

NO. A11-126

State of Minnesota
In Supreme Court

George E. Frandsen,

Employee-Respondent,

v.

Ford Motor Company, Self-Insured,

Employer-Relator.

RELATOR'S BRIEF AND APPENDIX

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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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STATEMENT OF THE ISSUE

I. WHETHER THE WORKERS' COMPENSATION COURT OF APPEALS ERRED, AS A MATTER OF LAW, IN HOLDING THAT RELATORS WAIVED THEIR STATUTORY RIGHT TO DISCONTINUE BENEFITS AT AGE 67.

The Workers' Compensation Court of Appeals held that Relator waived its statutory right to discontinue permanent total disability benefits at age 67, even though waiver had not been plead or established, and despite the plain language of Minn.Stat. 176.101 Subd. 4 and the Stipulation for Settlement.

STATEMENT OF THE CASE

This case arises from a work related injury sustained by George Frandsen, Employee-Respondent ("Employee"), on November 3, 2004 while working for Ford Motor Company, Employer-Relator ("Relator").

The parties agreed that Employee is permanently and totally disabled as a result of his work injury and entered into a Stipulation for Settlement, which stipulated, in part, that the Employee was permanently and totally disabled as of the date of injury. Other issues addressed include the Employee's need for surgery, resulting permanency rating, and Ford's to-date overpayment. (A-7) The Stipulation for Settlement was approved by a Compensation Judge at the Office of Administrative Hearings and an Award on Stipulation was issued on April 30, 2007.(A-5)

Relator filed a Petition to Allow Discontinuance with the Workers' Compensation Court of Appeals on September 20, 2010 seeking to discontinue permanent total disability benefits on the grounds that Employee was 67 years old and was statutorily presumed retired pursuant to Minn.Stat. 176.101 subd. 4 and therefore no longer entitled to permanent total disability benefits.¹ (A-1) The Employee filed an Objection, simply alleging that he was entitled to ongoing permanent total disability benefits. (A-13)

¹ Minn. Stat. 176.238 provides procedures for discontinuing compensation benefits. Minn. Stat. 176.239 provides procedures for parties to obtain an expedited interim administrative decision in dispute over discontinuance of compensation benefits. Both statutes, however, contain a subdivision that states, "This section shall not apply to those employees who have been adjudicated permanently and totally disabled, or to those employees who have been administratively determined pursuant to division rules to be permanently and totally disabled." Minn. Stat. 176.238 subd. 11 and 176.239 subd. 10. In Cook v. J. Mark, Inc., 51 WCD 432 (WCCA 1994) the WCCA held that an award on stipulation constitutes an "adjudication" within the meaning of Minn. Stat.

On December 22, 2010 Judge Thomas L. Johnson of the Workers' Compensation Court of Appeals ("WCCA") issued a decision denying Relator's request to discontinue permanent total disability benefits on the basis that the statutory mandate to discontinue permanent total disability benefits at age 67 had been waived by Relator, since it had not been specifically reserved in the April 30, 2007 Stipulation for Settlement. (A-14)

Thereafter, Relator sought Writ of Certiorari for review by the Minnesota Supreme Court.

176.238 subd. 11. Those two statutes, therefore, are inapplicable for the purpose of discontinuing permanent total disability benefits to an employee who is receiving those benefits pursuant to an Award on Stipulation. In Ramsey v. Frigidaire Co. Freezer Prods., 58 WCD 411 (WCCA 1998) the WCCA established a procedure to discontinue permanent total disability benefits, holding that an employer and insurer may file a petition to discontinue with the WCCA. Pursuant to Ramsey, Relators filed a Petition to Allow Discontinuance with the WCCA in the case at hand.

STATEMENT OF THE FACTS

The Employee sustained an injury to his lumbar spine that arose out of and in the course and scope his employment with Ford Motor Company on November 3, 2004. He underwent a significant amount of medical treatment, including several lumbar surgeries, and was not able to return to work following that injury. Relator accepted liability for the injury and made payment of medical, vocational rehabilitation and temporary total disability benefits pursuant to the Minnesota Workers Compensation Act, Chapter 176.

The Employee was declared disabled by the Social Security Administration as of November 3, 2004 and began receiving Social Security Disability Income ("SSDI") as of August 1, 2005. As such, from August 1, 2005 through March 25, 2007, the Employee was receiving both workers' compensation temporary total disability benefits and SSDI. Minn. Stat. 176.101 subdv. 4(a) provides for an offset of SSDI benefits after an employer and insurer have paid \$25,000 in permanent total disability benefits.

