IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

WCC No. 9207-6543

STATE COMPENSATION INSURANCE FUND

Petitioner

vs.

DONALD E. CHAPMAN and RICHARD J. PYFER

Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

1. Petitioner filed a petition to resolve a dispute between itself and the respondents under Title 39, Chapter 71, Part 29, MCA.

2. The Clerk of Court gave notice to interested parties of (a) the time, place and nature of the trial; (b) the legal authority and jurisdiction under which the trial was to be held; (c) the particular sections of the statutes and rules involved; and (d) the matters asserted by notifying all parties who appeared of record to have an interest by mailing to them a copy of the ORDER SETTING TRIAL AND PRETRIAL CONFERENCE with a copy of the PETITION FOR HEARING attached and a copy of the Clerk's Certificate of Mailing the Order and Petition. Section 2-4-601, MCA.

3. A pretrial conference was conducted on November 13, 1992, before Clarice V. Beck, Hearing Examiner. The Pretrial Order was docketed on December 3, 1992. Pertinent parts of the Pretrial Order are as follows:

I. STATEMENT OF JURISDICTION

The Workers' Compensation Court has jurisdiction of this emergency petition pursuant to § 39-71-2909, MCA.

. . .

III. UNCONTESTED FACTS

A. Donald Chapman was injured in 1981 while employed as a truck driver.

B. Chapman filed a petition for hearing signed by Pyfer in November 1989.

C. Chapman's deposition was taken on March 9, 1990.

D. Chapman testified at hearing on May 14 and 15, 1990.

E. In Chapman's petition, during his deposition and hearing, and in his proposed findings of fact and conclusions of law, Chapman and Pyfer asserted that Chapman was permanently totally disabled because of headaches and back pain.

F. The Workers' Compensation Court found Chapman credible and "presently permanently totally disabled." A lump-sum advance and past-due benefits were awarded, as well as attorney fees and costs.

4. The parties have proposed and the Court adopts the following issues to be determined by the Court:

A. Whether Chapman is permanently totally disabled.

B. Whether Chapman was presently permanently totally disabled at the time of his hearing, prior to or anytime subsequent to his hearing.

C. Whether Chapman testified falsely during his deposition and hearing, and whether he misrepresented his physical condition, employment status and employability to this Court.

D. Whether Chapman should be required to reimburse all benefits, fees and costs obtained through false testimony and misrepresentation.

E. Whether Chapman should be required to reimburse State Fund for fees and costs expended in defending the underlying claim and in prosecuting its emergency petition.

F. Whether Pyfer should be required to reimburse State Fund for attorney fees and costs awarded based on the false testimony and misrepresentation of Chapman.

5. The trial in this matter came on December 8-9, 1992, before the Honorable Timothy W. Reardon. Dianna Chapman, Richard Pyfer, Cresenciano Dealba, Reed Scott, Willem Visser, Donald E. Chapman and Leo Ward were sworn and testified. Exhibit Nos. 1 through No. 36 were attached to the pretrial order and admitted. Exhibit Nos. 37 through No. 59 were admitted. The depositions of Donald E. Chapman, Dianna Chapman, Donna Pease, Marcia Lubs, Juan Pena, Gail Wuestenberg, Edward Keefer and Ronald Hinrichs were submitted to the Court and admitted into evidence. The affidavits of Lucinda Rhoades, Barbara Stowell and Linda Dugger were entered into evidence. The Court took judicial notice of the proceedings in WCC No. 8911-5572 at the time of trial. The Court takes judicial notice of the April 21, 1993, Judgment entered by the Montana First judicial District Court, Lewis and Clark County in the case of *State of Montana v. Donald Earl Chapman*, No. ADC 92-122.

