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CASE NO. A111784

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STATE OF MINNESOTA  
IN SUPREME COURT

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Minh Nguyen,

Employee-Relator,

vs.

Audio Communications,

Employer-Respondent,

and

SFM Mutual Insurance Company,

Insurer-Respondent.

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BRIEF AND APPENDIX OF MINH NGUYEN, EMPLOYEE-RELATOR

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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).

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**STATEMENT OF THE LEGAL ISSUES**

- I. DOES DENIAL OF GRUBER-TYPE FEES UNDER THE FACTS OF THIS CASE VIOLATE THE ESTABLISHED PURPOSES OF THE ATTORNEY FEE STATUTE AND CASELAW?**

**Workers' Compensation Court of Appeals Held:**

It is a court of limited jurisdiction limited to appellate review of the trial court's fact-finding and application of law. The trial court's decision was affirmed.

- II. DOES THE ATTORNEY FEE STATUTE PROVIDE A BASIS FOR AWARDING THE REQUESTED FEES IN THIS CASE AGAINST THE EMPLOYER/INSURER?**

**Workers' Compensation Court of Appeals Held:**

It is a court of limited jurisdiction limited to appellate review of the trial court's fact-finding and application of law. The trial court's decision was affirmed.

- III. SHOULD THE BASIC REASON FOR AN AWARD OF GRUBER FEES BE APPLIED FOR UNSUCCESSFUL CLAIMS OF OVERPAYMENT OF BENEFITS RECEIVED IN GOOD FAITH?**

**Workers' Compensation Court of Appeals Held:**

It is a court of limited jurisdiction limited to appellate review of the trial court's fact-finding and application of law. The trial court's decision was affirmed.

## STATEMENT OF THE CASE

On October 1, 2008, Minh Nguyen served an Amended Claim Petition claiming permanent total disability benefits. On March 25, 2009, the Honorable Peggy A. Brenden issued a Findings and Order awarding permanent total disability benefits from and after March 4, 2008. The employer/insurer's appeal to the Workers' Compensation Court of Appeals was dismissed for lack of subject matter jurisdiction. The employer/insurer then filed a Petition for Determination of Permanent Total Disability Onset Date asserting alternative dates of onset of either March 15, 2006 or January 23, 2007. A hearing on the merits resulted in a Findings and Order that Mr. Nguyen became permanently and totally disabled on March 1, 2007. Neither party appealed this September 15, 2010 Decision.

Mr. Nguyen petitioned for attorney's fees claiming attorney's fees from the portion of the overpayment claimed by the employer/insurer that was denied. On December 22, 2010, the Honorable Peggy A. Brenden issued a Findings and Order on Attorney Fees following oral arguments of counsel on December 13, 2010. The Trial Court ruled that Gruber-type attorney's fees were not payable by the employer/insurer but that Mr. Nguyen was the prevailing party at the August 27, 2010 workers' compensation hearing on the issue of the onset date of permanent total disability. Mr. Nguyen appealed from the Decision that attorney's fees are not payable from the employer/insurer, and the employer/insurer cross-appealed on the finding that Mr. Nguyen was the prevailing party at the August 27, 2010 workers' compensation hearing. On September 12, 2011, the Workers' Compensation Court of Appeals affirmed the Trial Court's Decision. Mr. Nguyen appeals the denial of attorney's fees.

## STATEMENT OF FACTS

Mr. Nguyen sustained compensable work-related injuries on December 13, 2005, while employed as an electronic technician for Audio Communications. On that date, he fell from a ladder while installing electronic equipment. He subsequently had a 2-level cervical fusion. Mr. Nguyen also sustained injury to his shoulder necessitating surgery. In addition to the cervical and shoulder injury, Mr. Nguyen sustained further injury to his left hip due to the bone graft for the cervical fusion. Due to the failure of the cervical fusion, Mr. Nguyen underwent additional cervical fusion on February 5, 2009.

