

NO. A11-126

State of Minnesota
 In Supreme Court

George E. Frandsen,

Employee-Respondent,

vs.

Ford Motor Company, Self-Insured,

Employer-Relator.

**BRIEF AND APPENDIX OF MINNESOTA SELF-INSURERS' ASSOCIATION
 IN SUPPORT OF RELATOR FORD MOTOR COMPANY, SELF-INSURED**

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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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INTRODUCTION¹

The Minnesota Self-Insurers' Association ("MSIA") is an incorporated, non-profit organization formed in 1971 to promote the interests of business and government units who are self-insured or retain at least a \$250,000 deductible for workers' compensation liability in the State of Minnesota. The MSIA serves as an educational forum for approximately one hundred members, who together employ approximately 330,000 workers in the State of Minnesota and pay nearly ten billion dollars in annual payrolls. With respect to public policy, the MSIA focuses on issues that are of special interest to self-insured and large deductible employers. The MSIA also acts as an information resource for state agencies charged with regulating the workers' compensation insurance industry. The MSIA is committed to preserving the right to self-insure and supports the efficient management and delivery of workers' compensation benefits in a way that maximizes available resources for injured workers and minimizes overall system costs. The MSIA is one of the most active voices in the Minnesota legislature and various State agencies with regard to workers' compensation issues. The MSIA takes a pro-active position against workers' compensation legislation that has a negative affect on the costs and management of workers' compensation cases. The MSIA strives for a positive workers' compensation system that benefits both employees and employers. Consistent with this mission, the MSIA sought leave to file a brief as *amicus curiae* in this matter, in

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

support of Relator Ford Motor Company, Self-Insured. This Court granted the MSIA's Motion on February 17, 2011.

The primary issue presented in this matter is whether employers or insurers can lose their rights to assert defenses pursuant to Minn. Stat. § 176.101, subd. 4 (2010) when stipulating to payment of permanent total disability benefits. The Workers Compensation Court of Appeals ("W.C.C.A.") has ruled that, if not specifically reserved in the stipulation, these defenses are waived. The membership of the MSIA is greatly concerned about the actual and potential implications of this ruling. The W.C.C.A.'s decision has significant public policy implications on Minnesota's workers' compensation system. The effect of the decision expands employer and insurer liability for workers' compensation benefits well beyond the statutory limits. If statutory caps for workers' compensation benefits are deemed automatically waived in settlement agreements, unless expressly reserved, it will undermine the ability of employers and insurers to rely upon the certainty of the benefit limitations found in the Minnesota Workers' Compensation Act – an Act that governs practically every aspect of workers' compensation benefit entitlement in the State. Employers and insurers will, therefore, be reluctant to enter into settlement agreements.

The W.C.C.A. decision also conflicts with to the legislative intent of Minn. Stat. §176.101, subd. 4 (1995). The statute was amended in 1995 as part of broad legislative reform of the Workers' Compensation Act, intended to simplify and clarify rights and obligations for benefits under the Act. A major goal of the 1995 legislation was to reduce costs of workers' compensation insurance for Minnesota employers and insurers, so they

would be on a more even playing field and be better able to compete with neighboring states. The W.C.C.A.'s decision in *Frandsen* runs counter to the intent of the Statute and counter to the legislative goals established in passing Minn. Stat. § 176.101, subd. 4 (1995). The MSIA supports reversal of the W.C.C.A. decision.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae MSIA adopts the Statement of the Case and Facts of Appellant Ford Motor Company.

ARGUMENT

I. THE LONG-ESTABLISHED PUBLIC POLICY FAVORING SETTLEMENTS IN WORKERS' COMPENSATION MATTERS IS UNDERMINED WHEN THE W.C.C.A. INTERPRETS A SETTLEMENT IN A MANNER THAT PREJUDICIALLY ELIMINATES A STATUTORY RIGHT OF ONE OF THE PARTIES.

The W.C.C.A. decision undermines the longstanding public policy encouraging settlement of workers' compensation disputes. It is well established that public policy favors settlement of disputed claims without litigation. *Hentshel v. Smith*, 153 N.W.2d 199 (Minn. 1986). The settlement of workers' compensation disputes is favored because it allows the parties to avoid the delay of litigation and expedite the granting of relief. *Senske v. Fairmont & Sign Waseca Canning Co.*, 45 N.W.2d 640 (Minn. 1951); *Mauer v. Braun's Locker Plant*, 298 N.W.2d 439 (Minn. 1990). 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). Settlement also allows the parties to avoid the expenses associated with litigation. The over-reaching results of the

W.C.C.A. decision, eliminating a statutory defense for employers and insurers will serve as a barrier to settlement and force employers and insurers, to seek the certainty of a judicial determination.