6. The undersigned, having reviewed the pleadings, considered the Pretrial Order and the exhibits admitted into evidence, heard the testimony and observed the demeanor of the

witnesses at trial and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law and Judgment:

FINDINGS OF FACT

1. The uncontested facts are found as fact.

2. Donald E. Chapman had a previous hearing before Robert J. Campbell, Hearing Examiner of the Workers' Compensation Court on May 14 & 15, 1990. The following judgment was entered in that proceeding:

> 1. This Court has jurisdiction over this matter pursuant to § 39-71-2905, MCA.
>
> 2. Claimant is presently permanently totally disabled as a result of his January 14, 1981 injury and is entitled to permanent total disability benefits retroactive to September 10, 1988.
>
> 3. Claimant is entitled to a lump sum advance of $4538.58 to pay past due obligations which meet the requirements of Section 39-71-741, MCA. All checks shall be by dual warrant to the creditor and the claimant. Defendant is entitled to an appropriate offset from each payment to recover the lump sum advances received.
>
> 4. Claimant is entitled to recover reasonable costs and attorney fees pursuant to § 39-71-611 or -612, MCA, in accordance with ARM 24.5.343 (1990).
>
> 5. Any party to this dispute may have 20 days in which to request a rehearing from this Order Adopting Findings of Fact and Conclusions of Law and Proposed Judgment of the Hearing Examiner and Entering Judgment.

(Ex. No. 37.)

3. Pursuant to that order, the State Fund paid out $46,378.90 in disability benefits to Donald E. Chapman and $16,927.00 to his attorney Richard Pyfer for attorney fees and costs. (Tran. Vol. II at 225-226.) Neither party appealed the results of the initial proceeding.

4. Subsequent to the initial proceeding in May, 1990, the State Fund learned that Mr. Chapman had been working as a truck driver. The State Fund filed a Petition For Emergency Hearing on July 23, 1992, in which it alleged that Mr. Chapman defrauded the Court and the State Fund. The State Fund requested reimbursement of the total disability benefits paid to Mr. Chapman, an order to discontinue benefits, and requested reimbursement for fees and costs incurred in defending the initial claim as well as costs of investigation. (Ex. No. 38.)

5. A criminal complaint was filed in district court charging Mr. Chapman with theft of workers' compensation benefits. A hearing was held on April 20, 1993, in which Mr. Chapman entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). District Court Judge, Dorothy McCarter sentenced Mr. Chapman as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that for the offense of THEFT (Common Scheme), a felony, the defendant is sentenced to ten (10) years at Montana State Prison, with all of that time suspended upon the following conditions:

1. The defendant shall pay full restitution as determined by the Workers' Compensation Court, plus an administrative handling fee, through the Court's Restitution Officer on a schedule which he shall arrange with the Officer. The defendant shall advise the Officer of any factors which may affect his ability to pay restitution or the Officers ability to contact the defendant.

2. The defendant shall pay the mandatory surcharge of $20, pursuant to Section 46-18-236, MCA.

3. The defendant shall remain law-abiding.

4. The defendant shall return to Canada. The defendant shall serve ninety (90) days in the Lewis and Clark County Jail beginning on April 26, 1993, if he has not returned to Canada by April 25, 1993.

5. If the defendant does not return to Canada or ever returns to the United States during the term of his sentence, he shall be under the supervision of the Montana Department of Corrections and Human Services and shall abide by all of its rules and regulations.

6. Donald E. Chapman is not a citizen of the United States. Cresenciano Dealba, a special agent with the U.S. Immigration Service, testified that Mr. Chapman has excludable alien status.

Credibility

7. Contrary to the prior ruling by Hearing Examiner Robert J. Campbell, Donald E. Chapman is not a credible witness. Mr. Chapman represented to the Court at his May 15, 1990, hearing that he was physically incapable of returning to work. (Transcript WCC No. 8911-5572 at 323.) Mr. Chapman admitted that he stated in his March, 1990 deposition that he was not offered any employment since his injury. (Transcript WCC No. 9207-6543 at 93-94) Mr. Chapman did not inform the Court that he worked for Highway Distribution Services from December, 1988 through July, 1989. Mr. Chapman did not inform the Court that he worked for Digby Southwest during the period July, 1989 through December, 1989. (Dep. of Marcia Lubs at 6.) Mr. Chapman's 1989 wages reported by Highway Distribution Services and Digby Southwest on W-2 forms are $4319.77 and $1113.84 respectively. (Dep. of Marcia Lubs Ex. Nos. 1 and 2.) Mr. Chapman failed to inform the Court that he had leased and was driving a truck for Monfort Transportation prior to his hearing as well.