In order to address the growing overpayment to the employee, and to address other issues pending at the time, the parties entered into a Stipulation for Settlement in April of 2007 which provided:

- a) That the employee was permanently and totally disabled since the date of injury;
- b) That the surgery being recommended by the employee's physician was reasonable and necessary;
- c) The extent of the employee's permanent partial disability following surgery;

- d) The date in which the Relator had paid \$25,000 in permanent total disability benefits;
- e) That wage loss benefits paid to date would be reclassified as permanent total disability benefits;
- f) How the Relator's overpayment in light of the SSDI offset would be recouped.

(A-7). The Stipulation for Settlement did not address the Employee's entitlement to future permanent total disability benefits, other than to state that such benefit would be adjusted annually on his date of injury and annually when his SSDI was adjusted.

There was no explicit waiver of any defense, statutory or otherwise, that Relator may have to future permanent total disability benefits, nor was there any explicit guarantee of such benefits. The only explicit waivers in the Stipulation were the employee's waiver of attorney fees pursuant to Minn. Stat. 176.081 subdivision 7, waiver of any claims for penalties or interest, and waiver of the 10 day period in which to object to attorney fees.

(A-10,11). The Stipulation for Settlement was approved by a Compensation Judge at the Office of Administrative Hearings and an Award on Stipulation was issued on April 30, 2007. (A-5).

The Employee was born on February 10, 1943, making him 64 years old at the time of the Stipulation for Settlement. On September 10, 2010, at which time the Employee was 67, Ford filed a Petition to Allow Discontinuance of Permanent Total Disability Benefits (A-1) with the WCCA seeking to discontinue permanent total disability benefits based on the retirement presumption set forth in Minn. Stat. 176.101 subdv. 4, which provides:

Subd. 4. **Permanent total disability.** For permanent total disability ... This compensation shall be paid during the permanent total disability of the injured employee but after a total of \$25,000 of weekly compensation has been paid, the amount of the weekly compensation benefits being paid by the employer shall be reduced by the amount of any disability benefits being paid by any government disability benefit program if the disability benefits are occasioned by the same injury or injuries which give rise to payments under this subdivision. This reduction shall also apply to any old age and survivor insurance benefits. ... **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.

(emphasis added). The Employee filed an Objection to the Petition to Allow Discontinuance stating only "The employee alleges that he is entitled to ongoing permanent total disability benefits". (A-13). There was no contention by the Employee that the statutory defense had been waived, nor was there any evidence presented to rebut the retirement presumption. In a decision issued December 22, 2010, the WCCA denied Relator's Petition to Allow Discontinuance on the basis that the statutory retirement presumption had been waived since it had not been expressly reserved in the Stipulation. (A-14).

STANDARD OF REVIEW

This appeal involves only questions of law. When reviewing questions of law determined by the Workers' Compensation Court of Appeals, this Court is free to exercise its independent judgment. Bruns v. City of St. Paul, 555 N.W.2d 522 (Minn. 1996).

ARGUMENT

I. THE WORKERS' COMPENSATION COURT OF APPEALS ERRED, AS A MATTER OF LAW, IN HOLDING THAT THE RELATORS WAIVED THEIR STATUTORY RIGHT TO DISCONTINUE BENEFITS.

The plain language of Minn.Stat.176.101 subdv. 4 provides that permanent total disability benefits "shall cease at age 67 because an employee is presumed retired from the labor market." In this case the WCCA held that the statutory presumption did not apply, as it had been waived by Relator in a Stipulation for Settlement that did not address the statutory presumption. That holding is contrary to the plain language of the statute, contrary to the intent of the Workers' Compensation Act, and contrary to contract interpretation principles. The statute further provides that the employee has the burden of rebutting the presumption. The WCCA's holding improperly removes the employee's evidentiary burden.

The Relator's statutory right to discontinue the Employee's permanent total disability benefits was not waived, either explicitly or implicitly, by the 2007 Stipulation for Settlement. The statutory right to discontinue benefits is mandatory and cannot be waived by not being expressly reserved. The Stipulation for Settlement does not in any way address, contemplate or waive the statutory mandate. In fact, it provides no

indication that benefits beyond age 67 were claimed, denied or addressed in any fashion in the Stipulation. The WCCA's finding to the contrary subverts the intent of the Workers' Compensation Act; undermines the statutory presumption, and ignores and supplants the plain meaning of the Stipulation for Settlement at issue.