The W.C.C.A.'s decision in *Frandsen* will force additional litigation of permanent total disability cases, making the result contrary to the well established public policy favoring settlement of workers' compensation claims. In entering into settlement, and in particular a "to-date" settlement such as the agreement in this case, the parties need to be able to rely upon the application of the statute to future disputes.² All parties to a settlement are deemed to have reserved claims and defenses unless resolved or specifically waived as a term of settlement. Employers and insurers enter into settlement for purposes of controlling future exposure and avoiding the costs associated with litigation. In contrast to this rationale, the result of the W.C.C.A.'s decision may well be that employers and insurers choose the certainty of a judicial determination versus the uncertainty of the W.C.C.A.'s future interpretation of a Stipulation for Settlement, which may, as in this case, run counter to the intentions of the parties.

The determination of the W.C.C.A. puts employers and insurers in the situation where, if they stipulate to permanent total disability, they may have higher exposure than if they proceeded to hearing resulting in a judicial determination finding a claimant permanently and totally disabled. In *Ramsey v. Frigidaire Co. Freezer Prods*, 58 W.C.D. 411 (W.C.C.A. 1998) the W.C.C.A. established a procedure for employers and insurers to

² A "to-date" settlement resolves only the current disputes between the parties. This can be contrasted with a "full, final and complete" settlement, which resolves all disputes, past, present and future, with the exception of any particular issues specifically not resolved, typically future medical claims.

follow when attempting to discontinue PTD benefits in cases in which settlements have been reached. The W.C.C.A. requires the employer/insurer to file a petition to discontinue with the W.C.C.A., following which the “Court 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.” *Ruby v. Mueller Pipelines*, 69 W.C.D. 453 (W.C.C.A. 2009.) The W.C.C.A. does not hold a hearing or make any factual determinations regarding the basis for discontinuance. In contrast, the W.C.C.A. has determined that for injuries occurring on or after October 1, 1995 (when Minn. Stat. § 176.101, subd. 4 was effective) if the employee has been adjudicated permanently and totally disabled, or has been administratively determined to be permanently and totally disabled, the employer/insurer may discontinue permanent total disability benefits *without* filing a petition to discontinue with the W.C.C.A. See *Bescheinen v. Independent Sch. Dist. #181*, No. WC10-5078 (W.C.C.A. July 15, 2010); *Olson v. 3M Co*, No. WC10-5054 (W.C.C.A. June 29, 2010). In other words, if an employer/insurer stipulate to payment of PTD benefits, the ability to discontinue such benefits is subject to the interpretation of the stipulation by the W.C.C.A., without hearing or due process. If the employer/insurer, as they did in *Frandsen*, stipulate to payment of permanent total disability benefits, they will experience the uncertainty of the potential determination of the W.C.C.A. that a defense is waived, and without the right to a hearing on the merits of the issue. However, if an employer or insurer chooses to take a case to trial, they will have the certainty of knowing that they still have the retirement defense to assert when

the claimant reaches the age of 67.³ It is clear that employers and insurers that take PTD cases to hearing will have much more certainty than those who stipulate to PTD status. The end result is that employers and insurers will be understandably reluctant to settle cases involving PTD benefits. Therefore, this result is contrary to the preference for settlement and quick resolution of workers' compensation cases.

Further, the result in *Frandsen* places employers and insurers in the position of having to anticipate every potential scenario and cite a defense to it, or be deemed to have waived a potentially viable defense to a future benefit. This result is specifically contrary to the existing case law indicating that a stipulation cannot be construed to "waive a statutory defense before the defense date was reached, without more specific language." *Spitzack v. Armstrong Truck Lines, Inc.*, 1989 MN W.C.C.A. LEXIS 762 at *6 (W.C.C.A. September 14, 1989) (quoting Compensation Judge Combs).

The result in *Frandsen* penalizes employers and insurers that voluntarily pay benefits versus taking a case to trial. This is contrary to the consistently stated preference for settlement of workers' compensation cases. This will result in more cases going to hearing, and potentially, therefore, delaying benefits to employees. The W.C.C.A. has over-reached in determining that it can "interpret" stipulations without making factual findings or hearing arguments. The W.C.C.A.'s method of reviewing petitions to discontinue PTD benefits eliminates due process for all parties. Therefore, the MSIA supports the reversal of the *Frandsen* decision.