On January 17, 2008, Mr. Nguyen filed a Claim Petition seeking payment for an underpayment of the **temporary** total disability benefits from and March 6, 2006. [A-1] On October 2, 2008, Mr. Nguyen filed an Amendment to the Claim Petition seeking permanent total disability benefits from and after February 26, 2008 [A-3] The Claim Petition as amended was heard by Judge Brenden on February 18, 2009, and the Findings and Order issued on March 25, 2009. The Court awarded permanent total disability benefits from and after March 4, 2008, as claimed. [A-6 to A-11]

Mr. Nguyen applied for social security disability benefits in **April 2008**. He was awarded social security disability benefits from and after **April 2007**. This information regarding Mr. Nguyen's application for and receipt of social security disability benefits was provided to the employer/insurer prior to the February 18, 2009 workers' compensation hearing.

At the February 18, 2009 hearing, the employer/insurer took the position that it was premature to find Mr. Nguyen permanently and totally disabled as he had just had the cervical revision fusion surgery only twelve days before the hearing and further

surgery was anticipated for the left shoulder condition. [A-4 to A-5] At no time during the hearing on February 18, 2009 did the employer/insurer assert that Mr. Nguyen had been permanently and totally disabled at an earlier date than claimed by Mr. Nguyen.

Following the issuance of the Findings and Order by Judge Brenden, the employer/insurer wrote to the Compensation Judge asking the Court to issue an Amended Findings and Order determining a different date of the onset of permanent total disability benefits. [A-12] Judge Brenden declined to do so as the employer/insurer had not raised this alternative legal defense at the hearing.

The employer/insurer then appealed the Decision on April 23, 2009. Mr. Nguyen asserted that because an alternative onset date for permanent total disability had not been asserted by the employer/insurer at the hearing, the Workers' Compensation Court of Appeals lacked subject matter jurisdiction. On November 20, 2009, the Workers' Compensation Court of Appeals dismissed the appeal finding they did not have jurisdiction as this issue was not raised or heard by the Compensation Judge. [A-13 to A-17] Subsequently, the employer/insurer filed a Petition to determine the onset date of permanent total disability benefits and entitlement to an overpayment. In this Petition, the employer/insurer asserted alternative onset dates of either March 15, 2006 or January 23, 2007. [A-18 to A-20] Mr. Nguyen objected to the Petition. [A-21] A second hearing on August 27, 2010 was conducted by the Court. Neither party submitted any new exhibits and neither party called a witness to testify. On September 15, 2010, Judge Brenden issued the Findings and Order finding that Mr. Nguyen became permanently and totally disabled as of March 1, 2007. [A-22 to A-24] Neither party appealed from this Findings and Order.

As a result of the September 15, 2010 Findings and Order, the employer/insurer calculated a credit for a \$19,090.50 overpayment as the social security offset would have started one year earlier than the March 5, 2008 onset date for permanent total disability as ordered following the first hearing on the merits regarding permanent total disability. The employer/insurer is now taking a 20% credit from Mr. Nguyen's ongoing permanent total disability benefits. Had the employer/insurer been successful in its claim that permanent total disability benefits were payable as of March 15, 2006, an additional \$19,090.50 of overpayment would have occurred and the employer/insurer would be entitled to a continued credit of 20% until that additional \$19,090.50 had been paid back. On November 12, 2010, Mr. Nguyen filed a Statement for Attorney's Fees claiming \$4,018.10 in Gruber-type fees from the employer/insurer. However, because more than \$13,000.00 in attorney fees had previously been paid for this date of injury, the Court requested that an Excess Fee Petition be filed. [T. 15] On December 6, 2010, an excess attorney's fee claim was served asserting entitlement to \$4,018.10 using the 25/20 statutory formula on the additional overpayment amount not awarded to the employer/insurer as a Gruber-type fee. [A-25 to A-52]

Mr. Nguyen signed a retainer agreement with the undersigned attorney on March 28, 2006. [A-28 to A-29] In that retainer, Mr. Nguyen agreed to pay \$13,000.00 on attorney's fees for contested benefits. Based on the 2009 Findings and Order awarding permanent total disability benefits, Mr. Nguyen had paid \$12,749.99 in subd. 1 attorney's fees as of October 4, 2010. [See Exhibit 2 attached to Excess Fee Petition: A-30 to A-32]

On December 8, 2008, the employer/insurer paid the law firm of Schoep & McCashin \$1,828.00 for Roraff attorney's fees related to a medical dispute which was litigated and resolved in Mr. Nguyen's favor. [A-30] The itemized time for the Roraff-type attorney's fees has not been included in the itemization of the law firm's time.

