

CASE NO. A06-1849

STATE OF MINNESOTA
IN SUPREME COURT

James E. Gluba, by Lorraine Gluba,

Employee-Relator,

vs.

Bitzan & Ohren Masonry,

Employer-Respondent,

and

Grinnell Mutual Group,

Insurer-Respondent.

BRIEF AND APPENDIX OF JAMES GLUBA/LORRAINE GLUBA, EMPLOYEE-RELATOR

DeAnna M. McCashin (#160192)
SCHOEP & McCASHIN, Chtd.
6747 State Highway 29 S.
Alexandria, MN 56308
(320) 763-3634

Attorney for Employee-Relator

Dianne E. Walsh (#114133)
HEACOX, HARTMAN, KOSHMRL,
COSGRIFF & JOHNSON, P.A.
408 St. Peter Street - Suite 550
St. Paul, MN 55102
(651) 222-2922

Attorney for Employer-Respondent

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STATEMENT OF LEGAL ISSUES

I. IS MINN. STAT. §176.101, SUBD. 5 UNCONSTITUTIONAL AS IT DOES NOT PROVIDE EQUAL PROTECTION TO ALL INJURED WORKERS?

Court of Appeals affirmed Trial Court's ruling:

That the Workers' Compensation Court of Appeals does not have jurisdiction to decide constitutional questions.

Most Apposite Authority:

1. Fourteenth Amendment, U.S. Constitution §1
2. Article I, §2, Minnesota Constitution
3. State v. Frazier, 649 NW2d 828 (Minn. 2002)

STATEMENT OF THE CASE

On November 26, 1996, the employee sustained an admitted injury to his low back and left hip while employed as a stone and brick mason for Bitzan-Ohren, then insured for workers' compensation liability by Grinnell Mutual Reinsurance Company with claims administered by The ASU Group. The employer/insurer admitted liability and paid temporary total disability benefits to the employee from December 15, 1996 through February 7, 1997.

On August 4, 1998, the employee filed a Claim Petition claiming entitlement to temporary total and temporary partial disability benefits from and after February 7, 1997. The parties reached a to-date settlement of the claims for temporary total and temporary partial. A Stipulation was signed by the parties in September 1999 and an Award on Stipulation was issued on September 28, 1999. As part of the compromised agreement, the employer paid Mr. Gluba \$4,500.00 for a to-date settlement of his temporary total disability benefits with an agreement that this amount compensated him for 37 weeks of temporary total disability benefits. In addition, the employer/insurer paid to Mr. Gluba the sum of \$6,970.45 for his temporary partial claim on a to-date basis representing 72 weeks of temporary partial disability benefits between February 7, 1997 and September 1999.

The employer, Bitzan-Ohren, is a brick and block construction company affected by seasonal conditions. In general, the employer hires brick and block layers from approximately April through late fall/early winter of each season. As part of the Stipulation for Settlement, the parties agreed that during periods of layoff for all brick and block layers, Mr. Gluba would not be entitled to temporary total disability benefits due to the seasonal layoff but would be entitled to unemployment benefits. Between the date of injury in November 1996 and June 1, 2001, the employer continued to provide seasonal work for Mr. Gluba that he could do within his

restrictions. This generally consisted of laying brick rather than block. After June 1, 2001, the employer offered no further employment to Mr. Gluba.

During the season of 2001, Mr. Gluba contracted with various businesses to continue to perform brick laying. Temporary partial disability benefits were paid until September 4, 2001. Mr. Gluba did not perform work activity for pay after September 4, 2001. Through the first workers' compensation hearing on March 5, 2003, the employer had paid 46.8 weeks of temporary total disability benefits and 106.1 weeks of temporary partial disability benefits.

On February 1, 2002, the employee filed a Claim Petition seeking permanent total disability benefits from and after September 4, 2001; 13% whole body permanency pursuant to Minn. Rule 5223.0390, subp. 4.E. and 4.E.1; as well as entitlement to a rehabilitation consultation; rehabilitation services, as appropriate; and unpaid medical expenses. The employer/insurer filed an Answer asserting that the November 26, 1996 work injury was no longer a substantial contributing cause of Mr. Gluba's disability; his need for rehabilitation services or his medical treatment. On February 21, 2002, the employee filed a Letter Amendment to the Claim Petition to add a claim for an additional 9% permanency based on the previous rating for stenosis plus Minn. Rule 5223.0390, subp. 4.E.4 with a copy of Dr. Bailly's February 8, 2002 letter attached to the Letter Amendment. The matter came on for hearing before the Honorable Paul Rieke on March 5, 2003.

