MINNESOTA STATE LAW LIBRARY

NO. A11-1784

State of Minnesota
In Supreme Court

Minh Nguyen,

Employee-Relator,

vs.

Audio Communications,

Employer-Respondent,

and

SFM Mutual Insurance Company,

Insurer-Respondent.

BRIEF AND APPENDIX OF RESPONDENTS AUDIO COMMUNICATIONS AND SFM MUTUAL INSURANCE COMPANY

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

Attorney for Employee-Relator

LYNN, SCHARFENBERG & ASSOCIATES
Danielle T. Bird (#351568)
P.O. Box 9470
Minneapolis, MN 55440-9470
(952) 838-4464

Attorney for Employer and Insurer–Respondents Audio Communications and SFM Mutual

2011 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE LEGAL ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

LEGAL ARGUMENT 6

I. DOES THE AVAILABILITY OF AN ONGOING STREAM OF BENEFITS, FROM WHICH TO CLAIM ATTORNEY FEES, PREVENT THE EMPLOYEE'S ATTORNEY FROM CLAIMING GRUBER FEES FROM THE EMPLOYER AND INSURER? 6

II. IS MINNESOTA STATUTE §176.081 LIMITED IN SCOPE TO PETITIONER ATTORNEY'S REQUEST FOR ATTORNEY FEES? 10

CONCLUSION 12

APPENDIX 14

TABLE OF AUTHORITIES

Cases

Roraff v. State of Minn., 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980) 6

Kahn v. State of Minn., 327 N.W.2d 21 (Minn. 1982) 10

Irwin v. Surdyk's Liquor, 599 N.W.2d 132 (Minn. 1999) 9

Heaton v. J.W. Fryer & Co., 36 W.C.D. 316 (Minn. 1983) 6

Gruber v. ISD #625, 57 W.C.D. 284 (W.C.C.A. 1997) 6, 7, 8

Johnson v. Apple Valley Health Care Center, 62. W.C.D. 434, (W.C.C.A. 2003) 9

Barry v. NSP slip op. (W.C.C.A. May 8, 2000) 8

Wesley v. Wise Way Motor Freight, slip op. (W.C.C.A November 8, 2000) 7

Rules

Minn. R. Civ. App. P. 117, Subd. 2 3

Statutes

Minn. Stat. §176.081 ..... 6, 9, 10

Minn. Stat. §176.081 Subd. 1 5

Minn. Stat. §176.081 Subd. 1(a)1 6

Minn. Stat. §176.081 Subd. 1(3) 10

Minn. Stat. §176.081 Subd. 2 9

Minn. Stat. §176.081 Subd. 3 9

Minn. Stat. §176.101 Subd. 4 5

Minn. Stat §176.179 ..... 5, 8

STATEMENT OF THE LEGAL ISSUES

I. **DOES THE AVAILABILITY OF AN ONGOING STREAM OF BENEFITS, FROM WHICH TO CLAIM ATTORNEY FEES, PREVENT THE EMPLOYEE'S ATTORNEY FROM CLAIMING GRUBER FEES FROM THE EMPLOYER AND INSURER?**

II. **IS MINNESTOA STATUTE §176.081 LIMITED IN SCOPE TO PETITIONER ATTORNEY'S REQUEST FOR ATTORNEY FEES?**

Workers' Compensation Court of Appeals Held:

The determination that a reasonable attorney fee should be awarded under a contingency fee statute and that the fee should be shifted so that it is assessed against the employer and insurer to protect the prevailing party's rights is not a determination that can be made under the current statutory framework or current case law, including Gruber.

STATEMENT OF THE CASE

The employee, Minh Nguyen, sustained an injury while working for Audio Communications, Inc. on December 13, 2005. He sustained an injury to his left shoulder and cervical spine; these injuries were admitted. As a result of a cervical fusion surgery on July 5, 2006, the employee sustained a consequential injury when he fell on his left hip aggravating the graft site taken for his cervical fusion; this is an accepted injury. The employee underwent a second cervical fusion on February 5, 2009.

