MINNESOTA STATE LAW LIBRARY

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.

REPLY BRIEF TO AMICUS CURAIE BRIEF AND APPENDIX OF JAMES GLUBA/LORRAINE GLUBA, EMPLOYEE-RELATOR

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LEGAL ARGUMENT

INTRODUCTION

The Commissioner of the Department of Labor & Industry in his Introduction to Legal Argument reveals a disquieting pro-business bias regarding the 1995 workers' compensation amendments. The Commissioner's argument begins by quoting one of the small group of politicians who drafted the amendments in secret outside the committee and hearing process that is an integral part of the legislative process. To give credibility to the quote, the Commissioner attributes the quote to a 1996 William Mitchell Law Review article about the 1995 amendments written by the Honorable Thomas L. Johnson, an esteemed member of the Workers' Compensation Court of Appeals since 1992 and Catherine J. Wasson, a staff attorney with the WCCA since 1994 and adjunct professor at William Mitchell College of Law since 1992. The quote used by the Commissioner in his introductory statements to this esteemed Court is actually a quote from an article found on the *editorial* page of the St. Paul Pioneer Press. The Commissioner fails to approach the constitutional arguments from a fair and unbiased prospective.

The lengthy, well-researched 1996 law review article that contains 239 footnotes analyzes all of the 1995 workers' compensation amendments addressing strengths, weaknesses and unanswered questions that arise from the legislation. The authors of this law review article who are extremely qualified to address the content of the 1995 amendments from a non-political position raise multiple concerns regarding the permanent total disability thresholds enacted by the 1995 workers' compensation amendments. After reviewing the PTD provisions of the law before the 1995 amendments, the authors raise multiple questions regarding the changes in PTD portion of the amendments:

"What are the constitutional implications of the differential treatment that apparently will be accorded similarly-situated employees under the new threshold requirements? Pursuant to the amended law, an employee with a 15% PPD who was injured at age 50 will meet the threshold requirements. However, a similarly-situated claimant with a 15% permanent partial rating will not meet those requirements if he was injured at age 49. One can also consider the case of the employee with an eighth grade education who was injured at age 55, but who has only a 12% permanency rating.

The purpose of graduated PPD ratings dependent on the employee's age on the date of injury is unclear. If an employee has a 13% or 15% rating and is totally disabled, should he or she be barred from receiving permanent total benefits if he or she was 45 on the date of injury rather than 50 or 55? If the purpose of PTD compensation is to compensate an employee for the permanent loss of his or her ability to work, it is unclear why the employee's age at the time of injury should be a threshold requirement for receipt of benefits. ...The application of the new threshold requirements appears to be an area ripe for litigation and possible constitutional challenge. It might be reasonable to predict an increase in disputes over the proper PPD rating accorded an employee, especially when the potential ratings fall within the range covered by the new thresholds. Attorneys may also feel compelled to get expert opinions on rating applicable to non-work-related conditions, and to litigate that issue, unless and until it is determined that non-work ratings are irrelevant to the thresholds. Litigating non-work-related PPD ratings, however, will obviously increase the time and expense necessary to resolve claims." [22 Wm. Mitchell L. Rev. 1493, 1500]

In the Commissioner's second paragraph of the Introduction, he concludes that because eleven years have gone by since the passage of the 1995 amendments and no constitutional challenge on the basis of equal protection reached the Supreme Court until now, that the PTD amendments must somehow be constitutional. This esteemed Court in Irwin v. Surdyk's Liquor, 599 NW2d 132 (Minn. 1999) ruled that a portion of the 1995 workers' compensation amendment, Minn. Stat. §176.081, subd. 1(a)(1), which limited attorney fees on medical only disputes to 25/20% of the medical bill amount was unconstitutional as a violation of the separation of powers.

