

NO. A11-126

State of Minnesota
In Supreme Court

George E. Frandsen,

Employee-Respondent,

v.

Ford Motor Company, Self-Insured,

Employer-Relator.

BRIEF AND APPENDIX OF EMPLOYEE-RESPONDENT

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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Legal Issues

- I. For dates of injury occurring after 1995, Minnesota Statute Section 176.101, Subd. 4, provides that payment of permanent total disability shall cease at age 67 because at that age, an employee is presumed retired from the labor market. This presumption is known as the retirement defense. It is rebuttable. Did the Workers' Compensation Court of Appeals properly determine that this defense can be waived?**

The lower court held: The Workers' Compensation Court of Appeals determined that in certain circumstances the retirement defense can be waived.

- II. The employer agreed that the employee was permanently and totally disabled as a result of his 2004 work injury. The Stipulation memorializing that agreement does not include language preserving the retirement defense. It also does not contain an express general reservation of rights and defenses available under Minnesota law. As such, did the Workers' Compensation Court of Appeals correctly determine the employer waived the retirement defense?**

The lower court held: The Workers' Compensation Court of Appeals determined the employer waived the retirement defense because it assented to payment of ongoing permanent total disability benefits without mention of the retirement defense.

Statement of the Case

On November 3, 2004, George Frandsen sustained an injury arising out of and in the course and scope of his employment with Ford Motor Company. (A.7). On that date, the employer was self-insured for workers' compensation liability. (A.8). The employer admitted the injury and paid various workers' compensation benefits. (Id.).

The parties later stipulated that Mr. Frandsen was permanently and totally disabled effective November 3, 2004, as a result of his work injury. (A.9). Per this Stipulation, Mr. Frandsen was paid ongoing permanent total disability benefits, subject to reduction because of his simultaneous receipt of Social Security disability insurance benefits ("SSDI"). (Id.). The Stipulation was approved by virtue of an award served and filed April 30, 2007. (A.5-6).

The Stipulation regarding permanent total disability status is 6 pages long. (A.7-12). The Stipulation details the agreements of the parties including calculations regarding application of the SSDI offset to benefits previously paid as well as to those payable in the future. (A.9-10). The Stipulation further states as follows:

1. The parties agree that the employee is, and has been, permanently and totally disabled from and after the November 3, 2004 work injury.
2. The parties agree that all benefits payable to the employee from and after the date of injury shall be reclassified as permanent and total disability benefits.

3. The parties agree that as of March 26, 2007 the self-insured employer will offset the permanent total disability benefits payable to the employee by the amount of his Social Security disability benefits. The amount payable to the employee on that date will be \$262.15, less \$52.43 to be applied to the over-payment, for a net payment to the employee of \$209.72 per week. The employee's permanent total disability payment will be adjusted annually on his date of injury, and annually when his Social Security benefit is increased. (A.9-10).

The Stipulation nowhere mentions the retirement defense. (A.7-12). Further, there is no language conditioning payment of ongoing permanent total disability benefits to Minnesota Statute Section 176.101, Subd. 4. (A.7-12). Moreover, the Stipulation does not contain the paragraph in which the relators generally reserve all rights and defenses to future claims that could be asserted by Mr. Frandsen. (Id.).

When Mr. Frandsen turned 67, the relators filed a Petition to Allow Discontinuance of his permanent total disability benefits. (A.1-3). In that Petition, the relators asserted the right to discontinue Mr. Frandsen's permanent total disability benefits pursuant to the retirement presumption set forth in Minnesota

Statute Section 176.101, Subd. 4. (A.2). Mr. Frandsen disputed this discontinuance. He filed an Objection to the Petition to Allow Discontinuance, alleging that he was entitled to ongoing permanent total disability. (A.13). The Workers' Compensation Court of Appeals agreed with Mr. Frandsen and denied the relators' Petition to Discontinue. (A.14-17). This appeal followed.

Statement of Facts

Mr. Frandsen was born on February 10, 1943, making him 65 years old at the time of the Stipulation for Settlement. As a result of his work-related injury he underwent a significant amount of medical treatment, including several lumbar surgeries and was not able to return to work following that injury.

On September 10, 2010, at which time Mr. Frandsen was 67 years old, Ford Motor Company filed a Petition to Allow Discontinuance of permanent total disability benefits. (A.1). Mr. Frandsen filed an Objection to the Petition to Allow Discontinuance, alleging that he was entitled to ongoing permanent total disability benefits. (A.13).