On December 8, 2009, the employer/insurer paid to the law firm of Schoep & McCashin \$1,500.00 for the legal work involved in the appeal to the Workers' Compensation Court of Appeals that ended in a dismissal of the appeal. [A-31]

From the original contact from Mr. Nguyen to the law firm of Schoep & McCashin on March 23, 2006 through April 5, 2009, the itemized time excluding the time for the medical issue referenced above is \$16,844.50. [A-33 to A-44]

The legal time spent in addressing the appeal to the Workers' Compensation Court of Appeals, the preparation for the hearing on the determination of the onset date of permanent total disability and the current claim for attorney's fees totals \$9,825.50. [A-49 to A-52] In addition, an expense of \$209.00 was incurred for having a copy of the trial transcript needed for the employer/insurer's appeal.

On December 22, 2010, the Trial Court issued a Findings and Order on Attorney Fees denying the claimed Gruber-type attorney fees. [A-53 to A-55] Mr. Nguyen timely appealed to the Workers' Compensation Court of Appeals. The employer/insurer cross-appealed asserting that Mr. Nguyen was not the prevailing party. On September 12, 2011, the Workers' Compensation Court of Appeals affirmed the Trial Court. [A-56 to A-63] Mr. Nguyen appeals the denial of Gruber-type attorney's fees.

## LEGAL ARGUMENT

### **I. THE DENIAL OF GRUBER-TYPE FEES UNDER THE FACTS OF THIS CASE VIOLATES THE ESTABLISHED PURPOSES OF THE ATTORNEY FEE STATUTE AND CASELAW.**

#### **A. Worker's compensation attorney fee provisions are based on two basic public policy concerns.**

##### **1. Protection of Injured Workers.**

The workers' compensation statute has undergone many legislative changes over the past four decades. However, the basic rationale behind the statutory scheme and case law regarding attorney fee petitions and awards remain unchanged. The first purpose of the attorney fee statute requiring application and review by the courts for attorney fees is to protect injured workers from excessive legal charges which would otherwise severely deplete badly needed wage loss payments for the injured worker and that worker's dependents. Kahn v. State of Minn., 327 NW2d 21 (Minn. 1982).

##### **2. Reasonable compensation to attorneys.**

As the Supreme Court ruled in Kahn:

(T)he statute is designed to insure that attorneys who represent compensation claimants will receive reasonable compensation for their efforts, and is in furtherance of the public policy of this state that injured employees have access to representation by competent counsel knowledgeable of the intricacies of the workers' compensation law. Rock v. Bloomington School District #271, 269 NW2d 360, 363 (Minn. 1978). *Id.* p. 30.

On appeal of attorney fee awards or denials, both of these public policy concerns are to be considered. Saari v. McFarland, 319 NW2d 706, 708 (Minn. 1982). An analysis of both of these in the very narrow factual history of the present case leads to only one conclusion: reasonable attorney's fees are payable to Mr. Nguyen's attorney

from the employer/insurer and not from Mr. Nguyen's already reduced weekly wage payments.

The Compensation Judge denied an award of attorney's fees against the employer/insurer but concluded that the injured worker had prevailed in the August 27, 2010 hearing that determined the onset of permanent total disability status. In that hearing, the employer/insurer asserted two alternative dates for the onset: March 15, 2006 or January 23, 2007. The Compensation Judge found the onset date as of March 1, 2007.

The offset provisions as between workers' compensation permanent total disability benefits and Social Security benefits provide that during the first \$25,000.00 of permanent total disability benefits paid, Social Security is entitled to offset this income from the SSDI benefits. After \$25,000.00 is paid in permanent total disability benefits, the employer/insurer is entitled to take a dollar for dollar offset for the SSDI benefits. Minn. Stat. §176.101, subd. 4.

