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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STATEMENT OF THE ISSUE[1]

WHETHER THE WORKERS' COMPENSATION COURT OF APPEALS ERRED AS A MATTER OF LAW IN DETERMINING THAT RELATOR WAIVED THE STATUTORY RIGHT TO DISCONTINUE PERMANENT TOTAL DISABILITY BENEFITS AT AGE 67 BY NOT EXPRESSLY RESERVING THAT RIGHT IN A STIPULATION FOR SETTLEMENT.

The Worker's Compensation Court of Appeals held that Relator's failure to expressly reserve in a stipulation for settlement the right to discontinue the employee's permanent total disability benefits at age 67 constituted a waiver of that right and thereby denied Relator's Petition to Discontinue employee's permanent total disability benefits.

Apposite Cases:

Ruby v. Mueller Pipelines, 69 W.C.D. 453 (W.C.C.A. 2009)

Tambornino v. Health Risk Mgmt., No. WC10-5045 (W.C.C.A. Mar. 18, 2010)

[1] Pursuant to Minn. R. App. P. 129.03, this amicus brief has been authored in whole by attorneys from Brown & Carlson, PA on behalf of the Minnesota Defense Lawyers Association. Neither counsel of the parties to this appeal participated in the authorship of this brief. Except for Brown & Carlson, PA, which has paid all costs associated with the preparation and submission of this brief, no entity has made a monetary contribution to the preparation or submission of this brief other than the *amicus curiae* Minnesota Defense Lawyers Association.

STATEMENT OF THE CASE

This appeal arises out of a Petition to allow Discontinuance of Permanent Total Disability (PTD) Benefits filed by the Employer-Relator, Ford Motor Company, with the Workers' Compensation Court of Appeals [WCCA] on September 20, 2010. In a December 22, 2010 Findings & Order, the WCCA issued a decision denying Ford's request to discontinue permanent total disability benefits. The court determined that because Relator failed to expressly reserve the right to discontinue the Employee's PTD benefits upon the Employee reaching the age of 67 in a settlement agreement, Relator is deemed to have waived that statutory right. This appeal followed.

On February 17, 2011, this Court granted leave to the Minnesota Defense Lawyers' Association to file a brief as *amicus curiae* in this matter. This brief is offered on behalf of the Minnesota Defense Lawyers' Association in support of Relator's position that the WCCA erred as a matter of law in concluding that Relator waived a statutory right by not expressly reserving that right in a Stipulation for Settlement.

STATEMENT OF THE FACTS

As *amicus curiae*, the MDLA has no direct involvement in the facts of this case and in the interest of brevity, adopts the Statement of Facts as set forth in Relator's Brief.

STANDARD OF REVIEW

Statutory interpretation by the WCCA is subject to *de novo* review by the Minnesota Supreme Court. *Vezina v. Best Western Inn Maplewood*, 627 N.W.2d 324, 328 (Minn. 2001). When reviewing questions of law determined by the WCCA, this Court is free to exercise independent judgment. *Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 735 (Minn.2000).

ARGUMENT

I. THE WCCA'S DECISION IS CLEARLY ERRONEOUS BECAUSE IT VIOLATES LEGISLATIVE PROVISIONS IN THE WORKERS' COMPENSATION ACT.

A. The WCCA's Decision Directly Contradicts the Legislative Mandate in Minn. Stat. § 176.101, Subdivision 4 That Permanent Total Disability Benefits "shall cease" at Age 67.

Minn. Stat. § 176.101, subdivision 4 provides that "[p]ermanent total disability *shall cease* at age 67 because the employee is presumed retired from the labor market." (Emphasis added). Minnesota courts cannot add terms that the legislature has omitted. *Reider v. Anoka-Hennepin School District No. 11*, 728 N.W.2d 246, 250 (Minn. 2007). Minn. Stat. § 645.44, subdivision 16 states that "shall" in a statute means that an action is mandatory. "Where the legislature's intent is clearly discernible from plain and unambiguous language, statutory construction is neither necessary nor permitted and courts apply the statute's plain meaning." *Am. Tower, L.P. v. City of Grant,* 636 N.W.2d 309, 312 (Minn. 2001).

Under the plain language of Section 176.101, subdivision 4, the requirement that weekly permanent total disability (PTD) benefits cease at age 67 is mandatory unless the employee can rebut the retirement presumption. Notwithstanding the plain language of the statute that PTD benefits "shall" cease at age 67, the WCCA has determined that employers and insurers must

expressly reserve the right to discontinue benefits at age 67 when entering into a settlement agreement or else the statutory right is deemed waived. In doing so, the WCCA has determined that the legislative mandate in 176.101, subd. 4 does not apply in certain cases. Despite the unambiguous language of § 176.101, subd. 4, the WCCA has added terms to the statute without any statutory indication that the legislature intended for parties entering into a settlement agreement to expressly reserve the right to discontinue PTD benefits at age 67 in order to avail themselves of that right.

By looking to the settlement agreement rather than the plain language of the statute, the WCCA has ignored the fact that by using the word "shall," the legislature intended for the statute to be mandatory. Consequently, the WCCA's decision in this case is erroneous as a matter of law because is forces parties to specifically invoke a statutory right rather than applying the statute as intended by the legislature.

B. The WCCA Has Exceeded Its Scope of Authority Under Minn. Stat. § 176.421, Subd. 6 by Addressing Claims and Rights Not Raised By the Parties in the Settlement Agreement.

The WCCA is an administrative agency and the scope of its authority is strictly confined to the jurisdiction granted to it by the legislature. *Quam v. State,* 391 N.W.2d 803, 809 (Minn. 1986). Generally, the Workers' Compensation Court of Appeals review is limited to the issues raised by the parties. *Ruether v. State of Minnesota, Mankato State University,* 455 N.W.2d 475, 479 (Minn.1990); Minn.Stat. § 176.421, subd. 6. A stipulation for settlement covers only those claims and rights which are specifically mentioned in the agreement. *Johnson v. Tech Group, Inv.*, 491 N.W.2d 287, 288, 47 W.C.D. 367, 368 (Minn. 1992); *Hanson v. Jer Her Builders*, 366 N.W.2d 294, 37 W.C.D. 565 (Minn. 1985).