Standard of Review

The interpretation of contractual language is an issue of law for the court to decide. Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346 (Minn. 2003). In reviewing questions of law, this court is free to exercise its independent judgment. See Morrisette v. Harrison Int'l Corp., 486 N.W.2d 424, 426 (Minn. 1992). On appeal this court must view the facts in the light most favorable to the findings of the WCCA; however, this court may disturb these findings if “consideration of the evidence and inferences permissible therefrom requires reasonable minds to adopt a contrary conclusion”. Schnurrer v. Hoerner-Waldorf, 345 N.W.2d 230 (Minn. 1984).

Argument

- I. **For dates of injury occurring after 1995, Minnesota Statutes Section 176.101, Subd. 4, provides that payment of permanent total disability benefits shall cease at age 67 because at that age, an employee is presumed retired from the labor market. This presumption is known as the retirement defense. It is rebuttable. The Workers' Compensation Court of Appeals properly determined that this defense can be waived.**

On appeal, relators argue the retirement defense cannot be waived.

(Relator's Brief, pages 7-8). In doing so, they cite no supporting law for the position that a rebuttable presumption can never be waived.¹

¹ Minn. Stat. § 176.101, Subd. 4, 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.12).

The relator cites no case law because there is no case law in support of their position. Rather, as the Workers' Compensation Court of Appeals correctly determined, like all rights and defenses available under the Minnesota workers' compensation law, **the retirement defense can be waived.**

Waiver is defined as the voluntary and intentional relinquishment of a known right. See Har-Mar, Inc. V. Thorsen & Thorshov, Inc., 300 Minn. 149, 156-57, 218 N.W.2d 751, 756 (1974). Moreover, except as limited by public policy, an entity may waive a statutory right. See Stephenson v. Martin, 259 N.W.2d 467, 470 (Minn. 1977).

Neither case law nor statute suggest that public policy prohibits waiver of the retirement defense in a Stipulation. To the contrary, Stipulations in workers' compensation cases are to be encouraged. See Mauer v. Brown's Locker Plant, 298 N.W.2d 439 (Minn. 1980). Moreover, the defense itself can be rebutted by an employee at hearing through submission of appropriate evidence. See Minn. Stat. Sec. § 176.101, Subd. 4 (1997). (A.12). It follows that if the presumption can be rebutted, then it can also be waived.

Further support that the retirement presumption can be waived, is found in Robinson v. Minnesota Valley Improvement Co., 401 N.W.2d 68 (Minn. 1987). There, this court addressed a waiver of the 350-week cap in existence for an employee's 1961 work injury. Id. at 70. A review of the 1983 Stipulation led this court to conclude the employer and insurer had waived the 350-week limit

regarding payment of temporary disability benefits. Id. At 72-73.

Simply put, if an employer and insurer could waive an absolute cap on payment of temporary disability benefits (i.e. 350-weeks for a 1961 injury), then it follows that an employer and insurer could also waive the retirement defense for a post-1995 work injury. The rebuttable nature of the retirement defense further supports this conclusion. See Minn. Stat. § 176.101, Subd. 4 (1997). (A-12). As such, the WCCA properly determined that in the appropriate circumstance, the retirement defense can be waived.

II. The employer agreed that the employee was permanently and totally disabled as a result of his 2004 work injury. The Stipulation memorializing that agreement does not include language preserving the retirement defense. It also does not contain an express general reservation of rights and defenses available under Minnesota law. As such, the Workers' Compensation Court of Appeals correctly determined the employer waived the retirement defense.

The employer agreed Mr. Frandsen is permanently and totally disabled as a result of a 2004 work injury. (A.9). The Stipulation memorializing that agreement does not include language preserving a retirement defense. (A.7-12). It also does not contain an express general reservation of rights and defenses available under Minnesota law by the relators. (Id.). Furthermore, it nowhere mentions Mr. Frandsen's age. (Id.). As such, the WCCA correctly determined the relators waived the retirement defense. (A.17).

In its decision, the WCCA observed that proof of waiver requires evidence relators possessed knowledge about the retirement defense and intended to waive

that right. See Stephenson, 259 N.W.2d at 470. Based upon the agreement set forth in the Stipulation, Mr. Frandsen proved both elements. The WCCA recognized this proof. (A.16). Thus, it properly denied the Petition to Discontinue. (Id.).