The WCCA has concluded, in this case and in Tambornino v. Health Risk Management WC10-5045 (WCCA March 18, 2010) and in Ruby v. Mueller Pipelines, WC09-182, WC09-187 (WCCA Nov. 25, 2009) that parties need to specifically incorporate into the settlement agreement the provisions of Minn. Stat. 176.101 subd. 4 in order to reserve the retirement presumption. That conclusion, however, is contrary to the purpose of the Workers' Compensation Act, and contrary to established law regarding waiver and contracts.

A. The WCCA's holding is contrary to the Workers' Compensation Act, which is to be interpreted and applied even handedly.

Minn. Stat. 176.001 provides:

The intent of the Legislature. It is the intent of the legislature that chapter 176 be interpreted so as to assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. It is the specific intent of the legislature that workers' compensation cases shall be decided on their merits and that the common law rule of "liberal construction" based on the supposed "remedial" basis of workers' compensation legislation shall not apply in such cases. The workers' compensation system in Minnesota is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Employees' rights to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited by the provisions of this chapter, and employers' rights to raise common law defenses such as lack of negligence, contributory negligence on the part of the employee, and others, are curtailed as well. **Accordingly, the legislature hereby declares that the 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.**

(emphasis added). The Workers' Compensation Act provides a statutory platform from which it can be determined who must have workers' compensation insurance, who is an employee, what is considered to be a work injury, and what and how benefits are to be paid for work related injuries. The purpose of the Workers' Compensation Act is to ensure that injured workers' receive payment of workers' compensation benefits and related services in an expeditious manner. The Act is to be construed even handedly.

All workers' compensation benefits that are paid in Minnesota are paid pursuant to the Minnesota Workers' Compensation Act. Often times, parties in denied or otherwise litigated claims are able to resolve all or part of their differences. Their agreements are memorialized in Stipulations for Settlement, which need to be signed by all parties and approved by a Compensation Judge with the Office of Administrative Hearings. A Compensation Judge cannot approve a Stipulation for Settlement unless it is in conformity with the Workers' Compensation Act. Some Stipulations for Settlement address ALL of the parties' claims and defenses, and are referred to as "full, final and complete" settlements. Other settlements deal with only portions of the parties' claims and defenses, and referred to as "to date" or partial settlements.

The Workers' Compensation Act is extensive. Even if a Stipulation for Settlement resolves parties' disputes, it does so with the Workers' Compensation Act as a back drop. In other words, in a case like the one at hand, a Stipulation for Settlement allows the parties to address and clean up pressing issues on a to date basis, but does not supplant or replace the entire Workers' Compensation Act. Of course benefits agreed upon and set forth in a Stipulation for Settlement need to be paid pursuant to the

Award on Stipulation, but future benefits are to be paid pursuant to the Workers' Compensation Act.

The purpose of a to-date Stipulation for Settlement is not to contemplate or address future claims and defenses. Instead, the purpose of a to date agreement is to resolve issues regarding past and current issues. To date settlements are much like Findings and Orders issued by Compensation Judges, in that they only address issues that are ripe and actually before them. Just as a Compensation Judge cannot hear or determine an issue that is not mature or not raised, a to date Stipulation for Settlement also does not address (in general) future rights, claims or defenses of the parties. If a to date Stipulation for Settlement does not expressly provide for how or when a future benefit not addressed in the Stipulation will be paid, the parties look to the Workers' Compensation Act for instruction.

In the Stipulation for Settlement at hand, the parties did not address future entitlement to permanent total disability benefits. The employee did not expressly reserve his claim, and Relator did not expressly reserve their statutory defenses. To find that the Relator's failure to expressly reserve the defense results in a waiver of a statutory right is not an even-handed application of the law. An even handed application would also require an employee to expressly reserve future claims, which he did not. It also ignores the fact that the Workers' Compensation Act provides the statutory guideline for payments of benefits that are not closed out or addressed in a Stipulation.