8. Mr. Chapman entered into a lease agreement with Monfort Transportation on July 26, 1989. (Dep. of Pena Ex. No. 4 at 584.) Monfort Transportation reported $26,887.54 in nonemployee compensation for Mr. Chapman in 1989. (Dep. of Pena Ex. No. 2 at 578.) Mr. Chapman admitted driving the Monfort truck but denies that it was employment. Mr. Chapman's wife, Dianna Chapman testified that they drove the Monfort truck to his deposition taken in March, 1990 for the initial proceeding. (Dep. of Dianna Chapman at 34-35.)

9. At trial, Mr. Chapman admitted to having supplied false information on job applications. The false information included statements of U.S. citizenship or naturalization, past employment history, no felony convictions and the name of the high school he attended.

10. Mr. Chapman testified that he hired drivers for his truck and that they would bring him unsigned fuel receipts which he later signed and turned into Monfort Transportation.

11. Gail Wuestenberg, an accounts receivable supervisor at Iowa 80 Truck Stop testified that a driver could not take unsigned fuel receipts. (Dep. of Gail Wuestenberg.)

12. Edward Keefer, the accounting systems manager at the Amarillo 76 Truck Stop testified that an individual would have to sign a fuel receipt before leaving the truck stop when purchasing fuel. (Dep. of Edward Keefer at 8-9.)

13. Mr. Chapman testified that he would sign the trip envelopes when other drivers drove for him.

14. Ronald Hinrichs, claims coordinator at Monfort testified that only the driver was to sign the trip envelope. (Dep. of Ronald Hinrichs at 8-9.)

Employment

15. Marcia Lubs, the accounting manager for Highway Distribution Services and Digby Southwest, testified that her records indicate that Mr. Chapman was employed by Highway Distribution from December, 1988 through July, 1989. Ms. Lubs also testified that Mr. Chapman was employed by Digby Southwest during the period from July, 1989 through December, 1989. (Dep. of Marcia Lubs at 6.) The W-2 form issued by Highway Distribution reflects wages in the amount of $4,319.77 paid to Mr. Chapman in 1989. (Dep. of Marcia Lubs Ex. No. 1.) The W-2 form issued by Digby Southwest Inc. reflects wages in the amount of $1113.84 paid to Mr. Chapman in 1989. (Dep. of Marcia Lubs Ex. No. 2.)

16. Juan Pena, the assistant controller at Monfort Transportation, testified that Mr. Chapman entered into a lease agreement with Monfort and picked up his truck on July 26, 1989. (Dep. of Juan Pena at 30-31.) Mr. Chapman returned his truck on October 15, 1990. (Dep. of Juan Pena Ex. No. 5.) Mr. Pena testified that Monfort's records revealed a second period of employment for Mr. Chapman. Mr. Chapman worked as a driver for an owner operator referred to as HAL Enterprises that leased a Monfort truck. Mr. Chapman worked

for HAL Enterprises from January 10, 1991, through February 28, 1991. (Dep. of Juan Pena at 33-34; Pena Dep. Ex. No. 6.)

17. Monfort reported $26,887.54 in nonemployee compensation paid to Mr. Chapman in 1989. (Dep. of Juan Pena Ex. No. 2 at 578.) Monfort reported $88,299.35 in nonemployee compensation to Mr. Chapman in 1990. (Dep. of Juan Pena Ex. No. 2 at 579.) Mr. Chapman was issued a W-2 from HAL Enterprises showing $2,825.55 in wages for 1991. (Dep. of Juan Pena Ex. No. 2 at 580.) Mr. Chapman was to be paid at the rate of 74.5¢ per mile while working for Monfort Transportation pursuant to his lease agreement. (Dep. of Juan Pena Ex. No. 7 at 604.)

18. In order to earn the amounts reported by Monfort in 1989, Mr. Chapman's truck would have to travel 36,090 miles (26,887.54 ÷ 0.745) from July 26 through the end of the year. For the year 1990, Mr. Chapman's truck would have to travel 118,522 miles (88299.35 ÷ 0.745) from the first of the year through October 15, 1990, the date he returned his truck.

