

NO. A06-1849

State of Minnesota
In Supreme Court

James E. Gluba, by Lorraine Gluba,
Employee/Relator,

vs.

Bitzan & Ohren Masonry,
Grinnell Mutual Reinsurance Company,
Employer and Insurer/Respondent,
and

Medicare/Noridian Admin. Services,
Intervenor.

**BRIEF AND APPENDIX OF
EMPLOYER AND INSURER/RESPONDENT**

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TABLE OF CONTENTS

TABLE OF CONTENTS *i*

TABLE OF AUTHORITIES *ii*

LEGAL ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

ARGUMENT 10

Standard of Review 10

I. Minnesota Statute § 176.101, Subdivision 5 Does Not
Contravene Either The Equal Protection Clause Of
The Fourteenth Amendment Of The United States
Constitution Or The Equal Protection Clause Of
Article I, § 2 Of The Minnesota Constitution. 10

CONCLUSION 18

CERTIFICATION OF BRIEF LENGTH 19

RESPONDENT’S INDEX OF APPENDIX 20

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

United States Constitution, XIV Amendment 10, 11

UNITED STATES SUPREME COURT

Plyler v. Doe, 457 U.S. 202 (1982) 12

Western & Southern Life Insurance Co. v. State Board of Equalization,
451 U.S. 648 (1981) 12

STATE OF MINNESOTA CONSTITUTION

Minnesota Constitution, Article I, § 2 10, 12

MINNESOTA STATUTES

Minnesota Statute § 176.001 13, 14

Minnesota Statute § 176.101, Subdivision 5 10, 11, 14, 15, 16, 18

MINNESOTA SUPREME COURT DECISIONS

Contos v. Herbst, 278 N.W.2d 732 (Minn.1979) 14

Hegenes v. State, 328 N.W.2d 719 (Minn.1983) 13, 14

In re McCannel, 301 N.W.2d 910 (Minn.1980) 14

Nelson v. State, Department of Natural Resources, 305 N.W.2d 317 (Minn.1981) 12, 13

Rio Vista Non-Profit Housing Corp. v. County of Ramsey,
335 N.W.2d 242 (Minn.1983) 13

Schweich v. Ziegler, 463 N.W.2d 722 (Minn.1990) 16, 17

State v. Behl, 564 N.W.2d 560 (Minn.1997) 10

Tracy v. Streater/Litton Industries, 283 N.W.2d 909 (Minn.1979)..... 18

Westling v. County of Mille Lacs, 581 N.W.2d 815 (Minn.1998)..... 13

MINNESOTA COURT OF APPEALS

St. Cloud Police Relief Ass'n v. City of St. Cloud,
555 N.W.2d 318 (Minn.App.1996)..... 15, 16

MINNESOTA WORKERS' COMPENSATION COURT OF APPEALS

Metzger v. Turck, Inc., 59 W.C.D. 229 (W.C.C.A. 1999)..... 14

ISSUES

I. Whether Minnesota Statute § 176.101, subdivision 5 contravenes either the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution or the Equal Protection Clause of Article I, § 2 of the Minnesota Constitution?

A. As it did not have jurisdiction, the Workers' Compensation Court of Appeals declined to address the constitutional issue raised by the employee.

STATEMENT OF THE CASE

The above-captioned matter was brought before this court on September 29, 2006 (A-39) following a constitutional challenge to Minnesota Statute §176.101, subdivision 5, (2)(a)-(c). Specifically, the employee challenges the minimum threshold of permanent partial disability that an injured employee must reach to receive permanent total disability benefits.

This matter was initiated by the employee's May 7, 2004 Claim Petition, which alleged, in part, entitlement to an additional 9.25% permanent partial disability rating under Minnesota Rule 5223.0420, subparts 4 and 5, and ongoing permanent total disability benefits commencing on September 4, 2001. (A-21.) Compensation Judge Gary P. Mesna heard this matter on December 14, 2005. (A-24.)

On January 20, 2006, Judge Mesna issued his Findings and Order, whereby he found the employee had not met the requirements under Minnesota Rule 5223.0420, subparts 4 and 5, which would entitle him to a 9.25% permanent partial disability rating. (A-25.) Judge Mesna also rejected the employee's attempt to establish a 5% permanent partial disability rating for bladder dysfunction where the dysfunction was not permanent. (A-26.)