In this case, the WCCA exceeded its authority under the Workers' Compensation Act by acting as a principal factfinder rather than a reviewing court when looking to the terms of the settlement agreement rather than the statute itself to determine the parties' rights in regard to the retirement presumption. Although Minn. Stat. § 176.421 does give the WCCA the power to "make or modify an award or disallowance of compensation or other order based on the facts, findings, and law," the statute does *not* give the WCCA the power to reach factual and legal conclusions about issues not raised by the parties in the Petition to Discontinue or the settlement agreement.

In determining that an employer and insurer's failure to expressly address the retirement presumption in a settlement agreement results in a waiver of a statutory right, the court is imposing a legal consequence without regard to the intent of the parties when entering into the settlement agreement. *See Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010) (stating that a valid settlement agreement "must manifest an intent to release, discharge, or relinquish a right, claim, or privilege by a person in whom it exists to a person against whom it might have been enforced to be a release"). In cases such as this, where there is no manifestation of the employer and insurer's intent to waive their statutory right to discontinue benefits at age 67, the WCCA has nonetheless concluded, contrary to law, that a waiver of that right exists. In doing so, the WCCA has breached its authority under Section 176.421, and erred as a matter of law.

From a policy standpoint, the WCCA's approach in this case is problematic. First, there are countless Stipulations in existence, wherein the parties may have failed to explicitly reserve future rights or defenses to PTD benefits, even though the parties may not have contemplated the issue at the time of the settlement. Or even if they did contemplate the issue at the time of

settlement, the parties may have thought the language they used in their stipulation was sufficient to protect their future rights and interests. If this decision is upheld, employers and insurers who entered into those stipulations in good faith, lacking the benefit of the WCCA's recent direction, will be faced with uncertainly about their statutory rights, namely, whether those rights were properly reserved in the stipulation or unwittingly waived. Stipulations that were once considered final will be challenged and scrutinized in an effort to maximize an employee's entitlement to PTD benefits. Employers and insurers will face increased liability for PTD benefits to employees well past the retirement age. Questions will arise regarding other statutory rights that may not have been expressly reserved in the settlement agreement and whether that omission too should be considered a waiver of those rights.

Next, the WCCA's decision is problematic because it is inconsistent with those cases in which an employee is adjudicated permanently and totally disabled as a result of a judicial decision. If an employee is adjudicated permanently and totally disabled, an employer and insurer can avail themselves of the right to discontinue PTD at the age of 67. In that case, the compensation judge who determined that the employee is permanently totally disabled is not required to make a separate finding as to what will happen once the employee reaches age 67. Nor are employers and insurers are expected to expressly reserve the right to discontinue PTD benefits at the time of hearing. However, based on this and the WCCA's decision in *Tambornino v. Health Risk Mgmt.*, No. WC10-5045 (W.C.C.A. Mar. 18, 2010), in cases where the parties have reached a settlement regarding PTD, employers and insurers must specifically reserve the right to discontinue benefits at age 67 or lose it. This is inconsistent and confusing in light of the WCCA's holding that an award on stipulation constitutes an "adjudication" within

the meaning of Minn. Stat § 176.238, subd. 11. *Cook v. J. Mark, Inc.*, 51 W.C.D. 432 (W.C.C.A. 1994).

C. The WCCA's Decision Violates the Legislative Declaration in Minn. Stat § 176.001 that Workers' Compensation Cases are to be Decided in an Even-Handed Manner.

Minn. Stat. § 176.001 provides that "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." "Statutes are to be construed so as to yield reasonable results, consistent with the admonition contained in Minn. Stat. § 176.001 that the Act is to be construed in a nondiscriminatory manner." *Hagen v. Venem,* 366 N.W.2d 280, 284 (Minn.1985); *see also Foley v. Honeywell,* 488 N.W.2d 268, 271-72 n. 2 (Minn. 1992).

In determining that Relator's failure to expressly reserve the right to discontinue PTD at age 67 constitutes a waiver of that right, the WCCA failed to address the fact that the employee likewise failed to expressly reserve a *claim* for future PTD in the stipulation. Although *neither* party addressed the issue of entitlement to PTD after age 67 in the settlement agreement, the WCCA's decision in this case penalizes the self-insured employer by increasing the number of years PTD benefits must be paid out and results in a windfall for the employee. The WCCA places a higher burden on workers' compensation defendants to specifically reserve potential statutory rights and defenses at the time of settlement or lose them than it does on claimants to reserve future claims, even though employees are often in a better position to anticipate their future possible claims than are defendant employers and insurers. Such an approach is not even-handed and especially favors workers' compensation claimants in direct violation of Minn. Stat. § 176.001.

III. THE WCCA'S DECISION IS CONTRARY TO PUBLIC POLICY BECAUSE IT OVERLY BURDENS PARTIES TO ANTICIPATE AND ADDRESS FUTURE POTENTIAL ISSUES NOT IN DISPUTE AT THE TIME OF SETTLEMENT, IMPOSES AN UNKNOWING AND INVOLUNTARY WAIVER OF STATUTORY RIGHTS WITHOUT CONSIDERATION, AND DISCOURAGES A LONGSTANDING POLICY IN FAVOR OF SETTLEMENT.

A. The WCCA's Decision Overly Burdens Parties Entering Into Settlements to Anticipate and Address Each and Every Potential Statutory Issue that Could Arise Under the Workers' Compensation Act at the Time of the Settlement, Even If Certain Claims Are Not Ripe For Adjudication.

