

NO. A11-126

State of Minnesota
In Supreme Court

George E. Frandsen,

Employee-Respondent,

vs.

Ford Motor Company, Self-Insured,

Employer-Relator.

**BRIEF OF THE AMICUS CURIAE
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LEGAL ISSUE¹

DID THE WORKERS' COMPENSATION COURT OF APPEALS ERR AS A MATTER OF LAW IN DETERMINING THAT RELATOR CONSTRUCTIVELY WAIVED THE RETIREMENT DEFENSE PROVIDED FOR IN MINN. STAT. §176.101, SUBD. 4, WHEN SAID DEFENSE WAS NOT RESERVED IN THE STIPULATION FOR SETTLEMENT?

The Workers' Compensation Court of Appeals determined that the language in the parties' stipulation for settlement was silent with regard to the retirement defense and concluded, therefore, that the defense had been waived and the Relator could not presumptively discontinue permanent total disability benefits.

¹ Pursuant to Minn. R. Civ. App. P. 129.03, Minnesota Association for Justice (MAJ) states that no person or entity other than MAJ has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae Minnesota Association for Justice adopts the Statement of the Case and Statement of Facts of Employee-Respondent George E. Frandsen.

ARGUMENT

I. Standard of Review.

If a contract is unambiguous, interpretation of the contract is a question of law. City of Va. v. Northland Office Props., Ltd. P'ship, 465 N.W.2d 424, 427 (Minn. App. 1991), *review denied* (Minn. Apr. 18, 1991). Contract language is given its plain and ordinary meaning. Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 394 (Minn. 1998). Interpretation of a contract is a question of law that is reviewed *de novo*. Dohney v. Allstate Ins. Co., 632 N.W.2d 598, 600 (Minn. 2001).

Statutory interpretation is likewise a question of law, which this Court reviews *de novo*. Nelson v. American Family Ins. Group, 651 N.W.2d 499, 503 (Minn. 2002).

II. Stipulations for settlement are contractual in nature and must be interpreted based upon the plain language of the agreement.

Stipulations between settling parties are accorded the sanctity of binding contracts. Shirk v. Shirk, 561 N.W.2d 519, 521 (Minn. 1997). Therefore, as with all contracts, the language in a stipulation must be given its plain meaning. In a stipulation formed under the Workers' Compensation Act wherein an employee is deemed permanently totally disabled², the parties have agreed that wage loss benefits will be paid on a permanent ongoing basis. It follows that the contingencies which would result in the

² A person is totally disabled if his physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income. Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 83, 153 N.W.2d 130, 133-34, 24 W.C.D. 290, 295 (1967).

cessation of benefits are also subject to the negotiation of the parties and that the stipulation will encompass the parties' mutual agreement in that regard.

The Minnesota Workers' Compensation Court of Appeals has indicated that in all cases brought before it upon a petition to discontinue or petition to vacate³, the language of a stipulation provides precise guidance in determining whether permanent total disability benefits can be discontinued. In Ramsey v. Frigidaire Co. Freezer Prods., 58 W.C.D. 411 (W.C.C.A. 1998), it was held that the Workers' Compensation Court of Appeals may consider petitions to discontinue permanent total disability benefits if the stipulation for settlement contains language demonstrating the parties intended benefits would continue only so long as the employee remained permanently and totally disabled. *See also* Haberle v. Erickson Mills, Inc., 58 W.C.D. 487 (W.C.C.A. 1998).

In the case of Follese v. Eastern Airlines, 62 W.C.D. 648 (W.C.C.A. 2002) summarily aff'd. (Minn. Nov. 4, 2002), the employer/insurer and the employee had entered into a stipulation that settled the employee's claim for permanent total disability benefits on a full and final basis. The stipulation provided that the employee would receive payments for a period certain. Following the filing of an Award on Stipulation the insurer purchased an annuity that made payments to the employee consistent with the settlement agreement. Many years later, the employer/insurer discovered that the employee had been employed and a rehabilitation consultant was retained who opined that the employee was capable of sustained gainful employment. The employer/insurer then sought to vacate the award on stipulation and, accordingly, discontinue permanent

³ An employer/insurer must file with the W.C.C.A. a Petition to Discontinue or Petition to Vacate when it seeks to discontinue permanent total disability benefits. *See* Campbell v. Independent Sch. Dist. #191, slip op. (W.C.C.A. March 15, 2001).

total disability benefits. The Court found that the settlement agreement contained no language stating that payments were contingent on the employee remaining permanent and totally disabled. The petition to vacate was denied. While the case did not turn specifically on the inadequate contingency language in the stipulation, it is noteworthy that the court found it pertinent that the parties did not explicitly agree to the contingency. The insurer argued that under the language of the stipulation it was axiomatic that its agreement to pay ongoing permanent total disability benefits assumed that the employee remained permanently and totally disabled. The Court was not persuaded.