In addition, as the employee had previously brought a claim for permanent total disability benefits for the period beginning September 4, 2001 and ending March 5, 2003, the employee was barred by the doctrine of res judicata. (A-25.) However, the employee's claim for permanent total disability benefits for the period beginning on March 6, 2003 and ending on May 29, 2005, was not barred by the doctrine of res

judicata as the claim had not previously been made and determined by the court. (A-25.) Nevertheless, the employee was not entitled to permanent total disability benefits for the period beginning on March 6, 2003 and ending on May 29, 2005, because the employee was unable to meet the statutory threshold for permanent total disability benefits pursuant to Minnesota Statute §176.101, subdivision 5(2). (A-25.) The only permanent partial disability rating the employee possessed was a 10% rating, which was previously determined on April 2, 2003. (A-26.)

The employee appealed to the Workers' Compensation Court of Appeals, in part, from the Compensation Judge's denial of permanent partial disability and permanent total disability. (A-28.) In addition, the employee appealed the constitutionality of the permanent partial disability thresholds of Minnesota statute §176.101, subdivision 5(2). (A-29.)

The Workers' Compensation Court of Appeals affirmed the Findings and Order of Compensation Judge, Gary P. Mesna in its decision dated September 13, 2006. (A-31.) With regard to the constitutionality of the threshold requirements of Minnesota Statute §176.101, subdivision 5, the Workers' Compensation Court of Appeals found it did not have jurisdiction to consider the constitutional argument, and it was discussed no further. (A-37.)

The employee now appeals to this Court solely for the purpose of addressing whether Minnesota Statute §176.101, subdivision 5, contravenes the equal protection clauses of the United States and Minnesota Constitutions.

STATEMENT OF FACTS

On November 26, 1996, the employee sustained a work-related injury to his low back and hip, for which the employer and insurer admitted liability and paid various workers' compensation benefits. (A-25.) On the date of the injury, the employee was sixty-eight years old, having been born on May 8, 1928. (A-1.) The employee's formal education extended through the eighth grade. (A-7.)

By way of brief background, the injury occurred when the employee slipped and fell on an icy plank while he was performing block masonry work for the employer herein. (A-7.) Following the injury, the employee sought chiropractic treatment, but continued to perform his work activities. (A-7.) Eventually, the employee underwent a CT scan, physical therapy, and attended a work hardening program. (A-7.) Beginning in 1998, the employee performed his work activities under restrictions until his last day of employment on September 3, 2001. (A-8.)

On February 1, 2002, the employee filed a Claim Petition alleging a 13% whole body impairment pursuant to Minnesota Rule 5223.0390, subparagraph 4.E. and 4.E.(1). (A-1.) He also claimed entitlement to ongoing permanent total disability benefits beginning on September 4, 2001. (A-1.) The Claim Petition was amended on February 21, 2002 and increased the claimed permanent partial disability from 13% to 22% pursuant to Minnesota Rule 5223.0390, subparagraphs 4.E.(1) and 4.E.(4). (A-4, A-5.)

A hearing on the Claim Petition took place before Compensation Judge Paul Rieke on March 5, 2003. (A-6.) Judge Rieke found the employee's 1996 work-related injury was a significant contributing factor to his low back condition since the date of injury. (A-8.) Moreover, Judge Rieke found the 1996 injury to be a significant contributing factor to the employee's ongoing unemployed status beginning on September 4, 2001. (A-8.) However, the employee failed to establish he was entitled to a 22% permanent partial disability rating. (A-9.) Based upon the medical evidence, Judge Rieke found the employee's condition was properly ratable under Minnesota rule 5223.0390, subpart 4.C.(2), not subpart 4.E. as was previously claimed, thereby entitling the employee to only 10% permanent partial disability to the body as a whole. (A-9.) Thus, the employee was not entitled to receive permanent total disability benefits as he had not met the required statutory threshold to award such benefits under Minnesota Statute §176.101, subdivision 5(2)(C).¹

The employee appealed Judge Rieke's decision to the Workers' Compensation Court of Appeals, challenging, in part, Judge Rieke's 10% permanent partial disability rating and the denial of permanent total disability benefits. (A-12, A-13.) On October 24, 2003, the Workers' Compensation Court of Appeals issued its decision. (A-14.)