Judge Rieke issued his Findings and Order on April 2, 2003. Judge Rieke found that the employee had met his burden of proof that he had been permanently and totally disabled since September 4, 2001, and that the employee's low back and hip work injuries were "a" substantial, contributing cause of that permanent, total disability status. However, Judge Rieke found only a 10% whole body permanency based on multiple level degenerate disk disease as rated by the

adverse medical examiner. Therefore, the employee was denied payment of permanent total disability benefits as 10% permanency did not meet the threshold requirements of Minn. Stat. §176.101, subd. 5. In addition, Judge Rieke determined that the employee's permanent total disability ended on the date of the hearing.

Judge Rieke's decision was appealed to the Workers' Compensation Court of Appeals by Mr. Gluba. On October 24, 2003, the Workers' Compensation Court of Appeals affirmed Judge Rieke's decision on the issue of the percentage of permanent partial disability benefits, denial of permanent total disability benefits based on failure to meet the threshold amounts of Minn. Stat. §176.101, subd. 5(2)(c) but reversing Judge Rieke's finding that as of the date of March 5, 2003, Mr. Gluba was no longer permanently and totally disabled.

On May 7, 2004, Mr. Gluba filed a Claim Petition seeking payment of permanent total disability benefits from September 4, 2001 to the present and continuing and 9.25% whole body permanency pursuant to Minn. Rule 5223.0420, subps. 4 and 5 for leg weakness due to nerve impingement related to the work injury as rated by Dr. Bailly on April 6, 2004. The parties reached a stipulated agreement settling all claims except future medical and a Stipulation was drafted. On May 30, 2005, Mr. Gluba died before signing the Stipulation for Settlement.

The petitioner's claim came on for hearing before the Honorable Gary Mesna on December 14, 2005. On January 20, 2006, Judge Mesna issued his Findings and Order again denying payment of permanent total disability benefits from September 4, 2001 through the date of death. On February 13, 2006, the petitioner on behalf of James Gluba, the deceased employee, appealed Judge Mesna's decision to the Workers' Compensation Court of Appeals. On September 13, 2006, the Workers' Compensation Court of Appeals issued its decision affirming the Trial Court and correctly ruling that the Workers' Compensation Court of Appeals

does not have jurisdiction to hear constitutional questions. Relator files the present appeal asserting that Minn. Stat. §176.101, subd. 5(2)(a)(b)(c) is unconstitutional as it does not provide equal protection under the law.

STATEMENT OF FACTS

Mr. Gluba at the time of his death (date of death 5/30/2005) was 77 years old, having been born on May 8, 1928. Mr. Gluba completed eight years of public education. [Ex. L, T.25]¹ He had limited ability to read, write and do math. He has had no computer or keyboard training. [T.26]

Mr. Gluba's work history had been entirely as a construction worker and farmer. He worked for thirty years for the Carlson Construction Company laying brick and block as well as doing cement and carpentry work. The block work included handling blocks weighing between 20 and 75 pounds. [T.27] After the Carlson Construction Company went out of business, he was employed by Andy Construction and Showcase where he also did block work. [T.28-29]

In the 1980's, Mr. Gluba owned his own brick and masonry business. [T.30] Mr. Gluba had difficulty with the managerial portions of his self-employment. Mr. Gluba became acquainted with Mr. Bitzan and Mr. Ohren when they worked for him. Eventually, Mr. Bitzan and Mr. Ohren started their own construction company and then offered Mr. Gluba employment in 1994. [T.54] Bitzan-Ohren hired brick and block layers for the seasonal work. Generally, the season went from approximately April through January. [T.31-32] Occasionally, brick and block work was available year-round at Bitzan-Ohren. Mr. Gluba always worked when work was available for this employer. Mr. Gluba continued to do full duty brick and block work through the date of injury, November 26, 1996.

¹ All references to the transcript in the Statement of Facts are from Exhibit L.