The Court of Appeals has made it clear that when interpreting stipulated agreements, pursuant to its own decisions, it is charged with considering not only the contingency language explicitly contained in the contract but also with omissions when determining the obligation of an employer/insurer to pay ongoing permanent total disability benefits. A settlement covers only those claims and rights that are specifically mentioned in the agreement. Johnson v. Tech Group, Inc., 491 N.W.2d 287, 288 (Minn. 1992). At the time the parties' herein stipulated to the terms of their settlement it was well known, as it would be in all such cases, that absent death, the employee would turn 67 years of age on a date certain. By a failure to incorporate the retirement provision of Minn. Stat. §176.101, subd. 4, employer/insurer failed to reserve the right to presumptively terminate benefits on that date and waived that right.

III. When the plain language of the stipulation agreement does not include a reservation of the retirement defense, it is waived.

Prior to 1995, benefits payable under a permanent total disability determination were payable for an indefinite period of time into the future unless and until such time as the case could be reopened upon sufficient cause under Minn. Stat. §176.461. Petter v.

K.W. McKee, Inc., 270 Minn. 362, 373, 133 N.W.2d 638, 645 (1965). By enactment of an amendment in 1995, the following provision was inserted into Minn. Stat. §176.101, subd. 4: “[p]ermanent total disability shall cease at age 67 because the employee is presumed retired from the labor market”. The presumption is rebuttable.

In Ruby v. Mueller Pipelines, 69 W.C.D. 453 (W.C.C.A. 2009), the Workers’ Compensation Court of Appeals was asked to determine whether the employer/insurer had an ongoing obligation to provide permanent total disability benefits when the employee turned 67 years of age, in light of the 1995 statutory amendment. The parties in Ruby had entered into a stipulated settlement. They agreed that the employee “shall be paid permanent total disability benefits pursuant to Minn. Stat. § 176.101, subd. 4”. Based upon the presumptive retirement age, the employer/insurer petitioned the court to discontinue benefits. The court looked to the language of the settlement agreement and concluded that the presumptive retirement provision was incorporated therein and therefore granted the petition.

Subsequent to the Ruby case, the Court was similarly petitioned by the employer/insurer in Tambornino v. Health Risk Management, No. WC10-5045 (W.C.C.A. March 18, 2010) summarily aff’d. (Minn. Aug. 25, 2010). Unlike the parties in Ruby, those in the Tambornino case stipulated that the insurer would “continue to pay to the employee permanent total disability benefits from and after September 30, 2005, as her condition may warrant...” (later interpreted by the Court to refer to her physical condition, not her age). There was no language pertaining to the retirement presumption. When the employee turned 67, the employer/insurer petitioned for a discontinuance of benefits, arguing that since their obligation to pay permanent total disability benefits was

governed by Minn. Stat. §176.101, subd. 4, the presumptive retirement provision of the statute was implicitly incorporated. The Court disagreed. Consistent with previous case law, it looked to the specific language of the settlement agreement and found that the statutory presumption was not incorporated as a contingency upon which a determination would be made regarding the obligation of the insurer/employer to pay ongoing benefits. Based upon this omission, the Court held that the employer/insurer had waived its retirement defense and denied the petition.

It is well settled in Minnesota that a statutory right or defense can be waived. The Supreme Court has defined waiver as a voluntary relinquishment of a known right. Both intent and knowledge, actual or constructive, are essential elements. Intent need not be proved by express declaration or agreement, but may be inferred from acts and conduct not expressly waiving the right. Engstrom v. Farmers & Bankers Life Ins. Co., 230 Minn. 308, 41 N.W.2d 422 (1950).

In Stephenson v. Martin, 259 N.W.2d 467 (Minn. November 4, 1977), the Supreme Court was asked to review a decision by the Workers' Compensation Court of Appeals that denied a petition for reimbursement in connection with a subrogation claim that arose as a result of a third-party claim brought by the employee. Minn. Stat. 176.061, subd. 5 (1967), accorded to employer/insurer the right of subrogation at the time the employee was injured. Prior to resolution of the third-party matter, the employer/insurer and employee executed a stipulation for settlement of the workers' compensation claim. The employer/insurer did not expressly reserve a right to subrogation in that agreement. Upon consideration of employer/insurer's petition for

reimbursement, the Court of Appeals decided that the petitioners had waived their right of subrogation by entering into the stipulation without reserving that right. Id. at 469.