19. The evidence overwhelmingly establishes that Mr. Chapman drove his truck on a regular basis. Trip envelopes submitted with Mr. Chapman listed as the driver document trips from February 26, 1990, through May 30, 1990. The total miles documented by those envelopes is 24,007. (Dep. of Juan Pena Ex. No. 7 at 608-662.) Fuel receipts signed by Mr. Chapman document purchases from August, 1990 through October, 1990. (Dep. of Juan Pena Ex. No. 8.) An application for driver approval signed by Mr. Chapman on January 3, 1991, asks the applicant to list the states operated in for the last five years. Mr. Chapman's response to that question was "All 48 + Canada." (Dep. of Juan Pena Ex. No. 1 at 501.) Mr. Chapman was the named driver in accident reports dated Januaury 28, 1991, March 19, 1990, September 16, 1989 and October 18, 1989. (Dep. of Juan Pena Ex. No. 1 at 563, 511, 572 and 574.)

20. Donna Pease, the regional manager of human resources at Great Western Sugar, testified that Mr. Chapman was hired as a truck driver during a sugar beet processing campaign. Mr. Chapman was employed from November 16, 1990 through January 7, 1991. That position was a temporary seasonal job where he worked 12 hours per day. (Dep. of Donna Pease at 7.)

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this proceeding pursuant to section 39-71-2905, MCA.

Respondents argue that Rule 60(b) of the Montana Rules of Civil Procedure creates a time bar to the present case. At the outset the Court points out that the Rules of Civil Procedure do not apply in proceedings before the Workers' Compensation Court. *Dumont v. Wickens Bros.*, 598 P.2d 1099 (Mont. 1979); *Moen v. Peter Kiewit & Sons Co.*, 201 Mont. 425 (1982). The time barriers imposed by Rule 60(b) are not applicable in the present case. The legislature has imposed a time limitation on the Court for altering orders or settlements

that extends for four years after a settlement or award of compensation. Section 39-71-2909, MCA.

Even though the Court is not bound by the Rules of Civil Procedure it will comment on respondents' argument. The time limits imposed hinge on the distinction between intrinsic and extrinsic fraud. Intrinsic fraud is defined as "representations or concealments made during the court proceedings, assuming they are false or fraudulent." *Marriage of Lance*, 195 Mont. 176, 180 (1981).

Rule 60 (b) requires cases involving intrinsic fraud to be brought within 60 days. The stated purpose for the severe time bar is as follows:

> 'Public policy demands that there should be an end to litigation, and therefore the courts look with a jealous eye upon suits which have for their objective setting aside a judgment at law... Neither perjured testimony nor false or fraudulent allegations used in obtaining a judgment is a ground for equitable intervention in a suit to attack the judgment, unless the perjury or fraud was collateral to the questions examined and determined in the former proceeding.'

Brown v. Jensen, 753 P.2d 870 (Mont. 1988) quoting *Minter v. Minter* 103 Mont. 219 (1936).

The stated purpose for limiting an action concerning intrinsic fraud is not applicable in workers' compensation cases. The legislature has granted the Workers' Compensation Court the authority to review and alter previously awarded benefits for a period of four years after a settlement or order granting benefits. Section 39-71-2909, MCA.

Even if the Court were to conclude that the time limitations of Rule 60(b) were to apply, it is not clear that the type of fraud implicated is strictly intrinsic fraud. Extrinsic fraud is defined as follows:

> Extrinsic fraud is collateral to the matters tried by the court, and not to fraud in the matters on which the judgment was rendered. (citations omitted) Extrinsic fraud has also been defined as some intentional act or conduct by which the prevailing party has prevented the unsuccessful party from having a fair submission of the controversy.

Salway v. Arkava, 215 Mont. 135, 140 (1985).

It appears as if fair submission of the controversy may have been prevented by Mr. Chapman's misrepresentations made during his March, 1990 deposition. Mr. Chapman indicated that he had not been offered any employment when he had in fact been working for various entities. The time limits of Rule 60(b) do not apply in cases involving extrinsic fraud and relief may be granted within the discretion of the court. *Selway v. Burns*, 150 Mont. 1, 8 (1967); *Salway*, 215 Mont. at 140.

