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

Respondent.

OPINION AND ORDER ON PYFER'S REQUEST FOR REHEARING

On September 1, 1993, Workers' Compensation Judge Timothy W. Reardon issued Findings of Fact, Conclusions of Law and Judgment in this matter ordering claimant Donald E. Chapman and his former attorney to repay $46,378.90 in disability benefits and $16,927.00 in attorney's fees respectively to the State Compensation Insurance Fund. This ruling was based upon the determination that Mr. Chapman was not permanently totally disabled from and after December 1988. Judge Reardon granted the parties twenty days to request a rehearing.

On September 17, 1993, respondent Pyfer filed a request for rehearing which was opposed by the State Fund. Pyfer has requested oral argument which is hereby **denied.**

In the interim, the Honorable Mike McCarter was appointed Workers' Compensation Judge. Judge McCarter deemed himself disqualified from this matter and requested this Judge to assume jurisdiction of this cause which was accepted.

After reviewing the September 1, 1993, decision in this matter, together with the hearing and deposition transcripts at issue, and briefs submitted, the matter is now ready for decision.

The issues raised by Pyfer in his motion for rehearing include:

> (a) Lack of jurisdiction in the Workers' Compensation Court to reconsider the earlier decision awarding benefits to Chapman and Pyfer;
>
> (b) The application of Rule 60(b), M.R.Civ.P., would preclude the exercise of jurisdiction;

(c) The Workers' Compensation Court in its September 1, 1993 decision relied too heavily upon the criminal conviction of Mr. Chapman which should not have been considered; and

(d) There was no new evidence of rehabilitation or medical nature to support the determination that Mr. Chapman was not temporarily totally disabled after December 1988.

In response, the State Fund argues that jurisdiction for the proceedings exists pursuant to sections 39-71-2905, and 2909, MCA, and that such relief can be retroactive to 1988. The State Fund also argues that Rule 60(b), M.R.Civ.P., is not applicable to these proceedings based upon the administrative rules and its own procedural rules. However, even if Rule 60(b), M.R.Civ.P., applied, State Fund argues there was abundant evidence of both the extrinsic and intrinsic fraud upon which to reopen the claim pursuant to Rule 60(b), M.R.Civ.P.

The State Fund also argues that there was sufficient and overwhelming evidence that Mr. Chapman was not a credible witness and that was sufficient to determine he was not totally disabled. Further, the State Fund pointed to the evidence that Chapman worked as a truck driver for prolonged periods as further evidence that he was not totally disabled during or after the prior proceedings.

A request for rehearing is governed by section 25-11-103, MCA, which incorporates by reference section 25-11-102(1), (3) and (4), MCA, as grounds for a new trial. They specifically provide for new trial on the following grounds:

(1) irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

. . .

(3) accident or surprise which ordinary prudence could not have guarded against;

(4) newly discovered evidence material for the party making the application which he could not, with reasonable diligence, have discovered and produced at trial;

Respondent Pyfer does not assert the applicability of subsections (3) or (4) of section 25-11-102, MCA, in his motion for rehearing. Arguably the only basis for his motion under section 25-11-103, MCA, is subsection (1) of section 25-11-102, MCA, which provides for a new trial due to "irregularity in the proceedings of the court. . . or any order of the court or abuse of discretion by which either party was prevented from having a fair trial."

Pyfer's request for reconsideration based upon the evidence received by the Court concerning Chapman's work record and medical condition (Issues C and D) are outside the

statutory grounds and are summarily rejected by this Court as grounds for rehearing. There is sufficient evidence in the record to support the September 1, 1993 decision on Chapman's disability based upon the substantial credible evidence standard. See: ***Snyder v. EBI/Orion Group, 230 Mont. 16, 25, 748 P.2d 924 (1987)***; ***Tocco v. State Compensation Mutual Insurance Fund, 220 Mont. 221, 226 714 P.2d 160 (1986)***.

As concerns the balance of Pyfer's argument (Issues A and B), the Workers' Compensation Court correctly found jurisdiction pursuant to sections 39-71-2905 and 39-71-2909, MCA, as well as pursuant to Rule 60(b), M.R.Civ.P. The Court's decision of September 1, 1993, deals comprehensively with the issues concerning jurisdiction and Rule 60(b), M.R.Civ.P. Respondent Pyfer has asserted no new ground or authority to base reversal or to require reconsideration of the September 1, 1993 decision.

Further, the Court notes the recent case of *Maulding v. Hardman*, (Mont. 1993) 50 St.Rep. 141, contains a thorough discussion of the applicability of Rule 60(b)(6), M.R.Civ.P., which discusses time limits as "within a reasonable time." The Court in *Maulding* specifically relied on *In Re Marriage of Castor*, 249 Mont. 495, 500, 817 P.2d 665, 668 (1991), which afforded relief under Rule 60(b)(6), M.R.Civ.P., in those instances, "when a party in whose favor judgment was entered has acted improperly."

Without question, Chapman's actions in this matter were improper and Rule 60(b)(6), M.R.Civ.P., should be available to afford relief from such an extraordinary situation as that portrayed here. Therefore, even in the event the grounds asserted for lack of jurisdiction by Pyfer are assumed to be correct, Rule 60(b)(6), M.R.Civ.P., under the authority set forth above is an independent ground for the exercise of jurisdiction by the Workers' Compensation Judge.

Based upon the foregoing, respondent Pyfer's request for rehearing is hereby **denied.**

DATED this 6th day of December, 1993.

(SEAL)

\s\ John W. Larson
JOHN W. LARSON
District Judge