First, with regard to the permanent partial disability rating, the Workers' Compensation Court of Appeals determined that substantial evidence supported Judge Rieke's determination that the employee did not show each element as set forth in the

¹ Based upon the employee's age at the time of the injury and his education level, he had to establish at least a 13% permanent partial disability rating of the whole body. Minn. Stat. § 176.101, subdivision 5(2)(C).

relevant permanent partial disability schedule for a 22% rating. (A-18.) Therefore, the 10% permanent partial disability rating was affirmed. (A-18.)

Second, given the employee's age and education, the employee required 13% permanent partial disability under Minnesota statutes §176.101, subdivision 5, before permanent total disability benefits could be awarded. (A-18.) As the employee never argued there was a ratable pre-existing condition which could be added to the permanent partial disability resulting from the injury (which would then total 13%), and given the affirmance of Judge Rieke's 10% permanent partial disability rating, the compensation Judge's denial of permanent total disability was also affirmed. (A-18, a-19.) As was noted by the Workers' Compensation of Appeals at the time of the initial appeal, the employee did not raise the issue that Minnesota statute §176.101, subdivision 5, was unconstitutional. (A-18.) Rather, the employee's argument was that Judge Rieke should have accepted the opinion of his doctor on the extent of the permanent partial disability, and that if Judge Rieke had accepted that opinion, the employee would have been entitled to permanent total disability benefits. (A-19.)² The October 24, 2003 Workers' Compensation Court of Appeals decision was not appealed.

Instead, the employee filed another claim petition on May 7, 2004. (A-21.) Like the first claim petition, the employee again sought ongoing permanent total disability benefits beginning on September 4, 2001. (A-21.) In addition, he added a claim for

² The workers' compensation Court of Appeals reversed the compensation judge's determination that the employee's permanent total disability ended on March 3, 2003 (the date of the hearing) based upon a withdrawal from the labor market. (A-19.)

9.25% whole body impairment pursuant to Minnesota Rule 5223.0420, subparagraphs 4 and 5. (A-21.)

A hearing on the May 7, 2004 claim petition was held before compensation Judge Gary P. Mesna on December 14, 2005. (A-24.) The issues raised, in part, were the employee's entitlement to permanent total benefits from September 4, 2001 to May 29, 2005 and his entitlement to additional permanent partial disability. (A-24.) Also at the December 14, 2005 hearing, the employee raised, for the first time, a claim for an additional 5% permanent partial disability rating for bladder dysfunction ratable under Minnesota Rule 5223.0600, subpart 3.A. (December 14, 2005 Hearing Transcript, pp. 7-8, Petitioner's Exhibit E.) The employee never filed a Claim Petition asserting that with an additional 5% permanency for the bladder dysfunction, he met the threshold requirements. (See Relator's Brief, p. 8.)

First, Judge Mesna found the employee's claim for the additional 9.25% permanent partial disability was not barred by the doctrine of res judicata or collateral estoppel. (A-25.) However, the employee was not entitled to the 9.25% permanent partial disability rating under Minnesota Rule 5223.0420, subparts 4 and 5, as claimed, because he did not present sufficient evidence that there was an injury to his nerve roots. (A-25.) Regardless, if there was such an injury, the judge found the rating must be made under 5223.0390, because the employee's loss of motor function, if any, was not a complete loss. (A-25.) Minnesota Rule 5223.0390, subparagraph 1.B. specifically provides that if the loss of motor function is less than complete, the ratings under

5223.0390 are inclusive of any injury to the nerve root. (A-25.) Thus, a rating under Minnesota Rule 5223.0420, subparts 4 and 5, was not available to the employee. (A-25.)

Likewise, the additional 5% permanent partial disability rating for bladder dysfunction was rejected by the compensation Judge. (A-26.) Judge Mesna found Dr. Hansberry gave a 5% rating for a bladder dysfunction in a report dated May 28, 2004, but Dr. Hansberry indicated that the problem was first noted in October 2002, with the last episode in November 2002. (A-26.) There was no known problem after the November 2002 date. (A-26.)

Last, Judge Mesna found that the employee's claim for permanent total disability benefits from September 4, 2001 to March 5, 2003 was barred by the doctrine of res judicata, as the issue had already been decided by Judge Rieke on April 2, 2003. (A-25.) Any claims for permanent total disability benefits from March 6, 2003 to May 29, 2005 were not barred by the doctrine of res judicata, as any claim relating to those dates had not previously been before the court. (A-25.) But, as Judge Mesna found the employee had not established any further ratable permanent partial disability, the employee could not reach the 13% threshold³ which may have entitled him to a finding of permanent total disability. (A-25.)