The Court further notes that Mr. Chapman is not being prosecuted in a criminal fraud action before this Court. The Workers' Compensation Court is without authority to prosecute Mr. Chapman for fraud and its jurisdiction is limited to its inherent equitable powers and the provisions of the Workers' Compensation Act.

It is difficult to fathom the result sought by the respondents. To follow their argument to the natural conclusion, a claimant who is entitled to benefits and later has a changed condition within four years of his/her settlement may be cut off from workers' compensation benefits. A claimant who was wrongfully awarded benefits based on misrepresentations, however, would be protected and not have to repay benefits unless the misrepresentations were discovered and presented to the Court within the time frames established by Rule 60(b). Such a result would not be equitable nor proper. As Stated by Professor Larson:

> Surely it is a mockery of justice to admit that a legal system is powerless in the hands of any trickster who is clever enough to succeed in deceiving the court up to the point of obtaining a judgment.

Law of Workmen's Compensation, Section 81.51(a), 15-1129.

The Court has the proper authority and jurisdiction to hear and decide the present case pursuant to Section 39-71-2905, MCA. Further, respondents' time bar argument fails given the Court's authority to review, diminish, or increase awards for four years after an order or settlement pursuant to Section 39-71-2909, MCA.

2. Donald E. Chapman is not permanently totally disabled and was not permanently totally disabled as defined by statute at the time of his initial hearing.

Permanent total disability is defined in Section 39-71-116(13), MCA as follows:

> (13) "Permanent total disability" means a condition resulting from injury as defined in this chapter that results in the loss of actual earnings or earning capacity that exists after the injured worker is as far restored as the permanent character of the injuries will permit and <u>which results in the worker having no reasonable prospect of finding regular employment of any kind in the normal labor market</u>. (emphasis added)

In order to be permanently totally disabled, Mr. Chapman must have "no reasonable prospect of finding regular employment of any kind in the normal labor market." Section 29-71-116(13), MCA. In order to meet the requirements of that statute, a party must introduce substantial, credible evidence of:

> (1) what jobs constitute his normal labor market, and (2) a <u>complete</u> inability to perform the employment and duties associated with those jobs because of his work-related injury. (Emphasis added.)

Metzger v. Chemetron Comp., 212 Mont. 351, 355 (1984).

Under the Workers' Compensation Act, the party asserting a right has the burden of proving its case by a preponderance of the probative, credible evidence. *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).

In the present case, the State Fund has the burden of proof to show that Mr. Chapman was capable of working in his normal labor market. It is clear that Mr. Chapman has a demonstrated ability to work as a truck driver as is evident by his employment at Highway Distribution Service, Digby Southwest, Great Western Sugar and his driving for Monfort Transportation. The evidence presented shows that Mr. Chapman began working in December, 1988, for Highway Distribution Service. From that date forward Mr. Chapman demonstrated his ability to be gainfully employed in his normal labor market and was not entitled to permanent total disability benefits.

Mr. Chapman had reported wages from Highway Distribution Service and Digby Southwest totalling $5,433.61 in 1989. Monfort Transportation reported $26,887.54 in nonemployee compensation paid to Mr. Chapman in 1989. The initial hearing in Mr. Chapman's case occurred on May 14 & 15, 1990. Mr. Chapman was capable of working prior to his initial hearing.

Mr. Chapman admits to driving the Monfort truck, however, he alleges that he hired others to do the driving as well. The Court notes that Mr. Chapman was unable to indicate how often the "other drivers" drove and he failed to produce any evidence that the "other drivers" drove on a regular basis. At trial the names of two other drivers were mentioned, however, any documentation to indicate that these were not isolated events is noticeably absent. Mr. Chapman's self-serving statements that there were other drivers employed by him are not very credible given his propensity to stretch the truth if it is to his advantage.