On November 26, 1996, Mr. Gluba, then aged 69, sustained an injury to his left hip and low back when he slipped and fell on an icy plank. The temperature was ten below zero, and he fell from the plank landing on his left side on the frozen ground. He reported the injury and sought chiropractic care from Dr. Kastner in Elbow Lake. [T.33-34] Dr. Kastner diagnosed acute low back pain radiating into the left buttock and down the leg indicating there was damage to the left L5 disk. Dr. Kastner instituted work restrictions. Mr. Gluba continued to work during the summer of 1997 and continued to receive treatment with Dr. Kastner. Dr. Kastner's treatment notes of August 14, 1997 document the increased symptoms when Mr. Gluba was lifting cement block. On August 30, 1997, the doctor's records document Mr. Gluba's increased symptoms with the bending required with brick laying. On September 6, 1997, Dr. Kastner recommended no work due to the increased symptoms. [Ex. H]

In late fall 1997, Mr. Gluba changed treating chiropractors to Dr. Darryl Moon who continued to be his primary treating physician until his death. [Ex. F] At the time that he changed chiropractors, Mr. Gluba continued to have low back and left leg pain. The workers' compensation insurance company requested that he be seen by Dr. Bailly at MeritCare. Dr. Bailly recommended a CT scan and then an MRI scan which revealed spinal stenosis at L2-3 and a herniated disk at L5-S1 compressing on his left side L5 nerve. In addition, the scans revealed facet degeneration and spinal stenosis at L4-5. [Ex. G]

Dr. Bailly referred Mr. Gluba to physical therapy and a work hardening program in December 1997. On January 9, 1998, Mr. Gluba underwent a physical therapy evaluation at Douglas County Hospital which revealed decreased strength in dorsiflexion and great toe extension as well as decreased reflexes and sensation in the L5-S1 dermatomes. Mr. Gluba underwent the work hardening program at the Douglas County Hospital attending three times per

week at three hours each. These records reflect that Mr. Gluba was fully cooperative and gave full effort during the work hardening program. He was discharged from the work hardening program on March 27, 1998, with restrictions against working with block and also with weight and activity restriction. [Ex. I]

Mr. Gluba then returned to work in the spring of 1998 for the employer. The employer continued to provide work for Mr. Gluba within his physical restrictions during the seasons of 1998, 1999 and 2000. Mr. Gluba worked all hours offered to him. Mr. Gluba testified that he would have flares of his low back and left leg pain during the entire time between the date of injury and the date of his deposition, generally worsened by his work activity. [Ex. 6] When he would have substantial increases in pain, he would return to see his treating chiropractor, Dr. Moon.

After June 1, 2001, his employer offered him no further work. Mr. Gluba then went and found employment with Olson Construction and worked for that company during the summer of 2001. [T.41-42] Mr. Gluba spent the summer of 2001 attempting to find brick work that he could do and worked for various individuals during the summer of 2001. Mr. Gluba last worked as a brick mason on September 4, 2001.

Mr. Gluba returned to see Dr. Moon on September 26, 2001 due to an exacerbation of his low back and left leg pain. He received seven chiropractic treatments from Dr. Moon between September 26, 2001 and November 19, 2001. On November 19, 2001, Dr. Moon indicated that Mr. Gluba was unable to work due to his low back and left leg condition. [Ex. F] Dr. Moon never released Mr. Gluba to return to work.

The most recent test results indicate that Mr. Gluba had a seventh grade reading ability which is in the 27th percentile of the adult population. In addition, it reveals that he had a fourth

grade spelling ability which is in the 7th percentile. These same test results reveal that he was below average in spatial abilities and numerical abilities. [Ex. 4] QRC Tollefson testified that no other employer would hire Mr. Gluba at the present time as a brick mason. [T.82] This is un rebutted testimony. Additionally, QRC Tollefson testified that Mr. Gluba is permanently and totally disabled and the primary factor in his inability to work is his present work restrictions from the 1996 work injury.

In the fall of 2001, Mr. Gluba was diagnosed with prostate cancer. He received medical treatment from Kurt L. Hansberry, M.D., including external beam radiation therapy in November of 2001. Dr. Hansberry provided a 5% whole body permanency rating for the adenocarcinoma of the prostate pursuant to Minn. Rule 5223.6000, subp. 3. The report providing this permanency rating is dated May 28, 2004. [Ex. E] Mr. Gluba then filed a Claim Petition for payment of permanent total disability asserting that with the additional 5% permanency, he met the threshold requirement of Minn. Stat. §176.101, subd. 5(2)(c).

Judge Mesna denied Mr. Gluba's claim for permanent total disability from September 4, 2001 through May 30, 2005. The Workers' Compensation Court of Appeals affirmed the Trial Court and this appeal follows.