Mr. Nguyen last performed work activity for any employer when his employer, Audio Communications, indicated no work was available within Mr. Nguyen's restrictions, March 3, 2006. The employer/insurer voluntarily paid temporary total disability benefits for 104 weeks after that date. Based on Mr. Nguyen's average weekly wage of \$982.43 on the date of injury, his temporary total disability rate and permanent total disability rate are the same: \$654.97. Therefore, approximately 38 weeks of permanent total disability benefits must be paid before the employer/insurer can reduce this weekly amount by the SSDI received. [\$25,000 divided by \$654.97].

Mr. Nguyen applied for SSDI benefits in April 2008. The Social Security Administration determined Mr. Nguyen to be permanently disabled under its standards as of October 9, 2006. The Social Security Administration only back pays SSDI for one year before the application date and therefore Mr. Nguyen began receiving SSDI benefits in April 2007, which were reduced for the receipt of temporary total disability benefits. After temporary total disability benefits ended in March 2008 based on the cap of 104 weeks of temporary total disability, Mr. Nguyen received his full \$1,600.30 per month in SSDI benefits. This equates to \$369.30 per week.

When Mr. Nguyen's claim for permanent total disability benefits was heard on February 18, 2009, this employer/insurer knew he had been awarded SSDI and Social Security Administration had determined total disability as of October 9, 2006. However, the **ONLY** defense raised to the claim was that it was premature to find Mr. Nguyen permanently totally disabled as he had just had the revision cervical fusion surgery and once healed from that surgery would be undergoing additional shoulder surgery.

Immediately after receiving the Findings and Order issued on March 25, 2009, the employer/insurer wrote to the Compensation Judge requesting Amended Findings determining a different onset date than that claimed and proven by Mr. Nguyen at hearing. As this affirmative defense had not been pled or asserted at trial, the Trial Court appropriately denied the request. The employer/insurer then filed an appeal solely on that issue. This Court dismissed that appeal as no jurisdiction existed.

The employer/insurer then filed a "Petition for Determination of Permanent Total Onset Date and Entitlement to Overpayment." In that Petition, the two onset dates alternatively asserted were March 15, 2006 or January 23, 2007. The undersigned filed

an Objection to the Petition and the matter was set on for hearing. At the hearing, the employer/insurer did not offer any new exhibits or call any witnesses. The employer/insurer relied totally on the trial record from February 18, 2009.

The employer/insurer do not articulate any reason why the alternative defense of an earlier onset date of permanent total disability was not affirmatively pled or raised during the 2009 hearing on the permanent total disability claim. Clearly, that issue was ripe. The employer/insurer knew Mr. Nguyen was receiving SSDI and had been receiving those benefits since April 2007 before the workers' compensation hearing in 2009. By failing to raise this affirmative defense in a timely manner, Mr. Nguyen required the continued legal services of the undersigned to represent him in additional legal proceedings. None of these legal services would have been required had the defense been timely raised at trial.

Mr. Nguyen signed a retainer agreement in which he agreed to pay \$13,000.00 in attorney's fees based on the 25/20 percent contingent attorney fee statute from disputed benefits. Mr. Nguyen had paid almost that amount by October 10, 2010 from the disputed permanent total disability benefits awarded following the 2009 hearing. A review of the itemized legal time (not including an earlier dispute for medical treatment and payment of Roraff fees) through April 5, 2009, shows a total of \$16,844.60. Based on the Irwin factors, the undersigned would NOT have petitioned for excess fees for the successful representation of Mr. Nguyen for his claim for permanent total disability had that been the end of the permanent total disability dispute.

However, because the employer/insurer failed to raise the affirmative defense of an earlier onset date for permanent total disability at the February 2009 hearing, the

undersigned expended an additional \$9,825.50 in legal time. Absolutely, none of the additional \$9,825.50 in legal services would have occurred but for the employer/insurer's failure to timely assert the affirmative defense.

In the Memorandum of the Findings and Order on Attorney Fees, the Trial Court indicated that the undersigned could still file a claim for excess attorney's fees against Mr. Nguyen for these additional legal services. To do so would not be in accord with the two stated public policy purposes of the workers' compensation attorney fee scheme.