As noted above, many Stipulations for Settlement are "to date" settlements, cleaning up claims through a specific date, such as the date of the Award. A typical

scenario for such a to-date settlement is a claim where an employee is not working and not receiving wage loss benefits because a claim has been denied. An employer and insurer will then have the employee evaluated by an independent medical examiner and determine that there is in fact liability for the injury. The parties would then enter into an agreement whereby past benefits would be paid (perhaps at a compromise), and the employer and insurer would agree to commence payment of current benefits. Again, this is a typical situation. It is also typical that the Stipulation for Settlement signed by the parties and approved by a Compensation Judge would deal only with the past and current claims and defenses, and that it would not contemplate or attempt to control future claims and defenses. In such a case, there would eventually be a reason for and an attempt to discontinue wage loss benefits subsequent to the Award. ANY reason for discontinuance of benefits would be statutory.² Under the WCCA's decision in this case, the employer and insurer would be deemed to have waived their statutory defenses to payment of benefits, and employees would be paid wage loss benefits in perpetuity. This is only one scenario that would be likely if the WCCA's decision in this case were to stand. Clearly, it was not the intention of the Workers' Compensation Act, which is to be interpreted and applied even handedly, to have infinite liability for wage loss benefits in cases where inchoate statutory defenses are not expressly reserved in a to date settlement agreement.

² Minn.Stat.176.101 subd. 1 sets forth the statutory basis for discontinuing temporary total disability benefits.

B. The statutory provision to discontinue permanent total disability benefits at age 67 is mandatory and cannot be waived simply by not expressly reserving.

Minn. Stat. 176.101 subd. 4 provides:

Permanent total disability. . . .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.

(emphasis added). The statutory language is mandatory, stating that permanent total benefits *shall* cease at age 67. A court must construe the words of a statute according to their plain meaning. River Valley Truck Ctr. Inc v. Interstate Cos. 704 N.W.2d 154, 161 (Minn. 2005). With respect to the subdivision at issue, the legislature made plain its intention to presume retirement at age 67 by using the words “permanent total disability benefits shall cease at age 67....”. The decision of the WCCA, which in effect makes this statute inapplicable to the parties, is contrary to the plain language and intent of that statute. There are no words in 176.101 subdv. 4, or in the Workers’ Compensation Act, which convey that Relator must specifically invoke or expressly reserve the retirement presumption or any other statutory right, benefit or defense. It was error for the WCCA to read that requirement into the statute.

Under Minnesota Law, waiver is defined as “the intentional relinquishment of a known right”. Valspar Refinish, Inc. v. Gaylords, Inc., 764 N.W.2d 359, 67 (2009).; quoting Carlson v. Doran, 252 Minn. 449, 456, 90 N.W.2d 323, 328 (1958). Put another way, waiver “is the expression of an intention not to insist on what the law affords.” Carlson, 90 N.W.2d at 328. A statutory defense or right cannot be waived unwittingly.

While both knowledge and intention are essential elements, the knowledge may be actual or constructive and the intention inferred from the conduct. Stephenson v. Martin, 259 N.W. 2d (Minn. 1977), citing Carlson v. Doran, 252 Minn. 449, 456, 90 N.W. 2d 323, 328 (1958). It is also established that, except as limited by public policy, a party may waive a statutory right. Stephenson p.470. In this case, there was no knowledge or intention on behalf of Relator to relinquish or waive its statutory right pursuant to Minn. Stat. 176.101 subd. 4 to discontinue permanent total disability benefits at age 67.

A necessary element of waiver is the intentional relinquishment of a known right. Masden v. Travelers' Ins. Co., 8 Cir., 52 F.2d 75, 76, 79 A.L.R. 469; Liggett & Myers Tobacco Co. v. DeParcq, 8 Cir., 66 F.2d 678, 686. While waiver may be implied by acts or a course of conduct from which an intention to waive may reasonably be inferred, such intention is a question of fact, Masden v. Travelers' Ins. Co., *supra*, 52 F.2d page 76 with the burden of proof upon the party alleging waiver, Masden, 52 F.2d page 76, and doubtful situations will not support waiver, 56 Am.Jur.p. 118, 17.

The WCCA erroneously inferred a waiver of the statutory right, but did not support the inference with evidence of Relator's intent. A party alleging waiver must provide evidence that the party that is alleged to have waived the right possessed both the knowledge of the right in question and the intent to waive that right. Ill. Farmers Ins. Co. v. Glass Service Co., 683 N.W.2d 792, 798 (Minn. 2004). The WCCA did not review any evidence or testimony to make a factual finding that Relator had knowledge of waiving a statutory right or that they intended to do so. The fact that Relator did seek to discontinue permanent total disability benefits after the Employee turned 67 is evidence that they did not intend to waive the statutory right. Instead, the WCCA concluded that

since” 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, we conclude the petitioner failed to reserve that right in the stipulation and is not entitled to discontinue benefits on that basis.” In other words, the WCCA based its conclusion of an inferred waiver on its mistaken belief that the statutory presumption needs to be expressly reserved. That conclusion was an error of law, since merely signing the Stipulation for Settlement cannot constitute evidence of a knowing and intentional waiver of a statutory right that was not in any way addressed nor contemplated by the agreement. That conclusion removes the requirement that a waiver be done with knowledge and intention, and removes the employee’s burden to prove waiver.