A Claim Petition was filed alleging various permanency ratings as well as permanent and total disability status as of March 4, 2008, the last date temporary total disability benefits were issued. A hearing on these matters was held before the Honorable Peggy Brenden at the Alexandria Court House on February 18, 2009. Judge Brenden served and filed her decision on March 25, 2009. She awarded permanent total disability benefits as of March 4, 2008.

The Decision was appealed by the Employer and Insurer by filing a Notice of Appeal on April 23, 2009. After oral argument was held on September 28, 2009, a decision was issued by the Honorable Miriam Rykken on November 20, 2009 indicating that the issue of permanent total ONSET date was not determined by the compensation judge and remanded that issue for additional findings.

A Petition for Determination of Permanent Total Disability onset was filed by the employer and insurer on February 25, 2010. Judge Brenden issued her findings regarding permanent total onset date on September 15, 2010, finding the employee first became permanently and totally disabled as of March 1, 2007. Because the employee had been

collecting social security disability benefits, this resulted in an overpayment by the employer and insurer.

The employee's attorney filed for "Gruber-type" attorney fees on December 6, 2010 based on her successful defense of preventing additional overpayment from being awarded if the employer and insurer was successful in establishing an earlier onset date. The employer and insurer objected. A telephone hearing was held on December 13, 2010. A findings and order was issued on December 22, 2010 denying the request for Gruber-type attorney fees stating the employee's attorney continued to have a stream of benefits from which she could collect attorney fees.

The employee appealed the decision on January 13, 2011 on whether the Compensation Judge committed mistakes of face and errors of law in denying Gruber-type attorney fees. Oral argument was held June 20, 2011. A Decision was issued by the Workers' Compensation Court of Appeals on September 12, 2011 affirming the Findings and Order of the Compensation Judge.

Employee filed a Petition for Writ of Certiorari with the Clerk of Appellate Courts on October 11, 2011. Although the application for review of this workers' compensation case is not discretionary, the issues involved in this appeal would not qualify under any Rule 117 Subd. 2 criteria for acceptance of review by the Supreme Court. (See Minnesota Civil Rules of Appellate Procedure.)

STATEMENT OF FACTS

At the February 18, 2009 hearing regarding the employee's potential permanent and total disability status, the employer and insurer claimed it was simply premature to determine whether the employee met the threshold of such status since he was just 12

days out from a cervical fusion. The issue, as agreed to by all the parties, was "has the employee been permanently and totally disabled since March 4, 2008?" [A-1] This was the date pled by the employee in his Claim Petition, which also happens to be the day after the employee met the 104 week threshold for temporary total disability benefits.

The Compensation Judge, in her Findings and Order, determined that the employee had been disabled since March 4, 2008. It was somewhat ambiguous from this decision whether this was truly an established "onset" date, or rather, whether it was in response to the question framed by the parties.

Therefore, an appeal on the determination of "onset" date was made by the employer and insurer. If this was determined by the court of appeals to be a true "onset" date, an appeal to the Workers' Compensation Court of Appeals would have been the employer and insurer's only avenue for recourse. If not, the issue would be remanded for further findings by the Compensation Judge. The "onset" issue was remanded for further findings.

A Petition for Determination of Permanent Total Disability Onset Date was filed on February 25, 2010. [A-7] Briefs were submitted by each party in support of their position with regard to "onset" date. [A-10; A-21]. The employer and insurer argued two dates, October 9, 2006, the date the social security administration determined the employee's disabled status, or January 23, 2007 the date the employee's neck surgeon removed him from work indefinitely.

Based on the two dates briefed by the employer and insurer reviewed by the Compensation Judge on remand, there were two possible overpayment scenarios that were claimed by the employer and insurer, either October 9, 2006 or January 23, 2007.