LEGAL ARGUMENT

- I. THE PERMANENCY AND AGE THRESHOLDS FOR ENTITLEMENT TO PERMANENT TOTAL DISABILITY BENEFITS AS ENACTED IN MINN. STAT. §176.101, SUBD. 5(2)(A)(B)(C) ARE UNCONSTITUTIONAL AS THEY DO NOT PROVIDE EQUAL PROTECTION UNDER THE STATUTE TO ALL INJURED WORKERS.**

A. Historical background of permanent total disability benefits in Minnesota.

Before the enactment of Minn. Stat. §176.101, subd. 5(2)(a)(b)(c) with an effective date of all injuries after October 1, 1995, an injured worker could claim entitlement to permanent total disability benefits under one of two means. First, Minn. Stat. §176.101, subd. 4 stated that:

“The total and permanent loss of the sight of both eyes, the loss of both arms at the shoulder, the loss of both legs so close to the hips that no effective artificial members can be used, complete and permanent paralysis, total and permanent loss of mental faculties, or any other injury which totally incapacitates the employee from working in an occupation which brings the employer any income constitutes total disability.”

If an injured worker met one of the specific disabilities listed in the statute, the injured worker was entitled to permanent total disability benefits. Second, an injured worker could claim entitlement to permanent total disability benefits through the use of a medical/vocational analysis. Permanent total disability occurred when:

“Employee’s physical disability, in combination with the employee’s age, education, training and experience, causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income.”

Minn. Stat. §176.101, subd. 5(2)(b) (1992); Schulte v. CH Peterson Construction Co., 153 NW2d 130, 133-34; 24 WCD 290, 295 (Minn. 1967). Under this standard, permanent total disability was primarily dependent on an injured worker’s vocational potential, rather than his physical condition or disability. Thompson v. Layne of MN, 50 WCD 84, 100 (WCCA 1994); McClish v. Pan ‘O Gold Baking Co., 336 NW2d 538, 542, 36 WCD 133, 139 (Minn. 1983).

During the late 1980’s and early 1990’s, substantial efforts were made to reduce the cost of workers’ compensation to employers in Minnesota. As part of that attempt to reduce the cost of workers’ compensation, two proposed amendments to the statute were made. One was to judge the employability of an injured worker on the statewide labor market rather than the prior 50-mile radius of an injured worker’s home. The second was to place a threshold of 20% or 25%

permanency rating as a pre-requisite to entitlement to permanent total disability benefits. Both of these proposed reforms were rejected by the legislature. In 1992, the legislature did condify the Schulte definition of permanent total disability benefits in Minn. Stat. §176.101, subd. 5(2)(b).

However, in 1995, the legislature made additional amendments to entitlement to permanent total disability benefits for all injuries occurring after October 1, 1995. This statute provided thresholds in order to be entitled to payment for permanent total disability. These thresholds were as follows: (1) an employee must have at least a 17% whole body permanency rating; (2) if an injured worker was at least 50 years old at the time of the injury, the injured worker must have at least 15% whole body permanency; or (3) if an employee was at least 55 years old at the time of injury and had not completed high school or obtained a GED, the injured worker must have at least 13% whole body permanency to be entitled to permanent total disability benefits.

Since the 1995 enactment of the threshold requirements for permanent total disability benefits, case law has developed regarding the permanency threshold for permanent total disability benefits. In Frankhauser v. Fabcon, Inc., 57 WCD 239 (WCCA 1997), this esteemed Court summarily affirmed the Workers' Compensation Court of Appeals that ruled:

“An employee who has sufficient ratable permanent partial disability from any cause may establish entitlement to benefits for permanent total disability if he or she meets the remaining eligibility requirements - that is, if the employee's physical disability... causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income, Id.; see also Schulte [citation omitted] - as long as the employee's work-related injury is a substantial contributing cause of that disability.” at 252.

Therefore, under this analysis, if an injured worker that has 3% permanency for work-related bilateral carpal tunnel disability and another 14% whole body permanency for any other

non-related disability and the carpal tunnel is a substantial contributing cause to the inability to find work, the individual would receive permanent total disability benefits. Clearly, the Courts recognize that the work-related percentage of disability found in the permanency schedule is not the determinative factor in deciding when an injured worker is, in fact, permanently and totally disabled. Another injured worker could have a 14% rating for a work injury and have no other ratable disability. Therefore, the injured worker with a higher percentage of work-related permanency would not be entitled to permanent total disability benefits. This is not rational.