The employee again appealed to the workers' compensation Court of Appeals. (A-28.) On September 13, 2006, the workers' compensation Court of Appeals issued its decision affirming the decision of compensation Judge Gary P. Mesna in its entirety. (A-31.) However, given the affirmance of the decision that the claim for permanent total

³ Minn. Stat. § 176.101, subdivision 5(2)(c).

disability was barred by the failure to meet the requisite permanent partial disability, the Workers' Compensation Court of Appeals did not consider whether the claim was also barred by res judicata. (A-36.)

Finally, the employee challenged the constitutionality of the threshold requirements of Minnesota Statute §176.101, subdivision 5. (A-37.) All parties and the Workers' Compensation Court of Appeals agreed the court did not have jurisdiction to consider the constitutionality of the statute. (A-37.) The employee now appeals the constitutionality of Minnesota Statute §176.101, subdivision 5, and its threshold requirements, to the Minnesota Supreme Court.

ARGUMENT

Standard of Review

Challenges to the constitutionality of a statute are reviewed by this Court under a *de novo* standard. State v. Behl, 564 N.W.2d 560, 566 (Minn.1997). Minnesota statutes are presumed to be constitutional and the power to declare a statute unconstitutional must be exercised with extreme caution. Id. The party challenging the constitutionality of a statute bears the burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional. Id.

I. MINNESOTA STATUTE § 176.101, SUBDIVISION 5 DOES NOT VIOLATE EITHER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION OR THE EQUAL PROTECTION CLAUSE OF ARTICLE I, § 2 OF THE MINNESOTA CONSTITUTION.

The employer and insurer maintain that the permanent total disability threshold requirements contained in Minnesota statute §176.101, subdivision 5, are constitutional and violate neither the Equal Protection Clause of the United States Constitution nor the Equal Protection Clause of Article I, §2 of the Minnesota State Constitution. In enacting this provision, the Minnesota legislature had a legitimate purpose for establishing the threshold requirement classifications, which are wholly and rationally related to the objective of the statute and permissibly further its purpose.

Minnesota Statute, § 176.101, Subd. 5, defines “permanent total disability” as:

(1) 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

(2) any other injury which totally and permanently incapacitates the employee from working at an occupation which brings the employee an income, provided that the employee must also meet the criteria of one of the following clauses:

(a) the employee has at least a 17 percent permanent partial disability rating of the whole body;

(b) the employee has a permanent partial disability rating of the whole body of at least 15 percent and the employee is at least 50 years old at the time of injury; or

(c) the employee has a permanent partial disability rating of the whole body of at least 13 percent and the employee is at least 55 years old at the time of the injury, and has not completed grade 12 or obtained a GED certificate.

For purposes of this clause, "totally and permanently incapacitated" means that the employee's physical disability in combination with any one of clause (a), (b), or (c) causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. Other factors not specified in clause (a), (b), or (c), including the employee's age, education, training and experience, may only be considered in determining whether an employee is totally and permanently incapacitated after the employee meets the threshold criteria of clause (a), (b), or (c). The employee's age, level of physical disability, or education may not be considered to the extent the factor is inconsistent with the disability, age, and education factors specified in clause (a), (b), or (c).⁴

The employee challenges Minn. Stat. § 176.101, subdivision 5 on equal protection grounds under both state and federal constitutions. Amendment XIV, Section 1 of the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

⁴ In addition to adding the permanency threshold found in Minn. Stat. § 176.101, subdivision 5, the legislature made other changes to the permanent total disability benefits sections of the statute, including adding the presumption of retirement and increasing the minimum weekly compensation level. See Minn. Stat. § 176.101, subdivision 4 and 5.

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 2 of the Constitution of the State of Minnesota provides:

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 or the judgment of his peers. There shall be neither slavery nor involuntary servitude in the state otherwise than as punishment for a crime of which the party has been convicted.

Under the United States Constitution, equal protections challenges which do not invoke heightened scrutiny⁵ are scrutinized using a rational basis standard. The United States Supreme Court has stated that in applying the rational basis standard it seeks “the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.” Plyler v. Doe, 457 U.S. 202, 216 (1982). The Court has indicated that determination of whether a challenged classification is rationally related to achievement of a legitimate state purpose involves two basic inquiries: “(1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?” Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 668 (1981).

