The Brown & Carlson, P.A. Insight

Important Case Law Update – *Frandsen v. Ford Motor Company*

Good news for Employers and Insurers who are attempting to discontinue PTD benefits based on the retirement presumption!

Last year, the Workers' Compensation Court of Appeals issued a troubling decision in *Frandsen v. Ford Motor Co.*, No. WC10-5175 (W.C.C.A. Dec. 22, 2010). The Employer, Ford Motor Company, filed a request to discontinue the Employee's permanent total disability benefits with the WCCA on the grounds that the Employee reached the presumed retirement age of 67. The parties had previously entered into a stipulation for settlement in which they agreed to pay the employee PTD but failed to specify in the stipulation when, if ever, the PTD benefits would cease. The WCCA denied the Employer's request to discontinue PTD, holding that because the Employer failed to expressly reserve the right to discontinue the Employee's PTD benefits upon the Employee reaching the age of 67 in the settlement agreement, the Employer waived that right. *Frandsen* Decision

The Employer appealed the decision and the case was heard by the Minnesota Supreme Court. Attorneys Elizabeth Chambers-Brown and Doug Brown from Brown & Carlson, P.A. participated in the appeal and prepared an Amicus Brief on behalf of the Minnesota Defense Lawyers' Association (MDLA). Amicus Brief

On appeal, the MN Supreme Court reversed the WCCA's decision and held that the retirement presumption in Minn. Stat. § 176.101, subd. 4 shall apply unless the employee receiving PTD benefits rebuts the retirement presumption or proves the employer knowingly and intentionally waived the right to discontinue PTD based on the presumption. The Supreme Court remanded the case back to the WCCA for a determination on the Employer's request to discontinue the employee's PTD. MN Supreme Court Decision

The WCCA's decision on remand was recently issued on November 17, 2011. W.C.C.A. Nov. 17, 2011 Decision Significantly, the WCCA stated:

> Under the supreme court's decision, there is no need for an employer or insurer to file a petition to discontinue permanent total disability benefits based upon the presumptive retirement provision of Minn. Stat. § 176.101, subd. 4. Rather, an employer and insurer may cease payment of permanent total disability benefits when the employee attains the age of 67, without taking any further action prior to cessation. If the employee claims entitlement to permanent total disability benefits after age 67, he or she may file a petition pursuant to Minn. Stat. § 176.291.

What this means as a practical matter is that PTD benefits can now be discontinued *automatically* once an employee turns 67 without the need to file a petition to discontinue with OAH or the WCCA. The burden is then on the *employee* to prove entitlement to ongoing PTD benefits beyond the age of 67 and must file a claim petition for benefits.

Should you have any questions regarding this Decision or other matters, please contact Brown & Carlson, P.A.

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GEORGE E. FRANDSEN, Employee, v. FORD MOTOR CO., SELF-INSURED, Employer/Petitioner.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 22, 2010

No. WC10-5175

HEADNOTES

PERMANENT TOTAL DISABILITY - DISCONTINUANCE; PERMANENT TOTAL DISABILITY - RETIREMENT. Where the parties did not, in the stipulation for settlement, specifically incorporate the provisions of Minn. Stat. § 176.101, subd. 4, or include any language from which the court could reasonably conclude the parties intended that permanent total disability benefits would cease when the employee reached 67 years of age, the petitioner is not entitled to discontinue benefits on that basis.

Petition to discontinue permanent total disability benefits denied.

Determined by: Johnson, C.J., Wilson, J. and Stofferahn, J.

Attorneys: James F. Schneider, Butts, Sandberg & Schneider, Forest Lake, MN, for the Respondent. Kathryn Hipp Carlson, Hipp Carlson, Minneapolis, MN, for the Petitioner.

OPINION

THOMAS L. JOHNSON, Judge

The self-insured employer petitions this court to discontinue payment of permanent total disability benefits on the basis that the employee has reached the age of 67 years and is presumed retired under Minn. Stat. § 176.101, subd. 4. We deny the petition to discontinue benefits.

BACKGROUND

George E. Frandsen, the employee, sustained a personal injury on November 3, 2004, arising out of his employment with Ford Motor Company, the employer, then self-insured for workers' compensation liability. The employer admitted liability for the employee's personal injury. Thereafter, the parties entered into a stipulated settlement of the employee's claims in which the parties acknowledged the employee was found totally disabled by the Social Security Administration effective August 1, 2005, and was receiving Social Security disability benefits. The parties agreed the employee was rendered permanently and totally disabled effective November 3, 2004, as a consequence of his work injury. The parties agreed that all benefits paid to the employee from and after the date of injury would be reclassified as permanent and total disability benefits and agreed that the employer had paid $25,000.00 in permanent total disability benefits as of March 23, 2006. Finally, the parties agreed that as of March 26, 2007, the self-insured employer would off-set the permanent total disability benefits payable to the employee by the amount of his Social Security disability benefits,[1] and agreed the employee's total disability payment would be adjusted annually on the date of injury and annually when the Social Security benefit was increased. An Award on Stipulation was served and filed on April 30, 2007.

On September 20, 2010, the employer filed with this court a petition seeking to discontinue the employee's permanent total disability benefits on the basis that the employee has reached the age of 67 years and is presumed retired under Minn. Stat. § 176.101, subd. 4. The employee filed with the court an objection to the petition contending he was entitled to ongoing permanent total disability benefits.