The Commissioner also cited Scott v. Greater Anoka Co. Humane Society, 59 WCD 96 (Minn. WCCA), *aff'd without opinion*, 591 NW2d 722 (Minn. 1999), to imply that this Court

found the 1995 amendment providing a 104-week cap on temporary total disability benefits constitutional. In fact, the summary affirmance indicated that it was summarily affirmed pursuant to Minn. R. Civ. App. Proc. 136.01, subd. 1(b). That Rule provides that "unpublished opinions" and order opinions are not precedential except as law of the case, *res judicata* or *collateral estoppel*, and may be cited only as provided in Minn. Stat. §480A.08, subd. 3 (1996). The Commissioner's assertion that because portions of the 1995 amendments may pass constitutional muster then all of the amendments are therefore constitutional has no factual or legal basis.

I. RELATOR IN THE PRESENT PROCEEDING HAS STANDING TO CHALLENGE THE THRESHOLD REQUIREMENTS OF MINN. STAT. §176.101, SUBD. 5(2)(A)(B)(C).

The Commissioner asserts that relator has no standing to challenge the entire threshold requirements of the PTD amendment contained in Minn. Stat. §176.101, subd. 5(2) and that this Court can only address the 13% threshold requirement that applies to Mr. Gluba. It is undisputed that Mr. Gluba was 68 years old and did not have a GED or high school diploma when he sustained the work-related injuries. The Department asserts, therefore, the remaining PPD thresholds for different ages and educational levels should not be addressed as part of this constitutional challenge. Relator asserts that the PTD threshold provisions are all contained in one subdivision and cannot be analyzed in isolation by pulling only one of the thresholds away from the entire PTD statutory scheme as passed.

When deciding whether a statute is constitutional, the legislative history must be considered. All of the workers' compensation amendments that were passed into law in 1995 have an extremely limited legislative history. The only legislative history that exists is contained in 305 pages of transcribed debates that occurred on the House and Senate floors on May 9; May

19; and May 22, 1995. The transcript from the debates has been reproduced in relator's Reply Appendix. (See attached Appendix, pages 1 through R-305.)

On page 17 of the Amicus Brief in footnote 14, the Commissioner cites to all of the pages in which the permanent partial disability thresholds are mentioned. In each and every one of these references, the 17%, 15%, 13% thresholds are at all times grouped together and debated together. Amazingly, despite the catastrophic financial implication to injured workers who under prior law would be entitled to PTD benefits, the legislators only discussed these PTD thresholds on 32 of the 305 pages. However, the thresholds were always debated together and are all contained in the same subdivision of the statute, Minn. Stat. §176.101, subd. 5(2). The scheme using threshold requirements enacted by the Legislature uses graduated permanency, education and age requirements which cannot be fairly evaluated without analysis of the entire subdivision.

II. THE PROPER STANDARD OF REVIEW FOR THE CONSTITUTIONALITY OF THE THRESHOLD SCHEME OF MINN. STAT. § 176.101, SUBD. 5(2) FOR PERMANENT TOTAL DISABILITY BENEFITS IS NOT THE RATIONAL BASIS TEST.

A. The PTD thresholds involve a suspect classification and a fundamental right of injured workers in Minnesota requiring a higher scrutiny by this Court.

The Commissioner, on page 10, flies over the issue of whether or not the statute involves either a suspect classification or a fundamental right. If the statute involves either a suspect classification or a fundamental right, the rational basis standard argued by the Department is an incorrect standard of review. Relator asserts that the PTD threshold requirements involve both suspect classifications and fundamental rights of Minnesota injured workers.

The challenged portion of the 1995 amendments uses an injured worker's age on the date of injury as a cut-off classification. Three separate age groups are treated differently under the statutory scheme: injured workers who are younger than 50; injured workers who are 50 through

54; and injured workers 55 and over. Absolutely, no basis for choosing these cut-off ages is pro-offered by the legislators who wrote and supported this amendment. Senator Finn asked Senator Sams how the age thresholds were picked. Senator Sams' answer is essentially that the numbers were picked out of thin air. [Reply App. R-234] No studies, no expert testimony, no past experience is cited in support of using an age cut-off. Under the threshold requirements of the 1995 amendments, individuals' basic rights to permanent total disability benefits depend on the age of that injured worker on the date of injury. This is age discrimination as it treats similarly-situated injured workers (those who are unable to gain or maintain gainful employment) differently based solely on age. This does not pass constitutional muster.