In Stephenson v. Martin, 259 N.W.2d 467 (Minn.1977), the case relied upon by the WCCA in Tambornino, this court found that the parties’ actions in assenting to the terms of the Stipulation for Settlement were evidence of waiver of their statutory subrogation right under Minn.Stat. 176.061. Stephenson is distinguishable from the case at hand in many respects. In Stephenson, an employee was injured in an allegedly work related motor vehicle accident. Primary liability for the workers’ compensation claim was denied, but the parties eventually settled by way of a Stipulation for Settlement approved by a Compensation Judge at the Office of Administrative Hearings. That Stipulation did not address the insurer’s statutory subrogation rights.

In Stephenson, the Stipulation for Settlement entered into by the parties was a full, final and complete settlement, forever foreclosing the parties' rights, claims and defenses, save for future medical benefits. In this case, however, the Stipulation for Settlement was a "to-date" settlement, cleaning up, on a to date basis, the Relator's right to offset for SSDI benefits and resulting overpayment, the surgical issue that was pressing, and the permanent partial disability benefits that would be due following that surgery. No future benefits, claims or defenses were discussed in the agreement, and neither party expressly reserved any future statutory claims or defenses. The parties intent was not to dispose of the parties' claims once and for all, as in Stephenson, but instead to clean up the benefits due and owing at the time of the Stipulation.

It should also be noted that in Stephenson the statutory right deemed waived was not a statutory mandate, but a right of the insurer that could be exercised at their discretion.³ In contrast, in the case at hand, the statute at issue mandates a cessation of benefits at age 67, as noted above.

³ Minn.Stat.176.061 Subd. 3. Provides: **Election to receive benefits from employer; subrogation.** If the employee or the employee's dependents elect to receive benefits from the employer, or the special compensation fund, the employer or the special compensation fund has a right of indemnity or is subrogated to the right of the employee or the employee's dependents to recover damages against the other party. The employer, or the attorney general on behalf of the special compensation fund, **may** bring legal proceedings against the party and recover the aggregate amount of benefits payable to or on behalf of the employee or the employee's dependents, regardless of whether such benefits are recoverable by the employee or the employee's dependents at common law or by statute together with costs, disbursements, and reasonable attorney's fees of the action.

In Stephenson, the court focused on fairness and having the parties get what they bargained for. Quoting Donnay v. Boulware, 275 Minn. 37, 43, 144 N.W. 2d 711, 715 (1966) the Stephenson court stated “we 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 it’s terms.” Stephenson at 471. The employee in Stephenson asserted that the claim had been waived, arguing that to allow the insurer a subrogation interest in her personal injury claim would not be fair under their bargained for agreement. The concept of fairness and having the parties get what they bargained for should apply in this case, as well. There is no evidence, or even claim, that the Employee bargained for or was to be guaranteed benefits beyond age 67. There is also no evidence that the right to future benefits, or any possible defense to benefits, was discussed, negotiated or bargained for as part of the Stipulation. It is clear from the Stipulation that it was meant to clean up issues on a to-date basis, not to guarantee or waive any future claims or defenses to such benefits by either party. To infer otherwise gives the Employee an advantage not clearly expressed in the terms of the Stipulation.

Another significant difference between this case and Stephenson is that in Stephenson the issue of waiver was actually raised by the employee, and evidence was heard and considered by the court on that issue. In this case, waiver was not raised nor plead, and the WCCA did not hear or consider any evidence on the issue. The WCCA overreached by removing the employee’s burden of asserting and proving waiver.

C. The WCCA’s decision removes the employee’s evidentiary burden to show that he would have worked beyond age 67.

Although the statute puts the burden on the employee to prove entitlement to benefits beyond age 67, the WCCA's decision removes that burden, without any evidence or even argument from the Employee that he would have worked beyond age 67. Though it does not point to any language in the statute to support its position, the WCCA suggests that the legislature established a presumption of retirement at age 67, but then required that employers "expressly reserve" that same presumption. If that were the case, it would not be a presumption at all. The WCCA's chosen interpretation renders the language of the statute meaningless, which could not have been the legislature's intent.