The first public policy reason, in and of itself, provides ample support for finding the employer/insurer responsible for the claimed attorney's fees. As a result of the employer/insurer failing to timely assert this defense, an alleged overpayment of \$19,090.50 occurred for which the employer/insurer are now reducing Mr. Nguyen's weekly permanent total disability wage loss benefits by 20%. If the undersigned attorney would claim excess fees from Mr. Nguyen for being partially successful in the overpayment claim, his weekly wage loss benefits would be reduced by another 20% leaving him with only 60% of the ongoing wage loss benefit. To reduce a household's income by this much each week will certainly result in severely depleting the badly needed funds for Mr. Nguyen and his family. This is even more egregious given that all of the additional legal work occurred only because the employer/insurer failed to timely assert the defense.

The second public policy reason also supports an award against the employer/insurer under the very narrow facts of this case. If the employer/insurer are not found responsible for these claimed attorney's fees, the undersigned will not be paid any attorney's fees. To spend nearly \$10,000.00 worth of time and save the employee

approximately \$19,050.00 and be paid nothing would result in serious questioning of whether the law firm could afford to represent an injured worker in a claim for overpayment in the future.

If Mr. Nguyen is found responsible for the attorney's fees from his current stream of permanent total disability benefits from which the undersigned had already received the maximum allowable attorney's fees would require the attorney to engage in a cost/benefit analysis before agreeing to undertake the representation. For example, if the overpayment alleged is only \$4,000.00, and the employee successfully defends against the alleged overpayment, the attorney's fees would be capped at \$1,000.00. In most cases, this would be inadequate compensation for that representation and in all likelihood, an attorney would decline to represent that injured worker.

Arguably, if the \$1,000.00 in statutory fees in the example above was inadequate, the attorney could petition for fees in excess of the 25/20 statutory formula amount to be withheld from the injured worker's ongoing stream of permanent total disability benefits. Using that same example, if the legal time needed to successfully defend against the alleged overpayment is \$5,000.00, then it would be more cost effective for the injured worker to just agree to the overpayment claim of \$4,000.00 rather than retain an attorney and dispute the claim even if the claim is unfounded. Certainly, this result would lead to injured workers who have legitimate reasons to deny relatively small claimed overpayments to be denied access to competent counsel as win or lose, financially the injured worker would either be responsible for the overpayment or the attorney's fees. As an attorney, the choice without the prospect of Gruber-type fees is to either allow the

injured worker's ongoing benefits to be reduced and paid back to the insurer without fighting the claim or provide attorney services pro bono.

**II. THE ATTORNEY FEE STATUTE PROVIDES A BASIS FOR AWARDING THE REQUESTED FEES IN THIS CASE AGAINST THE EMPLOYER/INSURER.**

In 1995, the legislature passed Minn. Stat. §176.081, subd. 1(3) that states as follows:

"An attorney must concurrently file all outstanding disputed issues. An attorney is not entitled to attorney's fees for representation in any issue which could reasonably have been addressed during the pendency of other issues for the same injury."

Certainly, the date of the permanent total disability status was ripe at the time the claim for permanent total disability benefits was made and heard. The best evidence of this fact is that immediately after receiving the Findings and Order awarding the permanent total disability benefits (in effect losing), the employer/insurer wrote to the Compensation Judge requesting an Amended Findings and Order finding a different onset date. The second fact that supports the conclusion that the onset date issue was ripe at the time of the February 2009 hearing is that the employer/insurer offered no new testimony or new exhibits to support its position of an earlier onset date.

The employer/insurer's failure to timely raise the defense resulted in an additional \$9,825.50 of legal time to be expended by the undersigned's firm. The results from the second hearing were only 50% of the amount that may have been awarded had permanent total disability status been found as of the last date of work in 2006. Therefore, the law firm was only 50% successful in its efforts to retain Mr. Nguyen's benefits at the same level.