[A-10] Based on the first date, October 9, 2006, an overpayment of $26,639.44 would have resulted; based on the second date, January 23, 2007, an overpayment of $21,184.45 would have resulted when applying statutes that allow recovery of overpayments as applied to permanent total disability status. See MINN. STAT §176.179; MINN. STAT. § 176.101 Subd. 4 (2010); [A-33] The employee did not make any substantive arguments in support of why the initial date, March 4, 2008, should be considered the permanent total disability onset date. [A-21] This was the date after temporary total disability benefits were discontinued due to the 104 week statutory limit. In her decision dated September 15, 2010, the Compensation Judge determined, *sua sponte*, that the onset date was March 1, 2007, which resulted in an overpayment of $19,090.50. [A-46] At most, the employee prevented an additional $7,548.94 in overpayment from being collected by the employer and insurer based on the earliest date argued by the employer and insurer, October 9, 2006.

The employer and insurer continue to pay the employee weekly permanent total disability benefits. Pursuant to statute, the employee's benefits are reduced 20% until the overpayment has been recouped. See MINN. STAT. §176.179 (2010).

The employee's attorney filed a Petition for Attorney Fees claiming contingency fees based on a 25/20 formula from an alleged collection of $19,090.50 in benefits based on a Gruber theory. [A-52] An application WAS NOT made for payment of attorney fees pursuant to §176.081. Subd. 1 from the employee's ongoing permanent total disability benefits. [A-54]

LEGAL ARGUMENT

I. DOES THE AVAILABILITY OF AN ONGOING STREAM OF BENEFITS, FROM WHICH TO CLAIM ATTORNEY FEES, PREVENT THE EMPLOYEE'S ATTORNEY FROM CLAIMING GRUBER FEES FROM THE EMPLOYER AND INSURER?

In establishing an alternative form of attorney fees, such as hourly fees, the standard has always required determining that the employee's attorney cannot be adequately compensated from an ongoing stream of benefits. This is the threshold issue in all cases that address whether or not the issue of attorney fees should be shifted from the employee to the employer and insurer. This is codified in statute §176.081 "attorney fees for recovery of medical or rehabilitation benefits or services shall be assessed against the employer or insurer only if the attorney establishes that the contingent fee is inadequate to reasonably compensate the attorney for representing the employee in the medical or rehabilitation dispute. MINN.STAT. §176.081 Subd. 1(a)1 (2010) (emphasis added).

The policy behind these rules is the position the Supreme Court has taken "with respect to affording reasonable compensation for representation on other workers' compensation issues which similarly do not, in and of themselves, result in an award of benefits to an employee." Gruber v. ISD #625, 57 W.C.D. 284, 290 (W.C.C.A. 1997), citing to Roraff v. State of Minnesota, 288 N.W.2d 15, 32 W.C.D. 297 (Minn. 1980); Heaton v. J.W.Fryer & Co., 36 W.C.D. 316 (Minn. 1983) (litigation over rehabilitation services). The Gruber fee was established because there were no contingency fees from which to collect "reasonable compensation for representation."

Gruber involves and employee who initially refused to accept a suitable job offer. The employee prevailed at the discontinuance hearing and ongoing temporary total disability benefits were ordered. An additional pleading was then filed by the employer and insurer basically alleging the employee was faking his medical condition and attempted to recoup benefits paid out while the employee was collecting them in bad faith. By the time of the bad faith hearing, the employee was back to work and no stream of benefits existed upon which the employee's attorney could possibly request reimbursement for his representation of the employee. Without recourse for payment of his successful defense of the bad faith claim against his client, the employee's attorney petitioned for fees to be paid by the employer and insurer. The Gruber court found:

> [A]s a matter of policy, we conclude that where an employee successfully defends against an allegation of bad faith receipt of benefits but contingency fees available, if any, are insufficient to reasonably compensate the employee's attorney for time expended in defending that issue, the employee's attorney may be awarded reasonable hourly fees from the employer and insurer sufficient to compensate the employee's attorney for successful defense of the bad faith issue.