In Grunst v. Immanuel St. Joseph's Hospital 424 N.W.2d 66 (Minn. 1988), this court considered the retirement presumption in Minn.Stat. 176.101 subd. 8. That subdivision provides:

For injuries occurring after the effective date of this subdivision an employee who receives social security old age and survivors insurance retirement benefits is presumed retired from the labor market. This presumption is rebuttable by a preponderance of the evidence.

The issue in Grunst was whether the "and" in the subdivision established a requirement that employees need to receive both social security old age benefits and survivor insurance retirement benefits in order to be presumed retired from the labor market. The Grunst court held that to interpret the statute to require receipt of both benefits would greatly limit the scope of the presumption, which could not have been the legislature's intent. The Grunst court also held that whether the employee could rebut the retirement presumption is a question for a trier of fact, noting that the employee had the burden of proof and that the legislature required that the employee present more than a statement that she would have continued to work but for the injury in order to

rebut the presumption. The Grunst court remanded the issue of whether the retirement presumption had been rebutted to a compensation judge for a finding on that issue.

Just as this court found the WCCA to have overreached in Grunst, this Court should find that it was overreaching for the WCCA in this case to remove the evidentiary burden on the employee to show that he intended to work beyond age 67, as required by Minn.Stat.176.101 subd. 4.

D. The WCCA erred in concluding that Relator waived a statutory defense, when such waiver is not found in the parties' plainly worded agreement.

Under the most basic contract principles, where the contract is clear and the parties intent is plainly expressed, there is not need for the court to interpret anything. This court has "consistently stated that when a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction." Telex Corp. v. Data Products Corp. 271 Minn. 288, 294-95, 135 N.W.2d 681, 686-67 (1965). The primary goal of contract interpretation is to ascertain and enforce the intent of the parties. Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc. 666 N.W.2d 320, 323 (Minn. 2003). When interpreting a written instrument the intent of the parties is determined from the plain language of the instrument itself. Travertine Corp. v. Lexington-Silverwood, 683 N.W.2d 267, 271 (Minn.2004).

In cases such as this, where an employee has been administratively determined to be permanently and totally disabled and the employer and insurer seek to discontinue permanent total disability benefits, the WCCA will review the language of the settlement agreement to determine whether the stipulation for settlement contains language demonstrating the parties intended benefits would continue only so long as the

employee remained permanently and totally disabled. Ramsey v. Frigidaire Co. Freezer Prods. 58 WCD 411 (WCCA 1998). In other words, the WCCA interprets the contract between the parties.

It is undisputed that Relator did not expressly waive its statutory right to discontinue benefits at age 67 in the Stipulation for Settlement in question. Nowhere in the Stipulation does Relator expressly waive the retirement presumption or any other future statutory defense. There are a number of grounds for discontinuing or reducing permanent total disability benefits, and the Stipulation does not refer to any of them. The Stipulation for Settlement also does not expressly reserve the employee's right to receive those benefits. Certainly, that does not mean that the statutory rights and defenses of either party do not exist.

In the Stipulation for Settlement, the Employee did not specifically reserve his right to claim benefits beyond age 67. The WCCA's decision puts a requirement on the Relator to expressly reserve a mandatory, statutory defense, yet puts no burden on the Employee to expressly reserve a claim for a benefit to which he, by the clear language of the statute, has the burden of proving entitlement. To put such a burden on Relator, but not the Employee, is contrary to the intent of the Workers' Compensation Act as set forth in Minn. Stat. 176.001, above.

The fact that the Stipulation for Settlement does not refer to the retirement presumption should be the end of the inquiry. The retirement presumption, along with numerous other statutory rights and defenses, was not the subject of negotiations. The parties did not see fit to alter what both knew was the age 67 retirement

presumption. Nevertheless, the WCCA concludes that this particular presumed basis for discontinuing benefits must be specifically and expressly reserved.

It should be noted that there were three specific waivers made in the Stipulation for Settlement. In paragraph VIII (12) the employee specifically waived any claims he may have for partial reimbursement of attorney fees pursuant to Minn. Stat. 176.081 subdv. 7. Then, in paragraph IX, the employee waived any claim he may have for penalties, interest or reimbursement of attorney fees. In paragraph XIV, the parties waived their statutorily granted 10 days in which to object to attorney fees. (A-10, 11). See Minn.Stat. 176.081. There are no other express waivers by either party. Since there were explicit waivers made in the Stipulation for Settlement, but not a specific waiver of the retirement presumption, contract interpretation principles instruct that a waiver not be inferred.