³ Similarly, if an employer or insurer agrees to pay PTD benefits pursuant to a temporary order, the employer and insurer can seek to discontinue by filing a NOID and proceeding to a hearing on the merits of the discontinuance versus the process at the W.C.C.A. that results in no factual determinations or consideration of the merits. *See Skari v. Aero Sys. Eng'g, Inc.*, No. WC10-5093 (W.C.C.A. September 21, 2010).

II. THE W.C.C.A.'S DECISION IS INCONSISTENT WITH THE PLAIN LANGUAGE AND LEGISLATIVE INTENT OF MINN. STAT. § 176.101, SUBD. 4.

The Minnesota Workers' Compensation Act establishes an injured employee's entitlement to workers' compensation benefits and identifies and delineates the benefits available for any given date of injury. This statutory scheme is fundamental to the governance of an employer and insurer's liability for workers' compensation benefits. The W.C.C.A.'s holding is inconsistent with the legislative intent of the Minnesota Workers' Compensation Act:

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.

Minn. Stat. § 176.001 (2010). The decision reached by the W.C.C.A. in *Frandsen* will not result in the quick and efficient delivery of benefits, but rather in prolonged litigation in order to avoid the uncertainty of having a Stipulation misinterpreted by the Workers' Compensation Court of Appeals.

Minn. Stat. § 176.101, subd. 4 was amended in 1995 as part of broad legislative reform designed to “cut workers’ compensation costs.” The Honorable Thomas L. Johnson & Catherine J. Wasson, *Symposium: Closely Held Business: Problems And Solutions: The Minnesota Workers’ Compensation Act: Amendments By The 1995 Minnesota Legislature*, 22 WM. MITCHELL L. REV. 1493, 1497 (1996). Prior to the 1995 amendments, permanent total disability benefits were not capped at a particular age. For injuries prior to January 1, 1984 there was no provision in the Workers’ Compensation Act creating any type of retirement presumption. It was presumed that permanent total disability benefits were payable for life. For injuries on or after January 1, 1984, the Minnesota legislature added a provision, Minn. Stat. § 176.101, subd. 8, indicating that an employee receiving social security old age and survivors insurance retirement benefits was presumed retired. This was a rebuttable presumption. *Id.* In 1992, Minn. Stat. § 176.101, subd. 8 was amended to add a provision indicating that temporary total disability benefits shall cease at retirement. Minn. Stat. § 176.101, subd. 8 (1992). This provision put the burden of proof on the employer and insurer to prove that the employee had retired, by a preponderance of the evidence. *Id.* A subjective statement by the employee was not to be considered sufficient to rebut objective evidence of retirement. *Id.* The W.C.C.A. determined that this provision could only be used as a defense to permanent total disability claims where the employee claims to have become permanently and totally disabled on the date or after he commenced receiving social security old age benefits. *Faber v. Grand Laboratories*, 56 W.C.D. 81 (W.C.C.A. 1997.)

In 1995, Minn. Stat. §176.101, subd. 4 was amended to allow for the discontinuance of PTD benefits at age 67, and to place the burden of proof on the employee to establish an intent *not* to retire at age 67:

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

Minn. Stat. §176.101, subd. 4 (1995). In comparing the plain language of the pre and post-1995 statutes, it is clear that the legislative intent of the amended version of Minn. Stat. §176.101, subd. 4 was to provide more certainty in the length of time PTD benefits may be payable, and to place a definite limit on PTD benefits. In fact, the amendment established three requirements to be met for claiming PTD benefits. First, the claimant must be under the age of 67. Secondly, the claimant has the burden of proving intent not to retire by age 67. Third, the claimant is required to present more than a subjective statement as sufficient evidence of intent not to retire. The addition of these requirements demonstrates a distinct shift in the legislative intent regarding entitlement to permanent total disability benefits; the legislative intent is clearly to reduce exposure for PTD benefits for employers and insurers.