In Metzger v. Turck, 59 WCD 229 (WCCA 1999), the Court further eroded the threshold permanency requirements in ruling that:

“In establishing the permanent partial disability thresholds for permanent total disability, any substantial ratable permanent partial disability will satisfy that goal, whether or not that permanent partial disability is a factor in the employee’s wage loss or inability to work.” at 237.

Therefore, to reach the threshold for permanent partial disability, any permanency rating can be used even if it has no impact on an injured worker’s employability. These rulings demonstrate the lack of a rational basis for enacting these thresholds.

Another case which exemplifies the lack of relationship between a permanency rating and employability is Wensman v. Order of St. Benedict, 64 WCD 490 (July 14, 2004). Ms. Wensman was 79 years old on February 26, 2001 when she sustained a left hip and shoulder injury. As a result of her work-related injuries, she had ratable permanent partial disability of 11.7% whole body permanency. To meet the permanency threshold and therefore receive permanent total disability benefits, Ms. Wensman asserted entitlement based on additional permanency for a hysterectomy which she underwent in 1967. Clearly, the hysterectomy which Ms. Wensman had undergone thirty-one years before the work injury had no impact on her employability, either before or after the work injury. However, the permanency rating for the

hysterectomy was allowed so that Ms. Wensman received permanent total disability benefits as a result of her work injury.

The legislature in the past twenty years has also endeavored to reduce the complexity of the workers' compensation process and reduce workers' compensation litigation. The enactment of these permanent total disability thresholds only increases the litigation and expense. Now not only does the injured worker need to show he/she is unemployable but needs to establish other permanency ratings for non-work-related conditions. An example of this complexity is seen in the Wensman facts (cited above). The rating for a hysterectomy in the Permanent Partial Disability Schedule is 5% if done after menopause and 20% if done before. To spend time and money for expert medical opinion to establish non-work-related permanency ratings that have no impact on employability increases litigation and expense to the entire workers' compensation system.

B. James Gluba's claim for permanent total disability benefits.

Mr. Gluba was 69 years old when he sustained the low back and left hip injury at work. He died at age 77. Mr. Gluba last worked on September 4, 2001. Mr. Gluba had an eighth grade education and no GED.

In the Findings and Order of Judge Rieke dated April 2, 2003, Judge Rieke found that Mr. Gluba met his burden of proof that he had been permanently and totally disabled since September 4, 2001 and that his low back and hip work injuries were a substantial contributing cause of that permanent and total disability. However, permanent total disability benefits were not awarded as Mr. Gluba established only a 10% whole body permanency rating. Mr. Gluba asserts that the threshold requirements of Minn. Stat. §176.101, subd. 5(a)(b) and (c) are

unconstitutional as these provisions do not provide equal protection under the law to all injured workers.

The Fourteenth Amendment of the United States Constitution in Section 1 indicates that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” Similarly, the Minnesota Constitution at Article I, Section 2, provides that “no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land.” Minnesota’s Equal Protection Clause requires that similarly-situated people must be treated equally. State v. Frazier, 649 NW2d 828, 837 (Minn. 2002), citing McRoberts v. Palmer West Construction Co., 42 WCD 449, *summarily affirmed* 448 NW2d 373 (Minn. 1989).

The threshold requirements including the permanency requirement; the age cutoffs with different permanency requirements; and the education threshold of Minn. Stat. §176.101, subd. 5(a)(b) and (c) results in the denial of permanent total disability benefits to some injured workers who are in fact permanently and totally unable to secure anything but sporadic jobs which provide insubstantial income. Mr. Gluba is an excellent example.

The Workers’ Compensation Act “is social legislation, providing a measure of security to workers injured on the job, with the burden of that expense considered a proportionate part of the expense of production.” Monson v. White Bear Mitsubishi, 663 NW2d 534, 539 (Minn. 2003) quoting Franke v. Fabcon, 509 NW2d 373, 376 (Minn. 1993).

The entire compensation system has been set up and paid for, not by the parties, but by the public. The public has ultimately borne the costs of compensation protection in the price of the product, and it has done so for the specific purpose of avoiding having the disabled victims of industry thrown on private charity or public relief. To this end, the public has enacted into law a

scale of benefits that will forestall such destitution. 8 Arthur Larson and Lex K, Larson's Workers' Compensation Law §132.04(1) 2003.

By the enactment of the thresholds for payment of permanent total disability benefits, the purpose behind the Workers' Compensation Act is thwarted. Certain individuals such as Mr. Gluba who are permanently and totally unable to work as substantially caused by the work injury, will not receive wage loss benefits. This is contrary to the whole purpose of the Workers' Compensation Act.