Although the WCCA's decision in this case addresses only the effects of the failure to expressly reserve the right to discontinue PTD at age 67, the court does not distinguish the retirement presumption from other similar "rights" or mandatory provisions under the Workers' Compensation Act. For example, Minn. Stat. § 176.101, subdivision 1 provides that temporary total disability benefits (TTD) "shall cease" in a number of circumstances such as when the employee returns to work, if the employee withdraws from the labor market, if the employee has been released to work without any physical restrictions caused by the work injury, or once the employee has reached 90 days post-maximum medical improvement (MMI). The statute also provides that temporary total disability compensation "shall cease" entirely when 130 weeks of temporary total disability compensation have been paid. *Id.*

Because the WCCA draws no distinction between the cessation provisions in section 176.101, subdivision 1 and the retirement presumption in 176.101, subdivision 4, it logically follows from the WCCA's decision that employers and insurers must also expressly reserve the statutory rights enumerated in subdivision 1 when entering into a settlement agreement or be deemed to have forever waived them. The WCCA's decision in this case can only lead to the conclusion that although the legislature clearly intended

for temporary total disability benefits to cease in certain situations, for example, once the 104 or 130-week cap is reached, if an employer and insurer do not expressly reserve the right to discontinue TTD benefits in a settlement, the statutory cap on TTD would no longer apply.

The WCCA's decision in this case sends a message to employers and insurers that if statutory rights are not expressly addressed and reserved in a to-date settlement agreement, there is an implied waiver of those rights by conduct, even if those rights are inchoate at the time of settlement. Consequently, parties entering into settlement agreements now not only have the burden of resolving the claims and issues in dispute at the time of the settlement, but must also contemplate, anticipate, and address each and every possible claim and right that could arise under the Workers' Compensation Act, even if those issues have not yet arisen or are not ripe for adjudication. Employers and insurers are now faced with the fear that if they fail to expressly reserve a claim, defense, or other statutory right in the Stipulation for Settlement, they will be unable to later avail themselves of that claim or right should the issue arise in the future.

The WCCA's decision is contrary to public policy because it encourages parties to include boilerplate language in their settlement agreements that indiscriminately reserves all potential future claims and defenses for fear of losing them, regardless of the actual issues in dispute at the time of settlement. The WCCA itself, however, has rejected similar boilerplate language used in settlement agreements to avoid future vacation of an Award on Stipulation. *See Davis v. Trevilla of Golden Valley*, 70 W.C.D. 45, 57 (W.C.C.A. 2010) (stating that boilerplate language indicating the employee understood the finality of the settlement agreement "may but does not necessarily represent the reasonably foreseeable consequences of the injury or the true expectations and contemplation of the parties at the time of the award.") Not only does the

WCCA look disfavorably on the use of boilerplate language as a true representation of the parties' intent at the time of settlement, but the use of such language undermines the policy of customizing settlement agreements to resolve specific issues in dispute and avoid the uncertainty and expense of litigation. It also raises the issue of whether compensation courts even have authority to approve stipulations that address future rights and claims that have not yet matured. *See e.g. Dale v. Shaw Motors*, 206 Minn. 99, 287 N.W. 787 (1939) (holding that the workers' compensation commission properly refused to approve a settlement agreement in which the employee's wife and child gave a release of liability for dependency benefits prior to the employee's death on the grounds that their claim for death benefits was inchoate and it would violate the policy of the dependency statute).

Other practical policy issues include concerns that the practice of requiring parties to explicitly reserve all potential rights and claims in their stipulations will extend the amount of time it takes to prepare and execute stipulations, will result in unnecessary delay of finalizing settlement agreements, and will result in additional litigation costs for the parties responsible for preparing the settlement agreements. It also poses problems for defense attorneys who typically prepare the settlement agreements, as it increases their potential liability to clients if they fail to anticipate a future claim or reserve a statutory right for issues that may arise in the future but have not matured at the time of settlement.

In sum, the WCCA's decision should be reversed as contrary to public policy because it places an unnecessary burden on parties entering into settlements to anticipate and address future, potential claims; it encourages the use of boilerplate language in stipulations that may not reflect the true intent of the parties; and it creates practical concerns for those responsible for drafting settlement agreements.

B. The WCCA's Decision Imposes an Unknowing and Involuntary Waiver of Statutory Rights For Which No Consideration Was Given.

A settlement is a contract. *Jallen v. Agre,* 264 Minn. 369, 373, 119 N.W.2d 739, 743 (1963). To enforce a settlement, there must be an offer to settle and an acceptance so "it can be said that there has been a meeting of the minds on the essential terms of the agreement." *Id.* If the parties dispute the settlement agreement, the district court may determine what the facts are. *Id.* Settlement agreements are contractual in nature and subject to contract law principles. *Voicestream Mpls., Inc. v. RPC Props., Inc.*, 743 N.W.2d 267, 271 (Minn. 2008). The formation of a contract requires an offer, acceptance, and consideration. *Cederstrand v. Lutheran Bhd.*, 263 Minn. 520, 117 N.W.2d 213, 219-21 (1962). There must also be a meeting of the minds of both parties on the terms of the contract. *Johnson v. Freid*, 181 Minn. 316, 320-21, 232 N.W. 519, 521 (1930).

Waiver is the intentional relinquishment of a known right; it is the expression of an intention not to insist upon what the law affords. It is consensual in its nature; the intention may be inferred from conduct, and the knowledge may be actual or constructive, but both knowledge and intent are essential elements. *Seavey v. Erickson*, 244 Minn. 232, 241, 69 N.W.2d 889, 895 (1955) (quotation omitted). Generally, an estoppel or waiver theory should not be used to enlarge an insurance policy's coverage and impose liability for a risk not contemplated by the parties to the insurance contract and one for which no consideration was given. *Shannon v. Great Am. Ins. Co.,* 276 N.W.2d 77, 78 (Minn. 1979); *Redeemer Covenant Church v. Church Mut. Ins. Co.*, 567 N.W.2d 71, 76 (Minn. App. 1997).