Likewise, in Minnesota, challenges to the constitutionality of a workers’ compensation provision are generally analyzed using a rational basis standard. See Nelson v. State, Department of Natural Resources, 305 N.W.2d 317 (Minn.1981). Specifically, the employee must establish beyond all reasonable doubt that the classification was not rationally related to a legitimate government purpose. Id. at 319. “To survive challenge, a

⁵ For example, a statutory classification which burdens either the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class, will be scrutinized under strict scrutiny. See Generally Westling v. County of Mille Lacs, 581 N.W.2d 815 (Minn.1998).

classification must apply uniformly to all those similarly situated; be necessitated by genuine and substantial distinctions between the two groups; and effectuate the purpose of the law." Id.

The most logical starting point is to first consider the intent of the legislature. First, the intent of the Workers' Compensation Act is clearly set forth in Minn. Stat. § 176.001:

It is the intent of the legislature that chapter 176 be interpreted so as to assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. It is the specific intent of the legislature that workers' compensation cases shall be decided on their merits and that the common law rule of "liberal construction" based on the supposed "remedial" basis of workers' compensation legislation shall not apply in such cases. The workers' compensation system in Minnesota is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Employees' rights to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited by the provisions of this chapter, and employers' rights to raise common law defenses such as lack of negligence, contributory negligence on the part of the employee, and others, are curtailed as well. Accordingly, the legislature hereby declares that the workers' compensation laws are not remedial in any sense and are not to be given a broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand.

The intent of the 1995 amendments to Minn. Stat. § 176.101, subd. 5(2) has not been expressly articulated within the statute. However, in determining the intent of the legislature, classifications will be upheld as having a rational basis if *any* facts reasonably support them. Westling v. County of Mille Lacs, 581 N.W.2d 815, 821 (Minn.1998). The legislation need not contain a statement of purpose. Rio Vista Non-Profit Housing Corp. v. County of Ramsey, 335 N.W.2d 242, 245-46 (Minn.1983); see also, Hegenes v. State, 328 N.W.2d 719, 721-22 (Minn.1983) (sustaining a statute by conceiving of a possible

legislative basis). Under the rational basis test, “[e]very presumption [is] invoked in favor of the constitutionality of an act of the legislature....” Contos v. Herbst, 278 N.W.2d 732, 736 (Minn.1979).

In Metzger v. Turck, Inc., the Workers’ Compensation Court of Appeals conjectured that the legislature, when amending Minn. Stat. § 176.101, subd. 5, may have added the permanent partial disability thresholds in order to make permanent total disability status dependent on at least some objective evidence of some substantial physical impairment. 59 W.C.D. 229 (W.C.C.A. 1999). By adding objective standards to an award of permanent total disability, the legislature meets its goals of quickly and efficiently delivering benefits to injured workers. See Minn. Stat. § 176.001.

Additionally, it is likely the legislature recognized the difficulty of older, less-educated employees, finding sustained gainful employment in the labor market following a substantial work-related injury. See Minn. Stat. § 176.101, subd. 5(2)(b) and (c). It is certainly not difficult to imagine that a 56 year old employee who does not possess a GED on the day of her injury would have more difficulty re-entering the job market than a college-educated employee who was 40 years old on the day of injury. By reducing the amount of permanency required to establish permanent total disability, the legislature recognizes the obstacles placed in the path of older, less-educated employees and has made strides to more quickly and efficiently deliver economic loss benefits to those employees. Again, while none of these scenarios, other than quickly and efficiently delivering benefits to injured employees, are expressly stated, the statute must be deemed

rational if *any* facts support a conceivable legislative basis. See Hegenes, 328 N.W.2d at 721-22 (Minn.1983).

The employee also raises the possibility that the legislature enacted these provisions in order to reduce the cost of workers' compensation to employers in Minnesota. (Relator's Brief, p. 9.) While the employee provides no basis for this assertion, the employer and insurer maintain cost reduction is a legitimate legislative goal.

The next step in equal protection analysis is that the classifications created by the legislature be applied uniformly to those individuals similarly situated. This requires that the persons claiming disparate treatment must be similarly situated to those to whom they compare themselves. St. Cloud Police Relief Ass'n v. City of St. Cloud, 555 N.W.2d 318, 320 (Minn.App.1996). "To withstand such a claim the differences between classes need not be great, and if *any* reasonable distinctions can be found, a court should sustain the classification." In re McCannel, 301 N.W.2d 910, 917 (Minn.1980).

