

NO. A11-126

State of Minnesota
 In Supreme Court

OFFICE OF
APPELLATE COURTS

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George E. Frandsen,

: **FILED**
Employee-Respondent,

vs.

Ford Motor Company,

Employer-Relator,

and

Self-Insured,

Insurer-Relator.

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STATEMENT OF THE ISSUE¹

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 it 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 uncertainty 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 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 unfavorably 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.

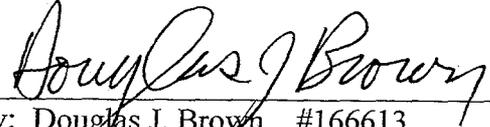
CONCLUSION

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



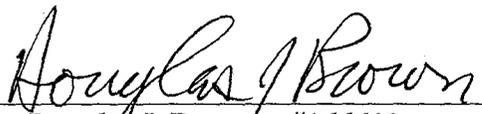
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CERTIFICATION

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.

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