

GAIL L. BARRY, Employee/Appellant, v. NORTHERN STATES POWER CO., SELF-INSURED, adm'd by ASU RISK MGMT. SERVS., LTD., Employer.

WORKERS' COMPENSATION COURT OF APPEALS  
MAY 8, 2000

No. [REDACTED SSN]

HEADNOTES

ATTORNEY FEES - GRUBER FEES. The compensation judge correctly denied the employee's request for payment of hourly attorney fees payable by the employer, pursuant to Gruber v. Independent School District #625, 57 W.C.D. 284 (W.C.C.A. 1997), where the disputed issue at hearing, the date of the employee's permanent total disability, directly affected the amount of future benefits payable to the employee, and a source for payment of fees was available from those future benefits.

Affirmed.

Determined by Wilson, J., Wheeler, C.J., and Johnson, J.  
Compensation Judge: Bernard Dinner

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's denial of her petition for attorney fees pursuant to Gruber v. Independent School District #625, 57 W.C.D. 284 (W.C.C.A. 1997). We affirm.

BACKGROUND

On October 29, 1990, the employee sustained a work-related injury to her back while employed by Northern States Power Company [the employer]. The self-insured employer apparently admitted liability for the injury and commenced payment of temporary total disability benefits effective December 31, 1991, the date of the employee's disability retirement from her job.

On February 26, 1998, the employer filed a petition to have the employee declared permanently and totally disabled as of December 31, 1991. In its petition, the employer alleged that the employee had been found disabled, for purposes of social security disability benefits, effective May 29, 1992, and that application of the offset provision contained in Minn. Stat. § 176.101, subd. 4, would likely "result in an overpayment of benefits to the Employee." The employee, through her attorney, subsequently filed an objection to the employer's petition, alleging that there was insufficient evidence to support the retroactive disability date selected by the employer, that there was insufficient evidence that the employee was receiving social security

disability benefits “because of the same condition as her work-related injury,” and that the employer was not entitled to any offset.

The matter came on for hearing before a compensation judge on February 4, 1999. At that time, the parties stipulated that the employee was permanently and totally disabled as a substantial result of her October 29, 1990, work injury and that the employer had paid the employee temporary total disability benefits from December 31, 1991, through the date of hearing; the sole issue was the effective date of the employee’s permanent total disability. According to the post-trial memorandums submitted to the compensation judge,<sup>1</sup> the employer continued to maintain that the employee had been permanently and totally disabled since December 31, 1991; the employee acknowledged that she was permanently and totally disabled as of the date of hearing, but not before. In a decision issued on March 9, 1999, the compensation judge determined that the employee had been permanently and totally disabled since May 29, 1992. Neither party appealed from this decision.

Following the compensation judge’s decision as to the date of permanent total disability, the employee filed a petition and an amended petition for attorney fees, asking for \$6,393.75 in hourly fees, together with \$53.11 in costs, to be paid by the employer pursuant to Gruber v. Independent School District #625, 57 W.C.D. 284 (W.C.C.A. 1997). In the petition, the employee alleged that, “[a]s a result of contested litigation, employee retained more than \$8,000 of alleged overpayment.” The employer objected to the employee’s request, asserting that Gruber was inapplicable, that no attorney fees were due because the employee was not the prevailing party, and that fees, if any, should be paid out of the employee’s ongoing benefits. Following a hearing on the employee’s fee petition held on October 26, 1999, the compensation judge determined that the employee was not entitled to an award of fees, payable by the employer, because Gruber was inapplicable.<sup>2</sup> The employee appeals.

## STANDARD OF REVIEW

“[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers’ Compensation Court of Appeals] may consider de novo.” Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

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<sup>1</sup> No transcript of the February 4, 1999, hearing is available.

<sup>2</sup> The judge also ordered as follows:

2. IT IS FURTHER ORDERED that the Employee’s attorney retains the right to pursue attorney’s fees on a contingency basis, to be withheld from the Employee’s ongoing benefits, and may also assert her claim for costs at that time, but no determination is made as to the validity or amount of such claims at this time.