The PTD amendments also use permanent partial disability ratings as thresholds. Individuals who are treated differently because of a disability generally have the protection of the Minnesota Human Rights Act. Unfortunately, this protection is not extended to Minnesota injured workers due to the legislated mandate that the exclusive remedy for damages from a work-related injury are workers' compensation benefits. In Karst v. F.C. Hayer Co., 447 NW 2nd 180 (Minn. 1989), injured workers were denied the protection of the Minnesota Human Rights Act as it relates to disability discrimination based on the Workers' Compensation Act's exclusive remedy provision. Therefore, when the statute uses 17%, 15%, 13% permanency rating as a means to deny permanent total disability benefits to otherwise permanently and totally disabled workers, the disability thresholds become suspect classification subject to a higher level of judicial review than the lesser rational-basis standard of review.

Additionally, the PTD threshold scheme enacted in the 1995 statute infringes on a fundamental right guaranteed to all Minnesota citizens. That fundamental right is a liberty interest to live where one chooses. An example would be an injured worker, age 35, who was

born and raised in Hallock, Minnesota and has lived her entire life in Hallock but only has a 15% permanency rating. If she is unable to find gainful employment within her restrictions in her labor market of Hallock, Minnesota, she will be financially forced to move to a more highly populated area to hopefully find employment. She would lose her basic constitutional right to remain in her home town.

Therefore, the PTD threshold provisions enacted involve suspect classifications of age and disability and also infringe on a fundamental liberty right, and as such, this Court must scrutinize the constitutionality of the provision at a higher standard of review than the less stringent rational-basis test.

B. The PTD thresholds fail to pass constitutional muster even when applying the lower rational basis standard.

When applying the rational basis standard to workers' compensation equal protection challenges, the rule of law in Minnesota has been long-established: "To survive challenge, a classification must apply uniformly to all those similarly-situated; be necessitated by genuine and substantial differences between the two groups; and effectuate the purpose of the law." Nelson v. State, DNR, 305 NW2d 317, 319 (Minn. 1981). The primary purpose of the Workers' Compensation Act is to compensate for loss of earning capacity to injured workers.

The first prong of this test is that the classification must apply uniformly to all those similarly-situated. The group to be analyzed would include any and all injured workers in Minnesota who are unable to gain or maintain gainful employment. "The concept of 'total disability' depends upon the employee's ability to find and hold a job, and not on his physical condition." McGlish v. Pan 'O Gold Baking Co., 336 NW2d 538, 542 (Minn. 1983). It is the reality of the job market and not the medical testimony that is most significant in the determination of permanent and total inability to be employed. Id. at 542.

Just on the face of the threshold requirements, the 1995 amendment creates classifications that do not apply uniformly to all similarly-situated injured workers. The classifications allow some permanently and totally disabled injured workers to receive permanent total disability benefits and excludes others who would otherwise qualify for these benefits. The first prong of the rational-basis standard is not met and therefore no need for further analysis is required for finding the PTD thresholds unconstitutional.

The second portion of the rational-basis standard requires that the classification be necessitated by genuine and substantial differences between the two groups. No genuine or substantial difference exists between an injured worker with a 10% PPD rating who is unable to gain or maintain gainful employment and an injured worker who also cannot gain or maintain gainful employment but who has a 17% PPD rating. Both cannot replace the earning capacity destroyed by the work injury.

The third prong of the rational-basis test is also not met. The PPD and age thresholds that must be met have no relationship to the purpose of the workers' compensation statute. The legislative history regarding the age and disability thresholds contains absolutely no support for concluding that PPD ratings higher than 17 percent are related to employability or that ages 50 or 55 are employability cutoffs. In fact, on May 9, 1995, Representative Tomassoni in addressing the House made the following statements:

> "Let me give you a little bit of background on it that the medical services review board actually looked at this, at this provision and this board is appointed by the Commissioner of Labor and Industry and its his responsibility to advise the Commissioner,[sic] its this board's responsibility to advise the Commissioner on the adoption of rules regarding all aspects of medical care and services provided to injured employees and they reviewed the proposal to set a threshold for permanent total disability and the board has unanimously recommended that the disability rating not be used. Let me repeat that. The disability rating not be used as the sole determining factor in placing a person on permanent total disability. This recommendation was made because of what doctors are really rating is