According to this court, knowledge, in the context of waiver, may be actual or constructive and the intention can be inferred from conduct. See Stephenson, 259 N.W.2d at 470. There, this court observed the employer and insurer possessed actual knowledge of their statutory right of subrogation but entered into an unambiguous settlement in which they agreed to make specified payments in full, final and complete settlement of the employee's claims. Id. at 470-471. This court went on to state that the employer and insurer "did not expressly reserve a right to claim subrogation in the Stipulation, and it is obvious that if they can now assert that right against employee's third-party recovery, the parties' expressed intent with respect to the payments specified in the Stipulation and Ordered by the award thereon will be defeated". Id. at 471.

As such, this court concluded the intention to waive their right of subrogation could reasonably be inferred from the employer and insurer's conduct in assenting to the terms of the Stipulation. (Id.). Simply put, failure to expressly reserve the right of subrogation constituted waiver. The waiver analysis in Stephenson controls this case. 259 N.W.2d at 470. Here, the relators had actual knowledge of the statutory provision creating the retirement defense; namely, Minn. Stat. Sec. 176.101, Subd. 4 (1997). (A.12). They acknowledged this provision at

paragraph VII (2) of the Stipulation. (A.9). Thus, the first part of the waiver test is satisfied.

As in Stephenson, here the WCCA properly inferred satisfaction of the second prong of the waiver test based upon the relator's conduct in assenting to the terms of the Stipulation. To begin with, the Stipulation does not contain any language preserving the retirement defense. (A.7-12). The Stipulation also does not indicate that payment of ongoing permanent total disability benefits will be made in accordance with the governing statute; rather, the Stipulation provides that Mr. Frandsen is, and has been, permanently and totally disabled from and after the November 3, 2004 work injury subject to the SSDI offset. (A.9-10).

Simply put, relators preserved their statutory right to offset Mr. Frandsen's SSDI benefits but waived the retirement defense. Furthermore, it cannot be argued that some other portion of the Stipulation preserved the retirement defense because the Stipulation lacks any sort of general language preserving relators' right and defenses available under Minnesota law. (A.7-12).

A case almost identical to the case at bar was analyzed by the Workers' Compensation Court of Appeals and summarily affirmed by the Minnesota Supreme Court on August 25, 2010. See Tambornino v. Health Risk Management, No. WC10-5045 (W.C.C.A. Mar. 18, 2010), summarily aff'd (Minn. Aug. 25, 2010). In Tambornino, the settlement document provided that the employer and insurer would pay permanent total disability benefits to the employee as her

condition may warrant. The Stipulation did not preserve the retirement defense, did not reserve the employer's rights and defenses under the workers' compensation law and made no mention of the employee's age. The employer thereafter sought to discontinue permanent total benefits based upon the age 67 retirement presumption of Minn. Stat. Sec. 176.101, Subd. 4. The parties did not specifically incorporate into the settlement agreement the provisions of Minn. Stat. Sec. 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, 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 by which it can reasonably be concluded that the parties intended that permanent total disability benefits should cease when Mr. Frandsen reached 67 years of age. The parties did not incorporate into the settlement agreement the presumptive retirement provision of Minn. Stat. Sec. 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).

Conclusion

The Stipulation for Settlement in this case represented an unambiguous agreement finding Mr. Frandsen to be permanently totally disabled with no express reservation of the retirement defense. Ford Motor Company assented to the terms. In doing so, they failed to preserve a known defense; namely, the rebuttal presumption that permanent total disability benefits end at age 67. As such, they waived that defense. For these reasons, the employee-respondent respectfully requests the Minnesota Supreme Court to affirm the December 22, 2010 decision of the Workers' Compensation Court of Appeals in all respects.

DATED: 3/8, 2011.

Respectfully submitted,

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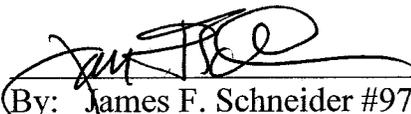
Certificate of Brief Length

I HEREBY CERTIFY that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subds. 1 and 3, for a Brief produced with a proportional font. The length of this Brief is 251 lines and approximately 2,400 words. This Brief was prepared using WordPerfect 2010.

A copy of this Certificate has been served with the Brief on the court and upon all parties.

DATED: 3/8, 2011.

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