Gruber, 57 W.C.D. 284, 290 (W.C.C.A. 1997) (emphasis added).

Ultimately, the rationale for awarding these types of fees was that there were no ongoing benefits, or potential stream of benefits, from which to look for contingency attorney fees to be paid. The employee's case is clearly distinguishable since an ongoing stream of benefits is available here from which to claim attorney fees.

With regard to Gruber, case law has also established these fees are strictly construed to apply only to the successful defense of a claim of bad receipt of benefits. The court has declined to extend this theory to successful defense of overpayment issues.

E.g., Barry v. NSP slip op. (W.C.C.A. May 8, 2000) (employee's attorney made an application for Gruber fees after disputing the effective date of onset of permanent total disability status, the request was denied.); Wesley v. Wise Way Motor Freight, slip op. (W.C.C.A. Nov. 8, 2000) (court refused to extend Gruber fees beyond limited scope of bad faith claims).

Barry v. NSP, addresses the application of Gruber fees to facts which mirror this case exactly. Despite a successful attempt at limiting some overpayment exposure based on the social security benefits being paid concurrently with permanent total disability benefits, the attorney's request for Gruber fees was denied. The first prong of Gruber was not met, in that the application for fees was not for the strictly construed reason of successful defense of bad faith claims.

In addition, the court determined that Gruber fees, or anything like them, are inappropriate to apply to permanent total overpayment situations, because contingency fees are likely to reasonably an attorney for their time expended in defense of the claim because they can be taken from an ongoing benefit stream "in dispute." Barry established that "although employee's entitlement to ongoing benefits was not disputed, the amount of those ongoing benefits was directly disputed by virtue of the contest over the date of permanent total disability, and the resulting overpayment or underpayment of past benefits, and the availability of the credit under Minn. Stat §176.179." (Emphasis in original.)

Finally, the employee's attorney claims that the maximum attorney fee of $13,000 has been paid and therefore any additional payment would violate the retainer agreement signed by both parties at the beginning of representation. That very same retainer

agreement expressly indicates that "...my attorney may make application for fees in excess of $13,000.00." [A-56] This language is in conformity with the notice requirements of §176.081. The face of the Fee Petition [A-52,54] additionally reiterates this information as is required by §176.081 Subd. 3, which allows for the notice of and objection to said fees that is followed by a review of the reasonableness of the fees submitted based on the amount involved, the time and expense necessary to prepare for trial, the responsibility assumed by counsel, the expertise of counsel, the difficulty of the issues and the nature of the proof involved. See MINN. STAT. §176.081 Subd.2 and 3 (2010); and Irwin v. Surdyk's Liquor, 599 N.W.2d 132 (Minn. 1999). This process is done to protect the employee from excessive attorney fees.

Similarly, in Johnson v. Apple Valley Health Care Center, 62. W.C.D. 434, (W.C.C.A. 2003), the attorney prevailed in preventing the employer and insurer from discontinuing permanent total disability benefits and he requested Gruber fees. The attorney based his claim on the fact that the $13,000 in maximum statutory fees has already been paid and it therefore any fees should come from the employer and insurer. In assessing whether fees could continue to be withheld from the employee's ongoing permanent total disability benefits, the attorney fee threshold of $13,000 was not considered as a factor. Gruber fees were denied because the employee was continuing to receive permanent total disability benefits and there was a stream of benefits from which the employee's attorney may receive an attorney fee.

The employee's attorney has a disputed stream of benefits from which to collect contingency benefits and be reasonably compensated, and therefore, a new contingency fee in the form of Gruber type fees would be inappropriate.

II. IS MINNESOTA STATUTE §176.081 LIMITED IN SCOPE TO PETITIONER ATTORNEY'S REQUEST FOR ATTORNEY FEES?

§176.081 - "Legal Services or Disbursements; Lien; Review" directly regulates legal services and fees related to representation of injured workers. MINN. STAT. §176.081 (2010). The employee's attorney specifically points to Subd. 1(3) in support of her argument that the employer and insurer should bear the burden of attorney fees in this case. However, there is no burden shifting language that would allow the requested fees to be awarded and paid for by the employer and insurer.