The WCCA's decision in this case is virtually the same as its decision in *Tambornino v. Health Risk Mgmt.*, No. WC10-5045 (W.C.C.A. Mar. 18, 2010). There the WCCA likewise concluded that the employer and insurer's intention to waive the right to discontinue permanent

total benefits at age 67 could reasonably be inferred by failing to expressly reserve that right in the stipulation. In *Tambornino*, the WCCA relied on *Stephenson v. Martin*, 259 N.W.2d 467, 30 W.C.D. 130 (Minn. 1970), in which this Court determined that an employer and insurer waived their right of subrogation by failing to make an express reservation of their right in a stipulation for settlement. *Id.* at 471, 30 W.C.D. at 136. But the WCCA's reliance on *Stephenson* in this context is misplaced as the cases are easily distinguished.

In *Stephenson*, the employee in question brought an action against a third party for negligence resulting in her claimed work injury at the same time she filed a claim petition against the employer and insurer. 259 N.W.2d at 468. Because the employee had already initiated the third party claim, there was no question the employer and insurer had actual knowledge of their right to subrogation. In fact, counsel for the employer and insurer expressly communicated in a letter to employee's attorney an intent to claim reimbursement from any benefits paid by the third party. *Id.* at 469. Because there was "actual knowledge" of the right of subrogation at the time of settlement, this Court concluded that the employer and insurer should have addressed that right in the stipulation.

This case and the *Tambornino* case are distinguishable from *Stephenson* because there is no evidence the defendants had actual knowledge at the time of settlement of their right to discontinue the employee's PTD benefits at age 67. Unlike *Stephenson*, the employees in this case and in *Tambornino* did not assert any claim for PTD benefits after age 67 or offer any evidence specifically to rebut the retirement presumption. In the absence of any evidence that the parties specifically contemplated the retirement presumption issue at the time of settlement, it would be erroneous to conclude that the employer and insurer had actual knowledge of their statutory right to discontinue PTD at age 67.

The fact that the Workers' Compensation Act creates a statutory right does not, by itself, mean an employer and insurer had actual knowledge, contemplated or bargained that right at the time of settlement. The case law is quite clear that settlement agreements are contractual in nature and must include the elements of offer, acceptance and *consideration. Voicestream Mpls.*, 743 N.W.2d at 271; *Cederstrand,* 263 Minn. 520, 117 N.W.2d at 219-21. In order to waive or relinquish a statutory right in a settlement contract there must be intent and adequate consideration to support the agreement. In determining that failure to explicitly reserve the statutory right in a stipulation constitutes an implied waiver, the WCCA has completely circumvented the concepts of mutual intent and consideration, which are essential to a valid settlement agreement. Consequently, the WCCA's decision is erroneous and should be reversed.

C. The WCCA's Decision Discourages a Longstanding Policy in Favor of Workers' Compensation Settlements and Undermines the Intent of Parties Who Entered Into Existing Settlements.

It is well established that the law generally favors settlement, and workers' compensation settlements are to be encouraged. *Mauer v. Braun's Locker Plant*, 298 N.W.2d 439, 441, 33 W.C.D. 66, 71 (Minn. 1990); *Senske v. Fairmont & Waseca Canning Co.*, 232 Minn. 350, 45 N.W.2d 640, 16 W.C.D. 242 (1951). The settlement of workers' compensation disputes should be favored because they avoid the delays of litigation and expedite the granting of relief. *Id.* The usual purpose of settlement is to "resolve or avoid future potential or uncertain exposure to liability," *Husnik v. J.C. Penney Co., Inc.*, 57 W.C.D. 264, 273 (W.C.C.A. 1997).

The WCCA's decision in this case undermines the long-standing policies in favor of settlement in Minnesota. If this decision is upheld, employers and insurers who previously entered into settlements in order to avoid the delay and uncertainty of litigation are now faced with the concern that their stipulations may not withstand the harsh scrutiny of the WCCA with

regard to future statutory rights. Many employers and insurers could be faced with prolonged and expensive periods of liability for permanent total disability benefits they did not factor into their reserves. On the other side, employees and their attorneys will be encouraged to challenge the finality of settlements with regard to specific claims and rights not expressly addressed in a settlement agreement in an attempt to maximize their entitlement to benefits. These and other concerns are likely to have a chilling effect on the willingness of employers and insurers to enter into settlements to resolve issues for fear that the settlement will not offer much in the way of long-term protection from liability or preservation of rights. Because it is contrary to the longstanding public policy in favor of settlements, the WCCA's decision should be reversed.

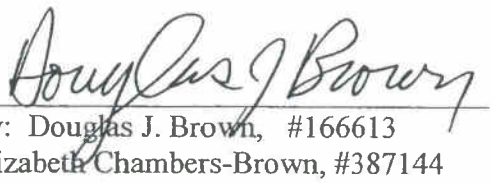
CONCLUSION

The Workers' Compensation Court of Appeals' decision is clearly erroneous because it violates the legislative mandate that permanent total disability benefits "shall cease" at age 67 and violates the legislative declaration that workers' compensation cases are to be decided in an even-handed manner. The WCCA has exceeded its authority and scope of review by acting as both factfinder and reviewing court with regard to issues not raised by the parties themselves.

The WCCA's decision is also contrary to public policy because it overly burdens parties entering into settlements, imposes an unknowing and involuntary waiver of inchoate statutory rights, and discourages a longstanding policy in favor of workers' compensation settlements. For these reasons, the *amicus curiae,* Minnesota Defense Lawyers Association, hereby respectfully requests that this Court reverse the decision of the WCCA.

BROWN & CARLSON, P.A.