In 1996, The Honorable Thomas Johnson, Chief Judge of the Workers' Compensation Court of Appeals, co-authored a William Mitchell Law Review article discussing the 1995 amendments to the Workers' Compensation Act, *Symposium: Closely Held Business: Problems And Solutions: The Minnesota Workers' Compensation Act: Amendments By The 1995 Minnesota Legislature*, Johnson and Wasson, *supra*. In

the article, Judge Johnson discusses the amendment to Minn. Stat. § 176.101, subd. 4, and states: "Thus, for injuries occurring on or after October 1, 1995, payment of PTD benefits will cease at age sixty-seven, unless the employee can rebut the presumption of retirement." *Id.* at 1505. Notably, Chief Judge Johnson, who also authored the W.C.C.A. decision in *Frandsen*, explicitly acknowledged the retirement presumption as limiting permanent total disability benefits to age 67. Judge Johnson also discussed the main goals of those who sponsored the 1995 legislation, which included business and insurance companies who maintained that "Minnesota's workers' compensation rates were significantly higher than rates in neighboring states, putting Minnesota businesses at a competitive disadvantage." *Id.* at 1496. This article discusses that the ultimate goal of the 1995 legislation was to simplify and clarify rights and obligations for benefits under the Act while reducing costs of workers' compensation insurance for Minnesota employers and insurers, so they could be more competitive with neighboring states:

Sponsors of the 1995 Amendments to the Minnesota Workers' Compensation Act stated that 'Minnesota has lost control of a system that should be simple but is not. We are foolishly allowing this state not to be as competitive as we could be.' The goal of the legislation was 'to keep and expand our state's number of good jobs. The status quo should not be acceptable.' *Id.* at 1533 (*citing* Scott Carlson, Caucus Unveils Plan to Revamp Workers' Comp Laws, St. Paul Pioneer Press, March 15, 1995 at E1, *quoting* Rep. Becky Kelso and Sen. Linda Runback).

It is clear from the decisions of the W.C.C.A. that that court is exhibiting a growing amount of "animosity" toward the presumption of retirement at age 67 provision found in Minn. Stat. § 176.101, subd. 4. *See Tambornino v. Health Risk Mgmt.*, No. WC10-5405 (W.C.C.A. March 18, 2010) (petition to discontinue at age 67 denied

because stipulation for settlement to pay PTD did not specifically incorporate the provisions of Minn. Stat. § 176.101, subd. 4); *Liniewicz v. Muller Family Theatre*, 67 W.C.D. 325 (W.C.C.A. 2007) (employee successfully rebutted retirement presumption because he was still working with a placement vendor at age 67, despite the fact that the QRC found that he was not capable of sustained employment); *Vandervoort v. Olinger Transp., Inc.*, WC09-4983 (W.C.C.A. January 2010) (W.C.C.A. reversed determination that employee failed to rebut retirement presumption and substituted its own factual determinations). The *Frandsen* case represents the culmination of this line of cases – essentially showing a complete lack of intent, on the part of the W.C.C.A., to implement the legislative intent in adding this provision to the statute in 1995. In this regard, the W.C.C.A. has over-stepped its statutory authority. It is the Minnesota Legislature, not the W.C.C.A., that establishes the rights and responsibilities of the parties in a workers’ compensation matter. If the age 67 presumption is considered to be “harsh” it is up to the legislature to modify its application.

The Court of Appeals failed to consider the legislative intent of Minn. Stat. § 176.101, subd. 4, and the Workers’ Compensation Act as a whole. The impact of the decision is significant, and will not only discourage settlement, but, potentially, increase the cost of workers’ compensation for employers and insurers, which is directly counter to the stated goals of the legislature in 1995. The decision reverts back to the law pre-dating the 1995 amendments, and should be reversed.

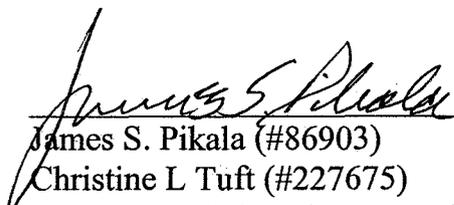
CONCLUSION

Not only does the Court of Appeals' decision discourage employer and insurers from settlement by improperly expanding liability for workers' compensation benefits beyond the statutory limits, it is inconsistent with the plain language and legislative intent of Minn. Stat. § 176.101, subd. 4. In accordance with the public policy concerns raised herein, and the well-established intent and purpose of the Minnesota Workers' Compensation Act, the MSIA respectfully requests reversal of the Court of Appeals' decision.

Respectfully submitted,

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Dated: March 1, 2011


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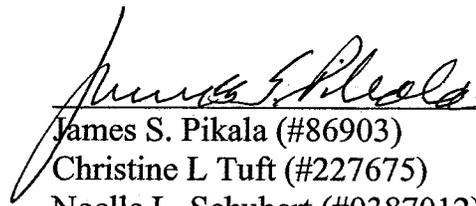
CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(c). The brief was prepared using Microsoft Word 2003, which reports that the brief contains 3,101 words.

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