## DECISION

The date of the employee's permanent total disability was important in this matter because of the availability of the social security offset contained in Minn. Stat. § 176.101, subd. 4.<sup>3</sup> The employer apparently began taking the offset in November of 1995. As explained by the parties at the fee hearing, had the employer prevailed in its contention that the employee had been permanently and totally disabled since December 31, 1991, the employer would have an overpayment claim of nearly \$30,000. If, on the other hand, the employee had prevailed on her contention that she was not permanently totally disabled until the February 4, 1999, hearing, she would have had an underpayment claim of more than \$24,000. The compensation judge's finding that the employee was permanently totally disabled effective May 29, 1992, means that the total overpayment to the employee was at least \$4,000 less than it would have been had the compensation judge adopted the employer's proposed date for permanent total disability.<sup>4</sup> Therefore, because of the employer's ability to recoup overpayments through a credit against future benefits, pursuant to Minn. Stat. § 176.179,<sup>5</sup> the judge's later permanent total disability

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<sup>3</sup> Minn. Stat. § 176.101, subd. 4, provides in pertinent part

[Permanent total disability compensation] shall be paid during the permanent total disability of the injured employee but after a total of \$25,000 of weekly compensation has been paid, the amount of the weekly compensation benefits being paid by the employer shall be reduced by the amount of any disability benefits being paid by any government disability benefit program if the disability benefits are occasioned by the same injury or injuries which give rise to payments under this subdivision.

A compensation judge may make a retroactive finding of permanent total disability, and temporary total disability benefits paid after the commencement of permanent total disability may be counted toward the \$25,000 threshold. Christensen v. Whirlpool, 41 W.C.D. 1047 (W.C.C.A. 1989).

<sup>4</sup> The employee alleges an \$8,000 savings. The precise figures cannot be ascertained on this record.

<sup>5</sup> Minn. Stat. § 176.179, entitled "Recovery of Overpayments," provides that when mistaken payments "have been made to a person who is entitled to receive further payments of compensation for the same injury, the mistaken compensation may be taken as a partial credit against future periodic benefits," not to "exceed 20 percent of the amount that would otherwise be payable." However, reimbursement of benefits from the employee is available if mistaken compensation was "not received in good faith," that is, through fraud, or if the employee knew that benefits were paid by mistake and did not refund them. Id.

finding will in the end allow the employee to receive at least \$4,000 that would have otherwise been taken away from her through a credit against ongoing permanent total disability benefits.

The dispute in this matter concerns the attorney fees payable for the employee's attorney's work in connection with the litigation over the date of permanent total disability. The employee alleges that the employer should be ordered to pay her attorney fees, on an hourly basis, pursuant to the rationale of Gruber. The compensation judge was not persuaded by this argument, and neither are we.

In Gruber, the employer and insurer sought reimbursement of temporary total compensation, from the employee, on grounds that the compensation had been mistakenly paid and "not received in good faith," as specified in Minn. Stat. § 176.179. Discussing the issue of attorney fees in such cases, a panel of this court noted that, "[w]here an employee prevails on the issue of bad faith receipt of benefits, and there are not disputed issues of entitlement to benefits, . . . no monetary benefits will be available from which to pay a contingency or hourly fee to the employee's attorney." Gruber, 57 W.C.D. 284, 290-91. "The critical consideration in this type of case is that without some possibility that the employee's attorney will receive some payment 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." Id. at 290. For these reasons, the court held as follows:

[W]here 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.

Id.

The employee contends that it would be reasonable to extend the holding in Gruber to the present matter because the efforts of her attorney "did not result in any additional *payment* of contested workers' compensation benefits to the employee," in that her entitlement to ongoing permanent total disability benefits was never disputed. However, while the 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, the resulting overpayment or underpayment of past benefits, and the availability of a credit under Minn. Stat. § 176.179.

Had the employee's position as to the date of permanent total disability been adopted by the judge, the employer would owe the employee a substantial sum for past underpayment. As it is, the efforts of the employee's attorney arguably saved the employee at least \$4,000 that she would not have otherwise received, in future benefits, had the employer's date for permanent total disability been accepted. In either case, a source for attorney fees is

available from benefits paid as a result of the compensation judge's decision. The judge correctly declined to extend Gruber to these circumstances, and we therefore affirm the judge's denial of the employee's request for hourly fees from the employer.