In order for a statute to pass constitutional muster, the government must show that there is a rational relationship between the statutory provision and a legitimate governmental interest. In this case, the apparent government interest was to reduce workers' compensation costs to businesses in Minnesota. As a result of the efforts made by the business community, certain changes in the law occurred reducing benefits to injured workers in Minnesota. For example, a limit of 104 weeks of temporary total disability benefits per date of injury was imposed by Minn. Stat. §176.101, subd. 1 (1995). However, this limitation of 104 weeks of temporary total disability applies to any and all injured workers.

Likewise, a limitation of 225 weeks of temporary partial disability benefits within a 450-week timeframe after a work injury for temporary partial disability benefits was also enacted by the legislature. Minn. Stat. §176.101, subd. 2(b). Again, all injured workers injured after the date of enactment are affected equally by this new legislation limiting temporary partial disability benefits.

However, the threshold requirements of the permanent total disability statute does not apply equally. The subsequent case law further erodes the thresholds when the case law

specifically indicates that permanency for non-work-related conditions which have no impact on employability can be used in reaching the threshold.

The permanent partial disability schedule developed by the Department of Labor and Industry as mandated by the law in 1983 attempts to assign a permanent partial disability rating to over one thousand physical and emotional categories. However, the extent of permanency which any individual injured worker may reach under the schedule may have no relationship to employability. An excellent example of this is the condition of carpal tunnel syndrome. The permanency rating under the schedule for carpal tunnel syndrome is at its highest 3% per wrist. Generally, individuals who develop carpal tunnel syndromes are those who earn their living in a hand-intensive position. If after the development of carpal tunnel syndrome, that individual is unable to return, as is often the case, to his or her pre-injury position, that 3% whole body permanency is much more disabling to that injured worker than to an employee who does not use their hands repetitively in the employment setting. Likewise, individuals working in heavy physical construction-type positions who sustain career-ending back injuries would have the same permanency rating as an office worker with the same back injury. The same permanency rating for both would apply, but future employability would be much more difficult for the construction worker.

The Wensman case cited above was awarded permanent total disability benefits because she had a hysterectomy thirty-one years before the work injury. Clearly, the hysterectomy had nothing to do with her ability to work as she had been employed through the age of 79. However, this permanency for a non-work-related condition that has nothing to do with employability was used in order for her to meet the threshold and be entitled to permanent total disability benefits.

The thresholds are arbitrary. An injured worker's age, in and of itself, is not the primary controlling factor on employability. Under the statutory scheme, an injured worker who was one day short of his or her 50th birthday on the date of injury and had 15% permanency would not be entitled to permanent total disability benefits based on being injured one day before his/her birthday.

A closer review of the statute as enacted raises question as to why the age 50 and age 55 are used. If the threshold goes down by 2% for every five years between 50 and 55, why does it not continue to go down for age 60, another 2% at age 65 and so on. Likewise, the use of a high school diploma or GED as a controlling factor has no rational basis.

Ultimately, the question of entitlement to permanent total disability benefits should still be determined on whether or not the injured worker is able to gain and maintain suitable, gainful employment in that injured worker's labor market. The purpose of the entire workers' compensation system is to provide wage loss benefits. The threshold requirements provided in Minn. Stat. §176.101, subd. 5(2)(a)(b)(c) have no rational basis and serves only to reduce the cost of work place injuries to the employers. The statute does not protect all injured workers who are permanently precluded from substantial, gainful employment equally. Therefore, it is unconstitutional.

CONCLUSION

The legislative attempt to limit entitlement to permanent total disability benefits even when it is judicially determined that an injured worker is permanently and totally disabled results in unequal protection under the Workers' Compensation Act. Therefore, the provisions of Minn. Stat. §176.101, subd. 5(2)(a)(b)(c) are unconstitutional and must be vacated. The relator respectfully requests a finding that this portion of the law is unconstitutional and an award of

permanent total disability benefits from September 4, 2001 through May 5, 2005, together with statutory interest and taxable costs.

Respectfully submitted,

Dated: October 25, 2006.

SCHOEP & McCASHIN, Chtd.

By DeAnna M. McCashin

DeAnna M. McCashin (#160192)

Attorneys for Relator

6747 State Highway 29 S.

Alexandria, MN 56308

(320) 763-3634

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).