Dated: March 1, 2011



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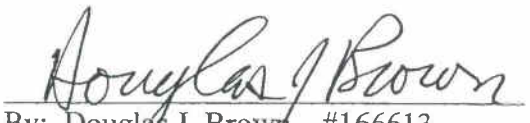
CERTIFICATION

I hereby certify that this brief conforms to the requirements set forth in Minn. R. App. P. 132.01, subd. 3(c) with regard to the number of pages, word count, and lines of text. According to Microsoft Word®, the processing software used to prepare this brief, the length of the brief is 4,131 words and 16 pages.

BROWN & CARLSON, P.A.

Dated: March 1, 2011



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STATE OF MINNESOTA

IN SUPREME COURT

A11-0126

Workers' Compensation Court of Appeals — Anderson, G. Barry, J.

George E. Frandsen,

Respondent,

vs.

Filed: August 10, 2011
Office of Appellate Courts

Ford Motor Company, Self-Insured,

Relator.

James F. Schneider, Butts, Sandberg & Schneider, LLP, Forest Lake, Minnesota, for respondent.

Kathryn Hipp Carlson, Hipp Carlson, PLLC, Minneapolis, Minnesota, for relator.

Raymond R. Peterson, McCoy, Peterson & Jorstad, Ltd., Minneapolis, Minnesota, for amicus curiae Minnesota Association for Justice.

James S. Pikala, Christine L. Tuft, Noelle L. Schubert, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota, for amicus curiae Minnesota Self-Insurers' Association.

Douglas J. Brown, Elizabeth Chambers-Brown, Brown & Carlson, PA, Minneapolis, Minnesota, for amicus curiae Minnesota Defense Lawyers Association.

SYLLABUS

1. The retirement presumption in Minnesota Statutes § 176.101, subd. 4 (2010), shall apply unless the employee receiving benefits rebuts the presumption by a preponderance of the evidence or proves knowing and intentional waiver by the employer.

2. The Workers' Compensation Court of Appeals erred when it held that the employer's failure to expressly reserve the retirement presumption in a stipulation for settlement constituted waiver of the presumption because the record contains no evidence that the employer intended to continue paying the employee permanent total disability benefits after the employee turned 67 years old.

Reversed and remanded.

OPINION

ANDERSON, G. Barry, Justice.

In this workers' compensation case, we review on certiorari whether an employer waived a retirement presumption in the Workers' Compensation Act by failing to expressly reserve the presumption in a stipulation for settlement. Relator Ford Motor Company asserts that it was entitled to cease payment of permanent total disability benefits when respondent George Frandsen turned 67 years old pursuant to a provision in Minn. Stat. § 176.101, subd. 4 (2010), which states: "Permanent total disability shall cease at age 67 because the employee is presumed retired from the labor market. This presumption is rebuttable by the employee." Frandsen objected to Ford's petition to

discontinue benefits. The Workers' Compensation Court of Appeals (WCCA) denied the petition on the grounds that Ford failed to expressly reserve the right to assert the retirement presumption in a stipulation for settlement that the parties entered into in April 2007. Ford sought review by certiorari. We reverse and remand the case for further proceedings.

The facts of this case are not in dispute. Frandsen was employed by Ford Motor Company (Ford) on November 3, 2004, when Frandsen was injured in the course and scope of his employment. Ford assumed responsibility for the injury and paid Frandsen medical, rehabilitation, and temporary total disability (TTD) benefits pursuant to the Minnesota Workers' Compensation Act. *See* Minn. Stat. ch. 176 (2004). Frandsen was subsequently found to be disabled under the Social Security Act, 42 U.S.C. ch. 7 (2002), and began receiving Social Security Disability Insurance (SSDI) on August 1, 2005. From August 1, 2005, through March 25, 2007, Frandsen received both workers' compensation TTD benefits and SSDI.

In April 2007, the parties entered into a stipulation for settlement of Frandsen's workers' compensation claims. The parties agreed that Frandsen was permanently and totally disabled as a result of his workplace injury. Consequently, the parties agreed to reclassify the TTD benefits that Ford had previously paid to Frandsen as permanent total disability (PTD) benefit payments. *See* Minn. Stat. § 176.101, subd. 4. This reclassification from TTD to PTD benefits permitted the parties to stipulate that, as of March 23, 2006, Ford had paid Frandsen $25,000 in PTD compensation. Under Minn.

Stat. § 176.101, subd. 4, once an employer has paid an employee $25,000 in PTD benefits, the employee's weekly compensation is "reduced by the amount of any disability benefits being paid by any government disability benefit program" if the benefits are occasioned by the same workplace injury. Because the PTD benefits Frandsen received after March 23, 2006 should have been offset by the amount he received in SSDI benefits, the parties stipulated that, as of March 25, 2007, Ford had overpaid Frandsen $34,053.78 in workers' compensation benefits.

In addition to recognizing this overpayment, the parties' stipulation contained several provisions allowing Ford to recoup its overpayment. First, the parties agreed that Frandsen was entitled to permanent partial disability (PPD) benefits in the anticipated amount of $19,950. *See* Minn. Stat. § 176.101, subd. 2a(a) (2004). Of that $19,950 in PPD benefits, the settlement provided that Frandsen's attorney would receive $13,000 and the remaining $6,950 would be applied to Ford's overpayment. The parties also agreed that any additional PPD benefits that Frandsen was entitled to receive would be applied to Ford's overpayment.

Second, the parties agreed that Ford could reduce the amount of weekly PTD payments to Frandsen to offset Ford's overpayment. *See* Minn. Stat. § 176.179 (2010) (stating that in the event of overpayment to an employee entitled to receive further benefits, "the mistaken compensation may be taken as a partial credit against future periodic benefits"). The settlement required that $52.43 per week would be withheld from Frandsen's benefits and applied to Ford's overpayment. The parties agreed to

adjust that offset amount "annually on [the] date of [Frandsen's] injury, and annually when [Frandsen's] social security benefit is increased."