Abundant evidence demonstrates that Mr. Chapman regularly drove the Monfort truck. The trip envelopes submitted to the Court which require a drivers signature were signed by Mr. Chapman. Likewise numerous fuel receipts were submitted and signed by Mr. Chapman. Mr. Chapman's statements that he signed the trip envelopes and fuel receipts after they were turned in by his drivers is not credible. Gail Wuestenberg and Edward Keefer, employees of two different truck stops testified that a driver would have to sign the fuel receipt when purchasing fuel. Ronald Hinrichs, claims coordinator at Monfort, testified that only the driver of the truck was to sign the trip envelope.

Mr. Chapman entered into the lease agreement with Monfort on July 26, 1989. According to that agreement, he was to be paid 74.5¢ per mile for hauling goods for Monfort. Mr. Chapman would realize a profit if he drove sufficient miles to cover the lease cost and expenses, such as fuel, that were deducted from his earnings. Mr. Chapman's truck would

have to be driven in excess of 36,000 miles in the five remaining months during 1989 to have $26,887.54 in earnings. In 1990, $88,299.35 was reported by Monfort as nonemployee compensation for Mr. Chapman. Mr. Chapman returned his leased truck to Monfort on October 15, 1990. The truck would have to be driven over 118,000 miles in ten and one-half months to earn the reported earnings in 1990. Obviously Mr. Chapman's truck was being driven quite extensively during the period of his lease.

This Court's prior award of permanent total disability benefits was retroactive to September 10, 1988. It is not clear to the Court that Mr. Chapman was capable of employment prior to his actual employment in December, 1988. Given the facts of the present case, the Court concludes that beginning in December, 1988, Mr. Chapman was no longer presently permanently totally disabled. It is only from that date forward that the Court is able to conclude that the State Fund carried its evidentiary burden of proof.

3. Mr. Chapman testified falsely at the initial hearing and misrepresented his physical condition, employability and employment status to the Court.

At the initial proceeding, Mr. Chapman represented to the Court that he would return to work if he felt he physically could. Obviously Mr. Chapman did not inform the Court that he had in fact been working prior to the hearing.

4. Mr. Chapman must repay the permanent total disability benefits paid after he began working in December, 1988.

The Court has the power to review, diminish or increase awards. Section 39-71-2909, MCA, provides as follows:

> **39-71-2909. Authority to review, diminish, or increase awards - limitation.** The judge may, upon the petition of a claimant or an insurer that the disability of the claimant has changed, review, diminish, or increase, in accordance with the law on benefits as set forth in chapter 71 of this title, any benefits previously awarded by the judge or benefits received by a claimant through settlement agreements. However, the judge may not change any final settlement or award of compensation more than 4 years after the settlement has been approved by the division or any order approving a full and final compromise settlement of compensation.

The Court notes that the present case is one of first impression. In the past, the Court has not had to review a previous award of benefits procured by false and misleading statements knowling made by a claimant.

As stated above, Mr. Chapman was not permanently totally disabled after he began working in December, 1988. Accordingly, Mr. Chapman must repay the permanent total disability benefits he received from that date forward. It has long been a maxim of jurisprudence that, "no one can take advantage of his own wrong." Section 1-3-208, MCA.

To allow such an occurrence would surely allow the "mockery of justice" referred to by Professor Larson in the above quoted passage. Equity demands repayment of the benefits received by Mr. Chapman due to his misrepresentations.

Principles of restitution can be applied to the present case. Section 74 of the *Restatement of the Law of Restitution* provides as follows:

> A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess.

It is clear that State Fund paid benefits pursuant to an order of this Court and is entitled to recoup those amounts improperly received by Mr. Chapman.

The Court notes that Mr. Chapman may be entitled to permanent partial disability benefits, however, that issue is not currently before the Court.

5. State Fund is not entitled to reimbursement of the fees and costs expended in defending the underlying claim or in prosecuting its emergency petition.

State Fund requests the Court to use its equitable powers to order Mr. Chapman to reimburse it for the costs of both the underlying claim and the present case. With regard to the underlying claim, the Court notes that it has ordered reimbursement of benefits only from December, 1988 forward. State Fund was unable to prove that Mr. Chapman was not permanently totally disabled prior to that date. Accordingly the request for reimbursement of fees and costs expended in the underlying claim is denied.