The Supreme Court affirmed the denial of the petition and held that the intention of the employer/insurer to waive their right of subrogation was reasonably inferred from their conduct in assenting to the terms of the stipulation and in failing to make an express reservation of that right. Id. at 471.

In this line of cases, it is clear that the courts assumed that an insurer and/or employer, both likely represented by counsel, would be knowledgeable of their rights and responsibilities under the Workers' Compensation Act. This is a reasonable assumption given the expected risk assessment that would be conducted in the normal course of business. Further, as the Supreme Court stated in Donnay v. Boulware, 275 Minn. 37, 43, 144 N.W.2d 711, 715 (1966)⁴, one "cannot assume that the parties intended to enter into a contract which was unjust or that either party assumed that he would secure an advantage not clearly expressed in its terms". Were the right to presumptively discontinue permanent partial disability benefits not clearly expressed in the contract terms, then the employee would be significantly disadvantaged. In cases where the retirement provision applies, the employer or insurer may discontinue benefits without filing a petition with the Court of Appeals and have no continuing liability for payments. The employee must then litigate his or her entitlement to further benefits. Olson v. 3M Co., No. WC10-5054 (W.C.C.A. June 29, 2010). The employee is therefore at a severe disadvantage both in terms of the time and expense involved in litigation as well as with regard to his or her steady flow of income. Accordingly, it is reasonable to infer that

⁴ As cited in Stephenson, 259 N.W.2d at 471.

employer/insurer herein intended to waive its right to the retirement defense when it chose to omit it from the clearly expressed terms of the agreement so as not to so sorely disadvantage the injured employee.

In the matter before this Court, the issue is identical to that in the Tambornino case which relied upon the holding in Stephenson and its distinction from the Ruby case. The decision by the Court of Appeals is consistent with these cases in its determination that the employer/insurer waived their statutory right to the retirement presumption by failing to make an express reservation of the right. The decision is based upon well-established precedent and should not be disturbed.

IV. The doctrine of stare decisis, while not controlling in this matter, is instructive.

The Tambornino case, cited above, was appealed to the Minnesota Supreme Court for review. Following consideration of the parties' submissions, the Court ordered that the decision of the Workers' Compensation Court of Appeals was affirmed without opinion, citing Hoff v. Kempton, 317 N.W.2d 361, 366 (Minn.1982). Tambornino v. Health Risk Mgmt., 787 N.W.2d 540 (Minn. 2010). In Hoff the Court noted that while summary affirmances have no precedential value in that they do not commit the court to any particular point of view, it does not mean that the case has not been carefully considered. Instances in which summary affirmance is used include instances where only a sufficiency-of-the-evidence question is involved or an application of well-settled law of importance to the parties but of no precedential value. Other instances, certain members of the court may feel that the appeal raises a troublesome legal issue of general interest but that the record on appeal is too confusing or inadequate to present the issue for a considered written opinion. Id. at 366.

In Tambornino, the question of sufficiency-of-the-evidence was not involved. The record on appeal was very straightforward and the issue was focused and well-defined. Arguably, therefore, the summary affirmance was indicative of the court's impression that the issue for review was the application of well-settled law to the facts of that particular case. This notion is supported by the fact that the Stephenson case clearly held that a statutory right was waived when a stipulated agreement did not expressly reserve that right.

Despite the fact that stare decisis is not implicated in connection with Tambornino, the principles underlying the doctrine are instructive. Under those principles, the Supreme Court has stated that it is "extremely reluctant" to overrule precedent unless there is a "compelling reason" to do so. Zutz v. Nelson, 788 N.W.2d 58, 63 (Minn. 2010). The Court has also stated that the doctrine of stare decisis does not require it to give validity to unsound principles but it does direct an adherence to former decisions in that there might be stability in the law. State v. Ross, 732 N.W.2d 274, 280 (Minn. 2007).

In the line of cases subsequent to the 1995 amendment and the Tambornino case, the Minnesota Workers' Compensation Court of Appeals has consistently looked to the contractual language in stipulations to determine whether or not the retirement presumption applied. It has evenly applied the law in its decisions. Where the statutory presumption was incorporated, the employer/insurer was granted leave to discontinue benefits. But in those instances where there was no agreement that benefits could be terminated upon an employee reaching the presumptive retirement age, the Court of

Appeals fairly and reasonably concluded that the retirement defense had been waived.⁵ The body of law that has been created is stable and informative. There is no evidence, anecdotal or otherwise, that would support the notion that an avalanche of litigation will ensue as a consequence of the holdings in Tambornino and subsequent cases. There is no compelling reason to sacrifice the stability of the legal landscape or to abandon the current law on this issue.