Finally, Ford expressly reserved its right under the Workers' Compensation Act to bring subrogation and indemnity claims. The stipulation does not mention the discontinuance of benefits or the statutory retirement presumption. The parties submitted the signed stipulation to the Office of Administrative Hearings on April 27, 2007, and a compensation judge approved the settlement and issued an award on stipulation.

On September 14, 2010, Ford petitioned the WCCA to discontinue payment of Frandsen's PTD benefits pursuant to Minn. Stat. § 176.101, subd. 4, which states that "[p]ermanent total disability shall cease at age 67 because the employee is presumed retired from the labor market." Frandsen turned 67 years old on February 10, 2010. Ford argued that Frandsen could not rebut this retirement presumption because in a deposition taken July 14, 2010, Frandsen testified that he planned to retire when he reached the "Rule of 85"—the number of years Frandsen worked at Ford plus his age—which would have occurred when Frandsen was 66 years old. Frandsen objected to Ford's petition to discontinue benefits by stating that "[t]he employee alleges that he is entitled to ongoing permanent total disability." Frandsen did not state whether he was arguing that the retirement presumption did not apply or that he could rebut the presumption at an evidentiary hearing.

The WCCA denied Ford's petition to discontinue payment of Frandsen's PTD benefits. *Frandsen v. Ford Motor Co.*, No. WC10-5175, 2010 WL 5580426 (Minn.

WCCA Dec. 22, 2010). The WCCA reviewed the settlement agreement and concluded that Ford had waived the retirement presumption because "[t]he 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." *Id.* at *2. Because the WCCA determined that the retirement presumption was inapplicable, it did not discuss whether Frandsen had rebutted the presumption that he would have retired upon reaching the age of 67. On review by certiorari, we must decide whether the WCCA erred when it concluded that Ford waived the retirement presumption in Minn. Stat. § 176.101, subd. 4, by failing to expressly reserve the right to discontinue payment of Frandsen's permanent disability benefits.

I.

The disposition of this case involves statutory and contractual interpretation, both of which are "legal issues subject to de novo review." *State ex rel. Humphrey v. Philip Morris USA, Inc.*, 713 N.W.2d 350, 355 (Minn. 2006); *see also Swenson v. Nickaboine*, 793 N.W.2d 738, 741 (Minn. 2011) (stating that interpretation of the Workers' Compensation Act is subject to de novo review). When interpreting a statute, we first look to see whether the statute, on its face, is clear and unambiguous. *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). When examining the language of a statute for ambiguity, we give words and phrases their plain and ordinary meaning. *See* Minn. Stat. § 645.08 (2010). If a statute is unambiguous, we apply its plain language,

taking care to "avoid absurd results and unjust consequences." *Schroedl*, 616 N.W.2d at 278.

Minnesota Statutes § 176.101, subd. 4, governs the receipt of PTD benefits. The relevant portion of that statute states:

> Permanent total disability shall cease at age 67 because the employee is presumed retired from the labor market. This presumption is rebuttable by the employee. The subjective statement the employee is not retired is not sufficient in itself to rebut the presumptive evidence of retirement but may be considered along with other evidence.

Minn. Stat. § 176.101, subd. 4. This provision, by its own terms, is a rebuttable statutory presumption, or "[a] legal inference or assumption that a fact exists." *Black's Law Dictionary* 1304 (9th ed. 2009). A presumption shifts the burden of production or persuasion to the opposing party. *Id.* Furthermore, the Legislature has specifically stated that the word " '[s]hall' is mandatory." Minn. Stat. § 645.44, subd. 16 (2010). Thus, according to the plain language of Minn. Stat. § 176.101, subd. 4, an employer's statutory obligation to pay PTD benefits ends when the employee turns 67 years old, unless the employee can rebut the presumption of retirement by a preponderance of the evidence. *See Grunst v. Immanuel-St. Joseph Hosp.*, 424 N.W.2d 66, 69 (Minn. 1988) (applying an earlier formulation of a PTD retirement presumption and concluding that once the presumption was triggered, the statute "placed the burden on the employee to rebut the presumption by a preponderance of the evidence").

To decide whether Ford waived the retirement presumption in Minn. Stat. § 176.101, subd. 4, we must engage in a two-part inquiry. First, we must consider

whether waiver must be affirmatively asserted in a stipulation for settlement or whether the retirement presumption can be waived through inaction by the employer. Second, we must apply our approach to the first question to the facts of this case to determine whether Ford's failure to expressly reserve the retirement presumption waived the presumption. We analyze these issues in turn.

II.

Assuming that the employer has the power to waive the retirement presumption,[1] we first consider the manner in which waiver may occur. Here, the WCCA held that Ford "failed to reserve in the settlement document the right to discontinue permanent total disability benefits at age 67 and so waived that right." *Frandsen*, 2010 WL 5580426, at *3. We disagree.

Waiver is the intentional relinquishment of a known right. *Valspar Refinish, Inc. v. Gaylord's Inc.*, 764 N.W.2d 359, 367 (Minn. 2009). Therefore, a valid waiver requires

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[1] Ford never argued that the retirement presumption is a nonwaivable right; instead, Ford's arguments concern the circumstances under which the presumption can be waived. To properly analyze the issues presented in this case, we assume without deciding that the retirement presumption in Minn. Stat. § 176.101, subd. 4, is a right that can be waived by the employer. We are hesitant to engage in a straightforward application of our waiver principles because we recognize that the workers' compensation system is "social legislation," *Monson v. White Bear Mitsubishi*, 663 N.W.2d 534, 539 (Minn. 2003) (citation omitted), that places employers and employees in different positions with regard to settlement power. *Compare* Minn. Stat. § 176.021, subd. 4 (2010) ("Any agreement by an employee or dependent to take as compensation an amount less than that prescribed by this chapter is void."), *with Stephenson v. Martin*, 259 N.W.2d 467, 470 (Minn. 1977) (stating that, except as limited by public policy, a person may waive a statutory right). Therefore, we leave for another day the question of whether the retirement presumption in Minn. Stat. § 176.101, subd. 4, is a right that can be waived by an employer.

two elements: (1) knowledge of the right, and (2) an intent to waive the right. *Stephenson v. Martin*, 259 N.W.2d 467, 470 (Minn. 1977). Waiver may be express or implied—"knowledge may be actual or constructive and the intent to waive may be inferred from conduct." *Valspar*, 764 N.W.2d at 367 (citation omitted) (internal quotation marks omitted). The burden of proving knowledge and intent rests with the party asserting waiver. *See Brekke v. THM Biomedical, Inc.*, 683 N.W.2d 771, 779 n.6 (Minn. 2004).