> impairment and not disability. Disability is impacted by many other factors far more recognized in the Kelso amendment. Age, education, training, experience, geographic labor market, they are all real factors in this decision." [Reply App. 72-73]

The legislative history preceding the passage of the entire 1995 amendment is extremely troubling when attempting to analyze its constitutionality. This history reveals that the entire amendments passed in 1995 were not written in any open committee. No testimony from experts relating to employability and/or disability was taken by any member of the House or Senate. The bill as presented and passed was written in secret. [AC App. p.65] The entire amendments were provided to the House several hours before the first debate of the bill on May 9, 1995 and consisted of 116 pages with forty amendments. [Reply App. 32] No formal hearings were conducted and no one had a single committee meeting regarding any part of the 1995 workers' compensation amendments. Representative Winter states:

> "So we look at 116 pages of language coming in in the House today. No formal hearings and any committees. No formal understanding by anybody who basically has to deal with the law. Representative Tuma whose a practicing attorney has to deal with it daily and he's asking questions on what is in it and how is it going to impact people. I think we have a flaw in the system and the amendment that was brought in without ample and proper time for people to investigate and look at." [Reply App. 54]

The Senate debate also reflects that no Senate committee meetings were held and the bill was not provided to the senators in advance of the May 19, 1995 Senate debate. Senator Finn states in part:

> "But let's not forget that this bill appeared on May 9 on the House floor. It wasn't subject to scrutiny and debate and discussion." [Reply App. R-196]

Senator Finn asked how the numbers of 17, 15 and 13 were arrived to set the thresholds. The answer from Senator Sams was that he and Senator Hottinger picked numbers out of the air.

[Reply App. R-234-235] Even the senators were acknowledging that the numbers picked were arbitrary. Senator Chandler challenges the use of the different percentages stating,

> "Why don't you have faith in a judge or someone of that nature to say, you know the fact is this person can't walk, maybe he should get coverage. But to assign an arbitrary number, numbers that by the way this legislature didn't even pass, Senator Runbeck, rules that are established out of thin air by the Department, those rules that you're typically railing against thousands of pages of which has been passed by the Department." [Reply App. R-256]

When evaluating whether an injured worker is permanently totally disabled, a vocational expert assesses many different factors. These include, on an individual basis, the injured worker's age, education, restrictions from the work-related injury, restrictions from any other disability, past work experience, etc. However, one factor that is **not** used in vocational rehabilitation and employability assessments is percentage of disability under the Minnesota Permanent Partial Disability Schedules. Absolutely no evidence whether by way of expert vocational or medical testimony, expert reports, or published articles has been offered in the legislative history that a relationship between a permanent partial disability rating under the Minnesota PPD rules and ability to work exists. In Exhibit L, the transcript from Mr. Gluba's workers' compensation hearing was provided. In that transcript, the qualified rehabilitation consultant providing services to Mr. Gluba testified on the issue of Mr. Gluba's employability. In addition, the employer/insurer hired a vocational expert who also testified regarding Mr. Gluba's employability. Neither vocational expert factored in the Mr. Gluba's PPD rating in reaching an expert opinion on employability. Likewise, Judge Rieke found that Mr. Gluba was permanently and totally disabled even though he found only 10% PPD. The permanency rating is just not relevant to an injured worker's employability.

Another factor to considered when determining whether a rational basis existed for the passage of the amendment is whether a legitimate legislative objective is or could be articulated

from a review of the statute. The Commissioner asserts various legitimate legislative objectives in the passage of the age and disability PTD thresholds. However, the legislative history simply does not support those assertions.

The first legislative objective cited was to reduce cost. Without any testimony regarding the impact on either premiums or benefits paid to injured workers claiming permanent total disability benefits, the cost factor cannot be analyzed. To use cost savings as the only legislative objective would be extremely suspect. For example, if one of the objectives is to reduce premiums to employers by reducing injured workers' benefits, the Legislature could pass a law that provides only blue-eyed workers are entitled to permanent total disability benefits. Clearly, a savings in terms of benefits paid out would occur. However, that factor alone cannot stand to justify the imposition of the various thresholds for permanent total disability benefits.