If an injured worker's attorney cannot be awarded attorney's fees pursuant to Minn. Stat. §176.081, subd. 1(3) if that attorney fails to timely consolidate a claim for benefits, why is the result any different for this employer/insurer for failure to timely assert a defense? For example, if a medical bill for Mr. Nguyen was in dispute in 2008 and both sides had ample opportunity to investigate the claim so that it could have been tried in the February 2009 hearing, the undersigned would be precluded from Roraff-type attorney fees if successfully litigating that issue later. Certainly, the statute must be construed equally as between the employer/insurer and the injured worker.

**III. THE BASIC REASON FOR AN AWARD OF GRUBER FEES SHOULD BE APPLIED FOR UNSUCCESSFUL CLAIMS OF OVERPAYMENT OF BENEFITS RECEIVED IN GOOD FAITH.**

The statutory basis allowing Gruber-type fees for successful representation in an allegation of bad faith receipt of worker's compensation benefits is Minn. Stat. §176.179. This statute also allows for 20% reduction in the future from ongoing benefits if there has been an overpayment of payments received in good faith. As such, the Gruber fees awarded for successful defense of a bad faith claim is also appropriate for a claim that is successfully defended for an overpayment.

The hourly fee used in the Gruber case refers to a section of the attorney fee statute which has since been repealed. The attorney fee statute for Mr. Nguyen's date of injury does not include a provision for hourly fees in a discontinuance conference. Therefore, the 25/20 percentage method was used in determining the claimed attorney's fees based on the \$19,090.50 savings to Mr. Nguyen.

In Gruber v. ISD #625, 57 WCD 284 (8/15/97), the Court of Appeals indicated as follows:

"Thus as 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 a successful defense of the bad faith issue. This is consistent with the approach the Supreme Court has long 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. See, e.g., Roraff v. State of Minnesota, 288 NW2d 15, 32 WCD 297 (Minn. 1980) (recovery of medical expenses); Heaton v. J.W. Fryer & Co., 36 WCD 316 (Minn. 1983) (litigation over rehabilitation services)."

The Workers' Compensation Court of Appeals in Gruber explained its reasoning for assessing attorney's fees against the employer/insurer on its failed attempt to discontinue benefits based on an assertion of bad faith receipt of benefits stating:

"Awarding reasonable compensation for the efforts of attorneys who represent workers' compensation claimants is in furtherance of the public policy of this state that injured workers have access to representation by competent counsel knowledgeable of the intricacies of the workers' compensation law. Kahn v. State, University of Minnesota, 327 NW2d 21, 24, 35 WCD 425 (Minn. 1982). The critical consideration in this type of case is that without some possibility that the employee's attorney will receive something for the attorney's services, it will be difficult for employees accused of bad faith receipt of benefits to obtain the services of an attorney."

The Court then listed the factors to be considered in determining a reasonable attorney fee. These factors include the amount of potential reimbursement exposure; the difficulty of the defense; the hours of effort required; and other factors as set forth in Minn. Stat. §176.081, subd. 5 (1992).

In the Gruber case, Mr. Gruber was injured while working as a janitor on September 28, 1993. The employer/insurer voluntarily paid temporary partial disability benefits from the date of injury through April 29, 1994.

On September 18, 1995, the employer/insurer began paying temporary total disability benefits to Mr. Gruber on a voluntary basis. A NOID was filed on April 16, 1996, based on the employer's assertion that Mr. Gruber had failed to accept a suitable 3(e) job offer. An administrative hearing was conducted on May 14, 1996, and the judge ruled that the employer/insurer could not discontinue benefits as the offer was not a 3(e) job offer. Subsequently, the employer/insurer filed a Petition to Discontinue on June 25, 1996, appealing the NOID decision and also asserting that Mr. Gruber had made a full recovery by May 1, 1996, and that all of the benefits he received after that date were received in bad faith. The employer/insurer were requesting reimbursement of any and all wage loss benefits paid to Mr. Gruber since May 1, 1996. Mr. Gruber returned to work on September 20, 1996, and therefore temporary total disability benefits ended. When the Compensation Judge heard the issues raised in the Petition to Discontinue, the employer/insurer withdrew its assertion that Mr. Gruber failed to accept a 3(e) job offer but continued with its assertion that Mr. Gruber had fully recovered and received workers' compensation benefits in bad faith after May 1, 1996.