The WCCA erroneously concluded that waiver can be implied from mere inaction by the parties. *See Frandsen*, 2010 WL 5580426, at *3–4. Although waiver can be express or implied, both types of waiver require an expression of intent to relinquish the right at issue. *See Carlson v. Doran*, 252 Minn. 449, 456, 90 N.W.2d 323, 328 (1958) (stating that waiver of a statutory right requires "the expression of an intention not to insist upon what the law affords"); *see also Black's Law Dictionary* 1717 (9th ed. 2009) (including "intent" in the definitions of "express waiver" and "implied waiver"). Therefore, whether a party has waived the right at issue turns on whether the party advocating waiver can meet its burden of showing that the waiving party knew about and intended to waive the right.

Applying this rule to the retirement presumption, it is clear that the plain language in Minn. Stat. § 176.101, subd. 4, requires an employee to produce evidence to demonstrate that inaction by an employer was intended to waive the retirement presumption. As discussed above, the retirement presumption and the corresponding cessation of PTD benefits is a mandatory provision of the Workers' Compensation Act.

See Minn. Stat. §§ 176.101, subd. 4, 645.44, subd. 16. According to its plain language, Minn. Stat. § 176.101, subd. 4, affords an employer the right to presume that an employee would have retired at age 67 and, correspondingly, to stop paying PTD benefits without taking any action prior to this cessation.[2] Because an employer could invoke the presumption of retirement by simply not acting, an employee cannot rely solely on that same inaction to prove an intent to waive the retirement presumption. Instead, an employee must prove waiver by producing evidence of knowledge and intent in the form of (1) language in a stipulation for settlement between the parties, (2) affirmative conduct on the part of the employer, or (3) circumstances that would ascribe meaning to the employer's silence.

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[2] We note without comment that the procedure for ending PTD benefits under Minn. Stat. § 176.101, subd. 4, supports the proposition that the retirement presumption takes effect upon inaction by the employer. The WCCA has treated the retirement presumption as a basis for employers to end PTD payments without notice to the employee or further legal process. For example, in *Olson v. 3M Co.*, the WCCA held:

> In cases in which the presumptive retirement provision of Minn. Stat. § 176.101, subd. 4, applies, an employer or insurer may discontinue payment of permanent total disability benefits to an employee who has been adjudicated or administratively determined to be permanently and totally disabled without filing with this court a petition to discontinue benefits. In such cases, an employer and insurer *have no continuing liability for permanent total disability benefits* after the employee attains the age of 67 years. If an employee claims entitlement to permanent total disability benefits after attaining the age of 67 years, he or she may file a petition pursuant to Minn. Stat. § 176.291.

70 Minn. Workers' Comp. Dec. 341, 346 (Minn. WCCA June 29, 2010) (emphasis added); *see also Campeau v. Nat'l Purity, Inc.*, No. WC10-5080, 2010 WL 3064528, at *3 (Minn. WCCA July 20, 2010); *Bescheinen v. Indep. Sch. Dist. #181*, No. WC10-5078, 2010 WL 3037775, at *3 (Minn. WCCA July 15, 2010).

To require an employer to expressly reserve the right to rely upon the retirement presumption improperly relieves the employee of his or her burden to either rebut the presumption by a preponderance of the evidence or to prove that the employer knowingly and intentionally waived the presumption. Therefore, we hold that the retirement presumption shall apply unless the employee rebuts the presumption or proves knowing and intentional waiver by the employer.

III.

When deciding whether a party has waived a right, "[e]ach case must rest on its own facts." *Beck v. Spindler*, 256 Minn. 543, 564, 99 N.W.2d 670, 684 (1959). Here, it is undisputed that Ford did not expressly waive the retirement presumption. And Ford does not dispute Frandsen's contention that Ford at least had constructive knowledge of the retirement presumption because the subdivision containing the presumption was the source of Ford's obligation to pay PTD benefits. The issue, therefore, is whether Frandsen presented evidence that Ford intended to waive the retirement presumption.

The WCCA reviewed the parties' stipulation and concluded, "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." *Frandsen*, 2010 WL 5580426, at *2 (emphasis added). But because an employer must intentionally waive the retirement presumption, the relevant inquiry is whether the stipulation contains language indicating that *the employer* intended PTD benefits to *continue* when the employee reached 67 years of age.

After conducting our own review of the stipulation, we find no indication that Ford intended to waive the retirement presumption. The stipulation contains no durational language from which we can infer the length of time that Ford intended to pay PTD benefits to Frandsen. The lack of information about future benefits is unsurprising because the parties agree that this settlement was a "to-date" stipulation intended to settle only those claims outstanding at the time of the agreement. *See Minnesota Workers' Compensation Deskbook* § 17.4(A) (Jay T. Hartman & Thomas D. Mottaz eds. 4th ed. 2007) (stating that a to-date settlement "involves a foreclosure to the employee's claim for specific workers' compensation benefits through the date of the settlement"). The stipulation did not foreclose future claims between the parties. In fact, the parties specifically agreed to review the amount of PTD compensation payable to Frandsen on an annual basis. Based on these facts, we conclude that the stipulation for settlement does not indicate that Ford intended to continue paying PTD benefits after Frandsen turned 67. Therefore, Frandsen failed to prove that Ford intended to waive the retirement presumption.