The second legitimate legislative objective asserted by the Department is that the statute would decrease litigation. The only "testimony" regarding whether litigation would be decreased by these amendments are the statements of Representative Tuma, an attorney, and Senator Johnson. Both stated that the proposed amendments would **increase** litigation. See, A.C. App. 64; Reply App. R-157.

The Commissioner asserts that another legitimate legislative objective of these amendments was to decrease the need for reliance on often conflicting medical testimony and to promote objectivity, consistency, and more uniform results in workers' compensation decisions. The Commissioner argues that claims people, attorneys, and workers' compensation judges make subjective decisions regarding permanent total disability benefits when applying only the factors of age, education, work restrictions and labor market in determining whether an individual is permanently and totally disabled. To avoid these subjective decisions, the

Commissioner argues, the PTD thresholds will apply an objective determination. This argument is flawed. Determining PPD under Minnesota workers' compensation law is anything but objective. All the thresholds (both age and PPD) accomplish is to bar certain permanently and totally disabled injured workers from PTD benefits. The same PTD determination regarding age, education, labor market, etc., must still be adjudicated after the thresholds are met. The thresholds only provide a barrier to certain injured workers from even reaching the previously-determined Schulte factors in determining permanent total disability benefits.

Without support, the Department asserts that it is reasonable to assume that the level of physical impairment affects the person's ability to find work. Nothing in the legislative history or any document supports this assertion. In fact, the legislative history clearly gives examples of the lack of relationship between the level of permanent partial disability rated under the schedule and any given injured worker's employability. [See e.g. Reply App. T. 38]

In a final desperate attempt to shore up a legislative history that would support a rational basis for the threshold requirements, the Commissioner attempts to compare the Minnesota permanent total disability thresholds to the 1989 workers' compensation statute passed by the Texas legislature. The Commissioner is comparing apples to oranges because the 15% permanency threshold passed by the Texas legislature was for temporary partial disability benefits. Additionally, the 15% Texas threshold applied to ALL injured workers. Interestingly in reading the Texas appellate decision, the Texas Court upheld the constitutionality of the law partially on the fact that expert testimony regarding vocational implications of permanency ratings and employability were considered by the Texas legislature. The permanency ratings used in the Texas TPD system is based on the American Medical Association permanency rating. AMA permanency ratings include permanency ratings for subjective complaints of pain.

Therefore, the permanency ratings and thresholds in Texas cannot be compared to the Minnesota permanency ratings which were specifically designed to eliminate any rating for subjective pain.

Even under the less stringent rational basis standard, the threshold requirements for permanent total disability consideration do not pass constitutional muster. Clearly, the classifications (disability ratings and educational as well as age classifications) do not apply uniformly to all similarly-situated injured workers who are unable to gain or maintain gainful employment. No showing has been made that there is any genuine and substantial difference between the injured workers who meet the thresholds and those who cannot meet the thresholds. Both groups are unable to gain or maintain gainful employment in their labor market. Lastly, the statute does not effectuate the purpose of the law which is to provide income or wage loss benefits to injured workers whose work injury is a substantial contributing cause of their inability to gain work which provides a living. Therefore, the threshold requirements for permanent total disability benefits are not constitutional even under the lesser rational-basis standard.

CONCLUSION

The threshold requirements for entitlement to claiming permanent total disability benefits are based on suspect classifications and impinge on the fundamental liberty rights of injured workers to live where they choose. The threshold PTD portion of the 1995 workers' compensation amendment does not pass constitutional muster as the law does not provide equal protection to all injured workers who are unable to gain or maintain employment due to their work injury. Even when applying the lesser standard of a rational basis, the statute providing the thresholds has no rational basis for treating similarly-situated injured workers differently. Therefore, relator requests that the threshold provisions of the permanent total disability statute be declared unconstitutional and benefits as claimed by Relator be awarded.

Respectfully submitted,

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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).