The relevant portion of the statute states, "[a]n attorney is not entitled to attorney fees for representation in an issue which could reasonably have been addressed during the pendency of other issues for the same injury." MINN. STAT. §176.081 Subd. 1(3) (2010). This language, read in conjunction with the other cited authority, Kahn v. State of Minn., 327 N.W.2d 21 (Minn. 1982), that requires the review of attorney's fee applications to protect injured workers from excessive legal charges, clearly establishes that the purpose of the statute is to control and consolidate litigation originating with legal pleadings made by the employee's attorney. Only petitioner's attorneys submit attorney fee applications for review by the court. It is a misplaced assertion that this statute applies to employer and insurers when asserting defenses.

The employee's application of this statute to be equally applied to employer and insurer's attorneys because this statute is meant to prevent unnecessary manipulation of the system by petitioner attorneys in an attempt to manufacture hours spent on two different issues that could have been heard at one hearing. There is nothing in this statute

that limits or prevents an employer and insurer from holding back on a defense in order to better represent its client.

At the time of the February 18, 2009, hearing, contrary to opposing counsel's opinion, the case was not ripe for the employer and insurer to make an argument in the alternative regarding onset date of permanent total disability status. The employee was a mere 12 days from his cervical fusion, he was not even close to being place at maximum medical improvement and had no permanent restrictions. The employee's job search prior to the surgery on February 5, 2009, was significantly hampered by the pain between his shoulder blades, which was meant to be corrected by the surgery. [A-60, lines 9-19; A-61, lines 18-25; A-62, line 1; A63, lines 17-23] At the time of the hearing, there certainly was hope, in the employer and insurer's eyes, that the employee would recover from his cervical fusion surgery and return to the job search and suitable employment.

To have forced the employer and insurer to have made an alternative argument, one that would be completely inconsistent with its chosen argument that the permanent total disability status was premature, would have severely affected its ability to zealously and effectively represent its client. The exhibits focused on, and testimony elicited, would have been completely different depending upon which outcome was requested. It could not have effectively advocated either position in juxtaposition to the other in the same hearing – opposite arguments would have been required. The employer and insurer have a right to defend its position as it feels would most benefit its client. In this case, making any concession with regard to its position that permanent total disability was a premature finding would have severely undermined its position in this regard and would not have been in the best interest of its client.

Once the employer and insurer lost the issue of permanent total disability however, the set of facts to which to apply and onset date were set and no additional records were needed at the second hearing. A different analysis of them was required, however. At the time of the onset date hearing, the finding that the employee was, at some point, permanently and totally disabled, was a stipulated fact established by the unappealed portion of the March 25, 2009 decision of the Compensation Judge. Since that was the case, there was no need to submit additional information into the record to apply the elements of permanent total disability status to establish onset date. The fact that new material was not submitted at this hearing, does not establish that the issue was ripe to be heard at the February 18, 2009, hearing.

CONCLUSION

The employee's claim for Gruber type fees should be denied because an ongoing stream of benefits is available from which the employee's attorney can claim fees; and expansion of the application of contingent fees is not appropriate in this setting. The attorney fee statute which requires all concurrent claims be filed simultaneously does not apply to employers and insurers when alleging affirmative defenses. The employer and insurer have a right to present its defenses to claims for permanent total disability benefits without fear of being assessed attorney fees. The employer and insurer respectfully request that Gruber-type fees be denied.

Respectfully Submitted,

LYNN, SCHARFENBERG & ASSOCIATES

Dated: 11/30/11

Danielle T. Bird (#351568)
Attorney for Audio Communications and
SFM Mutual Insurance Company – Respondent
P.O. Box 9470
Minneapolis, MN 55440-9470
(952) 838-4464