Frandsen argues that our holding in *Stephenson*, supports affirmance of the WCCA decision in this case. In *Stephenson*, we held that an employer's failure to expressly reserve in a stipulation the right to bring third-party claims resulted in waiver of those claims. 259 N.W.2d at 471. But *Stephenson* can be distinguished from this case for two reasons. First, *Stephenson* involved a "full, final and complete" settlement of the parties' claims. *Id.*; *see also* Hartman & Mottaz, *supra*, at § 17.4(D) (stating that a "full,

final, and complete" settlement is one in which "the employee agrees to forego and relinquish *any* claims against an employer and/or insurer as a result of an injury" (emphasis added)). Second, the statutory right at issue in *Stephenson* involved permissive language, stating that the employer "may" bring an action for subrogation or indemnity. 259 N.W.2d at 469. Unlike the retirement presumption—wherein inaction invokes the presumption—failure to reserve a permissive statutory right when such action was necessary to invoke that right under the statute can support an inference that the party intended to waive the right. Therefore, our analysis in *Stephenson* is inapplicable here.

Finally, it is important to note that whether an employer intended to waive the retirement presumption is a factually-intensive inquiry; here, the employee cites to no affirmative actions by the employer, language in the stipulation, or circumstances surrounding the agreement that show such an intention and we have found none. In fact, the employee conceded at oral argument that there was no evidence of any discussion of the retirement presumption at the time of the stipulation let alone an affirmative waiver by the employer. At the end of the day, the employee's position is essentially that entering into a stipulation with the implied knowledge of the existence of the retirement presumption is enough to establish an employer waiver. We disagree. The employee has the burden to come forward with at least some evidence of waiver and we need not decide here what is the minimum level of evidentiary support that the employee must produce. It is sufficient for purposes of the present dispute to simply note that waiver of

the retirement presumption is not established without some evidence of intent on the part of the employer and no such evidence was produced here.

In conclusion, we hold that the Workers' Compensation Court of Appeals erred when it denied Ford's petition to discontinue permanent total disability benefits on the grounds that Ford waived the retirement presumption in Minn. Stat. § 176.101, subd. 4. Assuming that an employer may waive its statutory right to presume that an employee would retire at age 67, the employee bears the burden of proving that the employer knowingly and intentionally waived that right. Here, the record lacks any evidence that Ford intended to continue paying PTD benefits to Frandsen after he turned 67. We therefore reverse the Workers' Compensation Court of Appeals and remand the case for further proceedings consistent with this opinion.

Reversed and remanded.

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

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 17, 2011

No. WC11-5342

HEADNOTES

PERMANENT TOTAL DISABILITY - DISCONTINUANCE; PERMANENT TOTAL DISABILITY - RETIREMENT. In cases involving the retirement presumption contained in Minn. Stat. § 176.101, subd. 4, an employer or insurer may discontinue payment of permanent total disability benefits when the employee attains the age of 67 without taking further action prior to cessation. No petition to discontinue permanent total disability benefits is required.

Petition to discontinue permanent total disability dismissed.

Determined en banc.

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

OPINION

THOMAS L. JOHNSON, Judge

The self-insured employer petitioned this court to discontinue payment of permanent total disability benefits on the ground that the employee had reached the age of 67 years and was therefore presumed retired pursuant to Minn. Stat. § 176.101, subd. 4. This court denied the petition. On appeal, the Minnesota Supreme Court reversed and remanded the case to this court. We dismiss the employer's petition.

BACKGROUND

George E. Frandsen, the employee, sustained an injury on November 3, 2004, arising out of and in the course 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. According to the agreement, the parties acknowledged that the employee had been found totally disabled by the Social Security Administration effective August 1, 2005, and was receiving Social Security disability benefits. The parties also agreed that the employee had become permanently and totally disabled effective November 3, 2004, as a consequence of his work injury. The stipulation specified that all benefits paid to the employee from and after the date of injury would be reclassified as permanent and total disability benefits and 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 employer would begin to offset the permanent total disability benefits payable to the employee by the amount of his Social Security disability benefits,[1] subject to annual adjustments. An Award on Stipulation was served and filed on April 30, 2007.

In September 2010, the employer filed with this court a petition seeking to discontinue the employee's permanent total disability benefits on grounds that the employee had reached the age of 67 and was presumed retired under Minn. Stat. § 176.101, subd. 4. The employee objected to the requested discontinuance, contending that he was entitled to ongoing permanent total disability benefits. By decision served and filed December 22, 2010, this court denied the employer's petition to discontinue benefits. Frandsen v. Ford Motor Co., No. WC10-5175 (W.C.C.A. Dec. 22, 2010). On appeal, the Minnesota Supreme Court reversed that decision and remanded the case to this court. See Frandsen v. Ford Motor Co., No. A11-0126 (Minn. Aug. 10, 2011).

DECISION

Minn. Stat. § 176.101, subd. 4, governs eligibility for permanent total disability benefits and provides, in part,

> Permanent total disability shall cease at age 67 because the employee is presumed retired from the labor market. This presumption is rebuttable by the employee. A subjective

statement the employee is not retired is not sufficient in itself to rebut the presumptive evidence of retirement but may be considered along with other evidence.

In Frandsen, the supreme court held that, "according to its plain language, Minn. Stat. § 176.101, subd. 4, affords the employer the right to presume that an employee would have retired at age 67 and, correspondingly, to stop paying PTD benefits without taking any action prior to this cessation." Id., slip op. at 10 (footnote omitted). The court further held that the retirement presumption "shall apply unless the employee rebuts the presumption or proves knowing and intentional waiver by the employer." Id., slip op. at 11.

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 the 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.

The self-insured employer's petition to discontinue permanent total disability benefits is dismissed.

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