The waiver issue in this case is similar to the waiver issue in Grachek v. Grachek, 750 N.W.2d 328 (Minn.2008). That case involved interpretation of a Karon waiver in a marriage dissolution judgment and decree.⁴ The Karon waiver expressly waived the parties' statutory rights to modify the award of spousal maintenance, but did not expressly address the statutory right to a cost of living adjustment to the awarded maintenance. Since it was not specifically addressed, it was decided that the statutory right to a cost of living adjustment had not been waived, despite the Karon waiver. The Grachek court stated, "The supreme court has indicated that, if the parties to a dissolution action agree to waive a statutory right to alter a maintenance award, they

⁴ Parties to a dissolution action have a statutory right to seek modification of a spousal maintenance award under Minn.Stat. 518A.39 (2006), but are permitted to waive this statutory right under certain circumstances. Such a waiver agreement is frequently referred to as a Karon waiver after Karon v. Karon 435 N.W.2d 501 (Minn.1989)

must incorporate clear and express terms in the dissolution judgment evidencing their specific intention to waive the identified right. (Referencing Loo v. Loo, 520 N.W.2d 740 (Minn. 1994), stating that “courts should not assume that parties... bargained to supplant the statutory modification procedure without a clear or express statement: indicating as much.) The Grachek court also noted they would not infer a waiver of a statutorily conferred right to alter a maintenance award “in the absence of a clear intent to waive” the right. Citing Keating v. Keating, 444 N.W.2d 605, 607-08 (Minn. App 1989), review denied (Minn. Oct. 25, 1989).

The waiver issue in this case is similar to Grachek. In this case, both parties have extensive statutory rights. There were some statutory rights that were expressly waived in the Stipulation for Settlement, but the Relators statutory right to discontinue benefits at age 67 was not one of the rights expressly waived. Since there was no express waiver or clear intent to waive that statutory right, the WCCA should not have inferred that the parties intended to supplant the statutory scheme for payment of permanent and total disability benefits.

E. The WCCA erred in denying Relator’s Petition to Discontinue based on waiver, when the issue of waiver was not plead, briefed or otherwise raised.

As stated above, the procedure to discontinue permanent total disability benefits when there is a Stipulation for Settlement stipulating that an employee is permanently and totally disabled was established by the WCCA in Ramsey. The procedure calls for the employer and insurer to file a Petition to Discontinue with the WCCA. In this case, the Petition to Allow Discontinuance that was filed sought to discontinue benefits pursuant to the statutory presumption of retirement at age 67, and also based on the

employee's deposition testimony that he had planned to retire when he reached the "rule of 85". (A-1). Attached to the Petition to Allow Discontinuance was the Stipulation for Settlement and Award on Stipulation as well as relevant deposition pages. (A-4-12). The employee filed an Objection to Petition to Allow Discontinuance, stating simply "The employee alleges that he is entitled to ongoing permanent total disability". (A-13). The employee did not assert that the statutory defense to discontinuance had been waived, nor did he offer any evidence to rebut the retirement presumption.

Waiver is an affirmative defense. Brekke v. THM Biomechanical, Inc. 683 N.W.2d 771 (Minn.2004). Failure to plead an affirmative defense waives the defense. Minn.R.Civ.P. 8.03; Bradley v. First National Bank, 711 N.W.2d 121, 128 (Minn.App 2006). A party alleging waiver must provide evidence that the party that is alleged to have waived the right possessed both the knowledge of the right in question and the intent to waive that right. Stephenson v. Martin, 259 N.W.2d 467 (Minn.1977); Ill.Farmers Ins. Co. v. Glass Service Co., 683 N.W.2d 792, 798 (Minn. 2004) In this case, waiver was not plead, and no evidence was presented on the issue. As such, it was error for the WCCA to both consider waiver and to conclude that a statutory right had been waived.

F. The Relators' statutory right to discontinue benefits at age 67 was inchoate at the time of the Stipulation for Settlement, as the Employee was only 64 years old at the time, and therefore could not be waived.