With regard to the fees and costs incurred in pursuit of the instant matter, the Court notes that the Workers' Compensation Act contains no provisions whereby an insurer is entitled to fees and costs. Prior decisions of the Montana Supreme Court have reiterated that principle. See *Jaenish v. EBI/Orion Group*, 248 Mont. 383 (1991); *Liberty Mutual Insurance Co. v. Evans Transfer and Storage*, 234 Mont. 209 (1988). State Fund is not entitled to reimbursement of fees and costs incurred in pursuit of the present matter.

6. Mr. Pyfer must repay those attorney fees that are derived from the benefits wrongfully obtained by Mr. Chapman.

Payment of attorney fees by the insurer is entirely dependant upon a claimant's entitlement to benefits. Section 39-71-611 provides the authority for an award of attorney fees.

> **39-71-611. Costs and attorneys' fees payable on denial of claim or termination of benefits later found compensable.** In the event an insurer denies liability for a claim for compensation or terminates compensation benefits and the claim is later

> adjudged compensable by the workers' compensation judge or on appeal, the insurer shall pay reasonable costs and attorneys' fees as established by the workers' compensation judge.

Clearly, an attorney is not entitled to fees unless the claimant prevails. In the present case, the claimant misrepresented to the Court his physical ability to work as was evident by his return to work prior to the initial hearing. As stated above, the claimant, Mr. Chapman, must now repay the wrongfully awarded benefits. Similarly, the attorney fees which flowed from Mr. Chapman's ill begotten gains must be repaid.

The repayment of attorney fees is not entirely new to the area of workers' compensation in Montana. The Montana Supreme Court has previously required the repayment of attorney fees based on an overpayment of disability benefits. *Champion International Corp. v. McChesney*, 239 Mont. 287 (1989). Attorney fees were also ordered to be repaid after the claimant's entitlement to benefits was subsequently reversed on appeal. *Reil v. State Compensation Mutual Insurance Fund*, 254 Mont. 274 (1992).

In the present case, it is clear that the State Fund conferred a benefit to Mr. Chapman and his former attorney, Mr. Pyfer in compliance with a judgment of this Court. That judgment is now modified and the erroneously awarded benefits are to be repaid. It naturally follows that the attorney fees that flowed from the erroneously paid benefits must also be repaid. To allow an attorney to retain fees that were a result of benefits paid in error because of the misrepresentations of a claimant would clearly frustrate the purpose of the law.

The Court wishes to emphasize that there are no allegations that Mr. Pyfer did anything improper in his representation of Mr. Chapman. It does not appear that Mr. Pyfer was aware of the employment held by Mr. Chapman during the two years preceding the initial hearing. Indeed, it would appear that Mr. Chapman successfully misled his attorney as effectively as he misled everyone else, including the hearing examiner. The net effect is that Mr. Pyfer, relying on the veracity of his client, expended considerable efforts (successful efforts) for which he will now have to repay the benefits. At a minimum it would seem Mr. Pyfer should have a cause of action against Chapman, however, such is not a matter within the purview of this Court.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to section 39-71-2905, MCA.

2. Donald E. Chapman is not permanently totally disabled and was not permanently totally disabled as defined by statute at the time of his initial hearing.

3. Mr. Chapman testified falsely at the initial hearing and misrepresented his physical condition, employability and employment status to the Court.

4. Mr. Chapman must repay the permanent total disability benefits paid to him after he began working in December, 1988.

5. State Fund is not entitled to reimbursement for fees and costs expended in defending the underlying claim or in prosecuting its emergency petition.

6. Mr. Pyfer must repay those attorney fees that are derived from the benefits wrongfully obtained by Mr. Chapman.

7. The JUDGMENT herein is certified as final for purposes of appeal pursuant to ARM 24.5.348.

8. 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 1st day of September, 1993.

(SEAL)

/s/ Timothy W. Reardon
JUDGE

c: Mr. Leo Ward
Mr. Richard J. Pyfer
Mr. Donald Chapman
Submitted: May 26, 1993