). ***Carroll v. Wells Fargo Armored Serv.****, 240 Mont. 151, 782 P.2d 1286 (1989).*

7. Claimant is entitled to a twenty percent (20%) penalty with respect to Liberty's refusal to pay a five percent (5%) impairment award, amounting to $692.50 (*500 weeks x .05 x 138.50 x .20).* Section 39-71-2907, MCA, provides that when payment of compensation has been unreasonably delayed or refused by an insurer, the full amount of compensation benefits due a claimant may be increased by twenty percent (20%). Liberty 's refusal to pay at least a five percent (5%) impairment award was unreasonable. There was undisputed medical testimony that claimant had a ten percent (10%) impairment rating of the whole person. In cross-examining Dr. Gary, Liberty raised legitimate issues regarding five percent (5%) of that rating but presented no evidence challenging the other five percent (5%). It was clear that claimant was entitled to at least a five percent (5%) impairment rating. ***Holton v. F.H. Stoltze Land Lbr. Co.,*** *supra at 269.*

Otherwise, Liberty's refusal to pay claimant was not unreasonable. With respect to any amount over and above the impairment rating, Liberty had colorable arguments that claimant was not entitled to anything more.

JUDGMENT

1. Respondent, Liberty Mutual Northwest Insurance Company shall pay claimant permanent partial disability benefits for a period of one hundred (100) weeks at the weekly rate of $138.50, less any permanent partial disability benefits paid to date.

2. Pursuant to section 39-71-612, MCA, claimant is entitled to reasonable attorney's fees and costs in an amount to be determined by the Court.

3. Claimant is entitled to a penalty in the amount of $692.50.

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 19th day of January, 1995.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Darrell S. Worm
Mr. Larry W. Jones