The statutory right of Relator to discontinue permanent total disability benefits at age 67 was inchoate at the time of the Stipulation for Settlement and therefore could not have been waived. The WCCA's holding in this case is contrary to

this court's holding in Sweep v. Hanson Silo Co., 391 N.W.2d 817, 39 W.C.D. 51 (Minn. 1986). In Sweep, this court held that a proposed stipulation for settlement was broader than statutorily permissible because it purported to close out claims for work-related injuries for which the "employee has made no claim based on such injuries and they were not a subject of dispute between the parties." Id. at 822, 39 W.C.D. at 57.

Following Sweep, the WCCA in multiple cases did not permit a settlement to foreclose claims not contemplated by the parties at the time of the settlement. In Munkelwitz v. Bladholm Bros., slip op. (W.C.C.A. July 28, 1993), the WCCA held that an alleged consequential left knee injury was not closed out by the full, final, and complete settlement of the employee's right knee injury, where there was no evidence or claim of left knee injury at the time of the settlement. Similarly, in Golen v. J.C. Penney Co., slip op. (W.C.C.A. Oct. 27, 1993), the WCCA held that a claim for consequential depression was not closed out by a full, final, and complete settlement closing out all claims "past, present and future, known or unknown, relating to the personal injury." And, in Buske v. Minnesota Dept. of Human Services, slip op. (W.C.C.A. Nov. 5, 1999), the WCCA cited Sweep, Munkelwitz, and Golen in holding that stipulation for settlement language that provided that "any consequential injuries . . . are foreclosed" did not foreclose an employee's subsequent claim for a consequential injury to another body part.

In Fitzsimmons v. Alberta Gas Chems., Inc., slip op. (W.C.C.A. June 27, 1995), the WCCA concluded that a stipulation that closed out all claims arising out of a 1982 injury did not bar a subsequent claim for benefits for a low back condition alleged to be due to the 1982 injury when the stipulation did not refer to a low back condition and described the injuries as being burns. In Fitzsimmons, the court stated, "A

stipulation for settlement covers only those claims or rights that are specifically mentioned in the agreement.”

In the case at hand, the claims of the employee are set forth in their entirety in paragraph VI of the Stipulation for Settlement, which reads”

That it is the claim and contention of the employee herein as follows:

1. That he is permanently and totally disabled from November 3, 2004 to the presents and continuing,
2. That he has been declared totally disabled by the Social Security Administration, and has been receiving social security disability income since August 1, 2005, with an initial entitlement of \$1,966.00.
3. That he is entitled to a minimum of 21% permanency.
4. That he is entitled to payment of a three level lumbar fusion as recommended by Drs. Sherman and Pinto.
5. That he is entitled to partial reimbursement of attorneys fees pursuant to Minn. Stat. 176.081 subv. 7, as well as penalties and interest.
6. That he is entitled to reimbursement of his reasonable and taxable costs and disbursements incurred in preparation of his workers' compensation claim herein.

(A-7). The employee made no other claims at the time of the Stipulation for Settlement. There was no claim that he would have worked beyond age 67 and that the retirement presumption would be rebutted. Since he was 64 years old at the time of the settlement, the statutory mandate to discontinue at age 67 was inchoate.

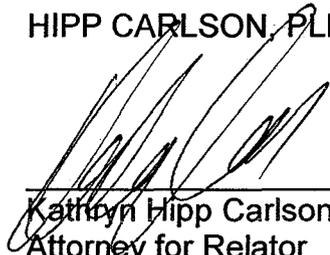
It is simply inconsistent and contrary to Sweep and the Workers' Compensation Act's mandate that the Act be interpreted even handedly to hold, on the one hand, that an employee cannot foreclose unknown claims even when they are negotiated and bargained for and expressly written, yet on the other hand hold that an employer and insurer have waived an inchoate, statutory defense that was not discussed, negotiated, at issue or even mentioned in an unambiguous Stipulation for Settlement. The WCCA's holding in that regard was an error of law.

Conclusion

The Workers' Compensation Court of Appeals erred in concluding that Relator waived its statutory right to discontinue the employee's permanent total disability benefits at age 67. That statutory right was not waived, and waiver was not plead. The WCCA's holding to the contrary is inconsistent with the Workers' Compensation Act, the intent of the statute, and the plain language of the Stipulation for Settlement. The holding also improperly removes the evidentiary burden placed on the employee to prove waiver as well as entitlement to benefits. As such, this Court should reverse the decision of the WCCA.

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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 with regards to number of pages, word count, and lines of text. The length of the brief is 6,859 words, and 25 pages.

A copy of this certificate has been served with the brief on the Court and all parties.

Dated: _____

2.22.11

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