V. The retirement presumption provision of Minn. Stat. 176.101, subd. 4 should be treated as an affirmative defense.

Minn. R. of Civ. P. 8.03 provides that a matter constituting avoidance is an affirmative defense that must be set forth affirmatively in a pleading to a preceding pleading or it is waived. The Supreme Court adopted the criteria for identifying an affirmative defense, those being surprise and fairness. Snyder v. City of Minneapolis, 441 N.W.2d 781, 788 (Minn. 1989). The rule, while not controlling in administrative proceedings provides necessary guidance in this matter. The retirement provision in Minn. Stat. §176.101, subd. 4, when applicable, entitles the employer/insurer to presumptively discontinue permanent total disability payments without notice to the employee. This clearly constitutes an avoidance of the employee's ongoing claim for benefits. Surprise and fairness mandate that the employee be on notice of this eventuality and therefore it is imperative that when entering into a stipulation for settlement, the retirement provision be affirmatively addressed by the employer/insurer. The

⁵See; Kanieski v. Ferche Millwork, Inc., No. WC10-5153 (W.C.C.A. November 9, 2010); Finn v. Homecrest Indus., Inc., No. WC10-5157 (W.C.C.A. October 14, 2010); Campeau v. National Purity, Inc., No. WC10-5080 (W.C.C.A. July 20, 2010); Bescheinen v. Independent Sch. Dist. #181, No. WC10-5078 (W.C.C.A. July 15, 2010). (*All held that the retirement provision was incorporated into the stipulation and petitions to discontinue were granted.*) Compare to Tambornino, No. WC10-5045, and Frandsen herein.

consequences to the employee of inferring a term into a stipulation that results in the cessation of benefits, without prior notice, are far more significant than those the employer/insurer may suffer. A waiver of the provision does not leave the employer/insurer without a remedy. *See Campbell* (W.C.C.A. March 15, 2001) at 3. A petition for discontinuance would still allow the matter to be brought before the Court for determination. The presumption would simply be negated and the parties would each be charged to prove their case based upon substantial evidence. Treating the retirement provision as an affirmative defense would balance the equities between the parties.

VI. Public policy considerations do not compel a reversal of the Workers' Compensation Court of Appeals decision in this matter.

In the *Stephenson* case, the Supreme Court noted that except as limited by public policy, a person may waive a statutory right. *Stephenson*, 259 N.W.2d at 470. The Minnesota Court of Appeals has determined in the present case that the employer/insurer waived the right to presumptively discontinue permanent total disability benefits. There are no policy implications that compel a reversal of that decision. In fact, it buttresses the generally accepted principle that parties to a contract should get the benefit of their bargain. When a party neglects to assert a known right in the course of settlement negotiations, then the opposing party should not bear the harsh consequences of this failure to bargain.

As a matter of public policy and judicial economy, stipulations in workers' compensation cases are to be encouraged. *Maurer v. Braun's Locker Plant*, 298 N.W.2d 439 (Minn. 1980). The Supreme Court has stated that "[t]he important concern is that the effect of the stipulation did not lessen the employee's compensation as prescribed by the Workers' Compensation Act and did not require employee to do anything inconsistent

with the purposes of the act.” Robinson v. Minnesota Valley Improvement Co., 401 N.W.2d 68, 72 (Minn. 1987), *citing* Ruehmann v. Consumers’ Ice Fuel Co., Inc., 192 Minn. 596, 257 N.W. 501 (1934). The decision in Frandsen, if upheld, will not discourage settlements. Rather, along with the Tambornino case and the line of cases that followed, it simply will remind the drafters of contractual agreements of the importance the courts place on clear, unambiguous and express language with which to efficiently, fairly and reasonably interpret settlement agreements.

CONCLUSION

The Stipulation for Settlement in this matter set out the terms of the agreement between the parties. Based upon the plain language of the contract, the Court of Appeals held that the employer/insurer waived the retirement provision of Minn. Stat. §176.101, subd. 4, by failing to incorporate the provision into the agreement or otherwise reserving the right to presumptively discontinue benefits. The holding is consistent with existing law. There is nothing unique in the facts of this case that would distinguish it from Stephenson or Tambornino. The holding does not unduly prejudice the employer/insurer and is not antithetical to sound public policy.

Accordingly, Minnesota Association for Justice respectfully requests that the Court of Appeals decision be affirmed.

Dated: 3-23-11



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CERTIFICATE OF BRIEF LENGTH

I HEREBY CERTIFY that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd.3(c). The brief was prepared using Microsoft Word 2002, which reports that the brief contains 3,172 words.

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