The Trial Court found that Mr. Gruber had fully recovered by May 1, 1996, but that the receipt of benefits by Mr. Gruber after May 1, 1996 was not done in bad faith. Therefore, Mr. Gruber did not have to pay back to the employer/insurer the temporary total received from May 1, 1996 through September 20, 1996. The attorney for Mr. Gruber then petitioned for attorney's fees based on the hourly time spent after the Petition to Discontinue was filed pursuant to the attorney's fee statute. These fees were initially denied by the Compensation Judge, but on appeal, these Findings were vacated and the case remanded to the Compensation Judge to determine the reasonable attorney fee for

the attorney in representing Mr. Gruber on the bad faith issue. The rationale for awarding these types of fees was that no ongoing benefits or potential stream of benefits existed from which Mr. Gruber's attorney could be paid.

In the present case, Mr. Nguyen contracted for legal services and agreed to pay up to \$13,000.00 in attorney's fees from disputed benefits. The law firm of Schoep & McCashin was successful in establishing permanent total disability benefits for Mr. Nguyen and through April 5, 2009, the law firm has documented \$16,844.50 in services to Mr. Nguyen. This itemization of time would be insufficient to request excess attorney's fees from Mr. Nguyen's ongoing benefits. Since Mr. Nguyen paid \$13,000.00 in attorney's fees to date, no further attorney's fees would be due and payable from Mr. Nguyen.

As a result of the employer/insurer failing to assert this alternative defense at the original hearing, the law firm of Schoep & McCashin expended additional time of \$9,825.50 to defend against the employer/insurer's claim. Had the law firm not been retained and Mr. Nguyen did not respond to the Petition, Mr. Nguyen would have even a larger credit than the credit now being taken from his ongoing benefits. Twenty percent of Mr. Nguyen's ongoing permanent total disability benefits is \$52.86 per week. At that reimbursement rate, it will take 361 weeks for Mr. Nguyen to pay back to the employer/insurer the overpayment of \$19,090.50. If Mr. Nguyen in addition to paying back this \$19,090.50 is also required to pay contingent attorney's fees for the additional work created by this employer/insurer, he will be getting only 60% of his workers' compensation benefits.

To require Mr. Nguyen to pay attorney's fees on the second hearing places an injured worker in an untenable position whenever an insurer asserts an overpayment. If the injured worker does nothing, the insurer will take 20% of his ongoing benefits until whatever overpayment the insurer asserts is due is collected from the ongoing benefits. If the injured worker hires an attorney to assist him in defending the claim for overpayment, and the attorney is not 100% successful, the injured worker will not only have to repay any overpayment but also attorney's fees on top of the overpayment credit. When, as here, the overpayment occurs when the employer/insurer did not timely assert the defense, the employer/insurer should then be responsible for attorney's fees incurred by that injured worker in successfully defending the claim for overpayment.

If the overall scheme of payment under the workers' compensation system is analyzed, no dispute can exist that the party in the best position in any single injured worker's case to determine what benefits are due and the correct amount that is due is the insurer. The workers' compensation insurers know the law; have the information regarding wages from its insured, the employer; receive the medical records and bills directly from the health care provider; and know exactly what is being paid to the injured worker. If an overpayment occurs in cases where the injured worker is receiving the benefits in good faith, then the error is the insurer's. It seems less than just or equitable to require the injured worker to pay the attorney's fees from ongoing benefits when an attorney successfully defends against the overpayment claims of the insurer who made the alleged mistake in payments in the first place.

CONCLUSION

Mr. Nguyen respectfully requests an order from the Court awarding Gruber-type attorney's fees against this employer/insurer for its failure to timely assert the defense and requiring additional legal work on the issue of overpayment. Mr. Nguyen paid the statutory maximum attorney's fees from his permanent total disability benefits. Therefore, the additional legal work required to successfully defend the overpayment claim is rightfully the responsibility of this employer/insurer.

Dated: November 2, 2011

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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01 and 3, for a brief produced with a proportional font in Times New Roman in Font Size 12 using the Microsoft Word application. It contains 458 lines of text.

Dated: Nov 2, 2011

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