DECISION

The law in effect on the date of the employee's injury and on the date of the award states that permanent total disability benefits, "shall cease at age 67 because the employee is presumed retired from the labor market." Minn. Stat. § 176.101, subd. 4. Since the employee is now 67 years of age, the petitioner asserts he is no longer entitled to permanent total disability benefits and seeks to discontinue those benefits.

In considering a petition to discontinue permanent total benefits, this court reviews the language of the settlement agreement to determine whether the stipulation contains language demonstrating the parties intended benefits would continue only so long as the employee remained permanently and totally disabled.[2] Haberle v. Erickson Mills,

Inc., 58 W.C.D. 478 (W.C.C.A. 1998); Ramsey v. Frigidaire Co. Freezer Prods., 58 W.C.D. 411 (W.C.C.A. 1998). In Ruby v. Mueller Pipelines, 69 W.C.D. 453 (W.C.C.A. 2009), this court considered a petition to discontinue in the context of the retirement presumption of Minn. Stat. § 176.101, subd. 4. In Ruby, the parties entered into a stipulation for settlement that stated the employee would "be paid permanent total disability benefits pursuant to Minn. Stat. § 176.101, subd. 4." When the employee reached the age of 67, the employer and insurer petitioned this court to discontinue permanent total disability benefits. This court held that by the language of the agreement, the parties incorporated into the stipulation for settlement the presumptive retirement provision of the statute. The court held the employer and insurer were entitled to discontinue payment to the employee of permanent total disability benefits effective the date the employee reached age 67.

In Tambornino v. Health Risk Mgmt., No. WC10-5045 (W.C.C.A. Mar. 18, 2010), summarily aff'd (Minn. Aug. 25, 2010), the parties' settlement document provided the employer and insurer would pay permanent total disability benefits to the employee "as her condition may warrant." The employer thereafter sought to discontinue permanent total benefits based upon the age 67 retirement presumption of Minn. Stat. § 176.101, subd. 4. The court interpreted the word "condition" to mean the employee's physical ability to work, not her age. The parties did not specifically incorporate into the settlement agreement the provisions of Minn. Stat. § 176.101, subd. 4, nor did they expressly reserve the right to discontinue permanent total disability benefits when the employee reached the age of 67. Citing Stephenson v. Martin, 259 N.W.2d 467, 30 W.C.D. 130 (Minn. 1977), the court concluded the employer and insurer's intention to waive the right to discontinue permanent total benefits at age 67 could be reasonably inferred by their agreement to continue paying permanent total disability benefits so long as the employee's condition warranted, and by failing to expressly reserve that right in the stipulation. Accordingly, the employer and insurer's petition to discontinue permanent total disability benefits was denied.

The settlement agreement in this case contains no language from which we can reasonably conclude the parties intended that permanent total disability benefits would cease when the employee reached 67 years of age. The parties did not incorporate into the settlement agreement the presumptive retirement provision of Minn. Stat. § 176.101, subd. 4, nor did they include language expressly reserving the right to discontinue payment of permanent total disability benefits at age 67. See, e.g., Campeau v. National Purity, Inc., No. WC10-5080 (W.C.C.A. July 20, 2010); Ruby, id. As in the Tambornino case, we conclude the petitioner failed to reserve that right in the stipulation and is not entitled to discontinue benefits on that basis.

The petitioner further contends there is evidence the employee intended to retire prior to reaching the age of 67 so the statutory presumption is applicable. In support of this assertion, the petitioner attached a copy of pages from a deposition of the employee taken on July 14, 2010. In that deposition, the employee testified he would have been eligible for retirement benefits from the employer when he reached the "Rule of 85" based on years of service with the employer plus the age of the employee. The petitioner contends the employee would have reached the Rule of 85 prior to his 67th birthday. The employee agreed that he had been "aiming for the magic eighty-five," but stated that with the passing of his wife he probably would have worked longer, past his full retirement.

The employee's intent to retire is a factor which may considered to determine whether the statutory presumption of retirement at age 67 has been rebutted. However, before considering whether the presumption has been rebutted, the statutory presumption must first apply. To decide whether the presumption applies, the court looks to the language of the settlement agreement. In this case, the petitioner failed to reserve in the settlement document the right to discontinue permanent total disability benefits at age 67 and so waived that right. Even assuming that intent to retire has anything to do with establishing the retirement presumption, the testimony presented is equivocal at best, and does not support discontinuance in these circumstances.

Accordingly, the employer's petition to discontinue permanent total disability benefits is denied.

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[1] Minn. Stat. § 176.101, subd. 4, provides in part that after a total of $25,000.00 of weekly benefits has been paid, the weekly benefit being paid by the employer may be reduced by the amount of disability benefits being paid by a government disability benefit program.

[2] Review is not necessary where the employee was adjudicated permanently and totally disabled pursuant to a findings and order as payment of permanent total benefits must, in such cases, be made in accordance with the provisions of the workers' compensation act, including Minn. Stat. § 176.101, subd. 4. Olson v. 3M Co., No. WC10-5054 (June 29, 2010).

NO. A11-126

State of Minnesota

In Supreme Court

George E. Frandsen,

Employee-Respondent,

vs.

Ford Motor Company,

Employer-Relator,

and

Self-Insured,

Insurer-Relator.

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