The employer and insurer maintain the thresholds in Minn. Stat. § 176.101, subd. 5(2) apply uniformly to all injured employees seeking permanent total disability benefits. That is, *all* injured employees, in order to reach permanent total disability status, must meet the standards set forth in subdivision 5(2)(a)-(c). The statute evaluates all workers equally in its requirements for permanent total disability.

However, even assuming that this provision does result in dissimilar treatment, genuine and substantial distinctions between older, less educated employees and younger, more educated employees necessitate this legislation. As previously indicated,

individuals who sustain a substantial injury at the age of 55 and who have never graduated from high school nor obtained a GED are at a distinct disadvantage when re-entering the job market as opposed to their younger, more educated counterparts. Moreover, it is eminently rational that the legislature attempt to put into place objective standards, such as minimum amounts of permanent partial disability for those employees that are younger and have more education. See St. Cloud Police Relief Ass'n, 555 N.W.2d at 320.

Last, the permanency, age, and education thresholds in Minn. Stat. § 176, 101, subdivision 5 effectuate the purpose of the law—to establish objective standards for evaluating permanent total disability while at the same time endeavoring to efficiently and quickly provide benefits to injured workers.

The employee argues it is irrational that an injured worker with only a 14% work-related permanent partial disability rating be denied permanent total disability benefits, when another individual with a 3% work-related permanent partial disability rating, plus a 14% permanent partial disability rating for non-work-related injuries will reach permanent total disability status. (Relator's Brief, p. 10-11.) Again, the focus on equal protection is on the lawmakers' reasonable belief, not on whether all the statute's purposes are fully satisfied in every conceivable scenario. Schweich v. Ziegler, 463 N.W.2d 722, 734 (Minn.1990). It was exceedingly reasonable for the legislature, when drafting this provision, to believe that persons with objectively more permanent partial disability to the body as a whole, would be at a distinct disadvantage when returning to the labor market.

Likewise, when enacting the law, the legislature was under no obligation to conceive of nor to ensure that the classifications protected every individual from every possible scenario. This Court must refrain from delving into whether the general welfare was actually promoted by the legislative objective behind the statute. Id. It must only look at whether the lawmakers' reasonably believed the statute would further their legitimate interest.

Last, the employee argues that the provision is constitutionally infirm, because there are more reasonable methods of providing for the needs of injured workers. Essentially, the employee is saying that the statute is not narrowly tailored. In support, the employee points to the predecessor of the provision at issue here, which "entitled an injured worker to permanent total disability benefits where the employee's physical disability, in combination with the employee's age, education, training and experience, caused the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income." (Relator's Brief, p. 9.) As previously stated, classifications which the legislature creates and which do not affect a fundamental right or a suspect class must be upheld if they are rationally related to a legitimate government purpose. It is rational that the legislature wanted to establish some measurable standard for assessing permanent total disability, rather than rely on the previous subjective determination that, despite the employee's assertions, would lead to less litigation, not more. Clearly, when objective standards are established, less litigation will ensue and benefits will be delivered more efficiently and quickly. The employee may not argue the statute does not meet strict scrutiny. The legislature has wide discretion in selecting

remedies under the Workers' Compensation Act, and "the wisdom of legislation is not a consideration for the courts." Tracy v. Streater/Litton Industries, 283 N.W.2d 909, 915 (Minn.1979). Thus, the employee must seek redress from the legislature, not this Court.

CONCLUSION

The employee has not proved beyond all reasonable doubt that the challenged provision is unconstitutional. The legislature had a legitimate purpose when it amended Minnesota Statute § 176.101, subdivision 5, to include minimum thresholds of permanency, education, and age and the law is rationally related to achieving that purpose. As the amended statute is rationally related to the achievement of these goals, the provision must be upheld as constitutional.

Respectfully Submitted,

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. 132.01, subdivisions 1 and 3, for a brief produced with a proportional font. The length of the brief is 453 lines and 4,444 words. This brief was prepared using Microsoft Word Office 2003.

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RESPONDENT'S INDEX OF APPENDIX

The Respondent Relies on the Relator's Appendix And Has Not Submitted Its Own.