

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

April 28, 2000 Session

GLORIA ANN JOHNSON v. WORLD COLOR PRESS, INC.

**Direct Appeal from the Circuit Court for Dyer County
No. 97-140 J. Steven Stafford, Chancellor**

No. W1999-01961-SC-WCM-CV - Mailed January 9, 2001; Filed April 9, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. The defendant World Color Press, Inc. appeals the judgment of the Circuit Court of Dyer County which denied defendant's claim for set-off for short-term disability benefits paid by defendant under its disability plan. We find that the trial court erred in its application of Tenn. Code Ann. § 50-6-114 and reverse the trial court's judgment on that issue. We further find that plaintiff waived consideration on appeal of her claim that defendant failed to establish that the disability plan was "employer funded" as required by the statute.

**Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right;
Judgment of the Chancery Court Reversed and Remanded**

HENRY D. BELL, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and W. MICHAEL MALOAN, SP. J., joined.

Jeffrey L. Lay and Gary H. Nichols, Dyersburg, Tennessee, for the appellant, WorldColor Press, Inc.

Jay E. DeGroot, Jackson, Tennessee, and Tanda Rae Grisham, Memphis, Tennessee, for the appellee, Gloria Ann Johnson.

MEMORANDUM OPINION

The plaintiff was injured at work after the effective date of the 1996 amendment to the T.C.A. § 50-6-114 under which defendant claims a right of set-off.

T.C.A. § 50-6-114 provides as follows:

(a) No contract or agreement, written or implied, or rule, regulation or other device, shall in any manner operate to relieve any employer in whole or in part of any obligation created by this chapter except as herein provided.

(b) However, any employer may set off from temporary total, temporary partial, and permanent partial and permanent total disability benefits any payment made to an employee under an employer funded disability plan for the same injury, provided that the disability plan permits such an offset. Such an offset from a disability plan may not result in an employee receiving less than the employee would otherwise receive under the workers' compensation law. In the event that a collective bargaining agreement is in effect, this provision shall be subject to the agreement of both parties.

The record on appeal consists of the technical record and a verbatim transcript of trial excerpts which includes only the testimony of Mrs. Christie Shannon, defendant's human resources manager. She testified as to the existence of defendant's short term disability program, the provisions of the plan and that payments totaling \$5,826.82 were made to plaintiff following her injury. The witness was unable to produce at trial a copy of the short term disability plan. The other excerpts are the findings and conclusions of the trial judge stated from the bench. The court found that the injury was compensable and awarded temporary total disability in the amount of \$6,802.54 and a lump sum based upon a finding of thirty percent (30%) permanent partial disability to the body as a whole. Before determining medical expense and discretionary costs issues the trial judge addressed counsel as follows:

The issue then becomes one of the applicability of T.C.A. 50-6-114(b). That statute deals with set off for payments by disability plans.

. . . .

The question is today, does the defendant receive benefits or receive offsets for any short-term disability that it may have paid to the plaintiff. The attorneys for both sides have done a good job here today of explaining this case and explaining the applicability of this Statute.

It is the defendant's position that this Statute applies and that they should receive the credit for the \$5,826.82 that has been paid by the defendant to the plaintiff as the result of the short-term disability.

It is the plaintiff's position that because in the sub part (b) the defendant has failed to prove by introduction of the plan itself that the disability plan permits such an offset, that the offset should be denied.

This is a court of equity, and in everything we do I think fairness should be the guide, that's fairness to the plaintiff and fairness both to the defendant.

So what the Court is going to do is this, I understand the plaintiff's objection, I also understand the defendant's position in this case. And in an abundance of caution the Court is going to do this, first of all, Mr. Lay, you have until one week from tomorrow to file a certified copy of the plan with the Court and to provide a certified copy of that plan to Mr. DeGroot.

Also, I'm going to require you to review the plan and point out with specificity to Mr. DeGroot where that plan provides such an offset.

Mr. DeGroot, in the event that you do not believe that plan provides an offset, then you need to write the Court or call the Court, whichever the case may be, whichever is the easiest to do, and get Mr. Lay on the phone, and the Court will rule upon that offset, whether or not it is applicable.

I'm not sure that this is the best way to do things, but I think it's the fairest way to do things. If the plan provides for the offset the Court will allow the offset. If the plan does not provide for the offset the Court is not going to allow it as an offset, it's as simple as that.

You all can take a look at the plan, you all are both very intelligent attorneys, and it either says it or it doesn't say it. If it doesn't say it, I'm not going to read it into it, but if it does say it, then I'm going to allow the offset.

The subsequent judgment order contains the following:

5. Following the injury, plaintiff was paid temporary total disability benefits from July 23, 1996, to July 25, 1996, which benefits were in the total amount of \$99.86. Plaintiff is entitled to additional temporary total disability benefits from August 7, 1996, through January 14, 1997, which benefits are in the amount of \$6,802.54.

6. During the period of August 7, 1996, through January 14, 1997, defendant paid to plaintiff short-term disability benefits in the total amount of \$5,876.82. Defendant's short-term disability plan has been filed of record at the Court's request. The plan contains an inference that an offset of temporary total disability benefits would be allowed. The plan does not, however, contain a specific written provision expressly permitting such an offset. No set-off will, therefore, be allowed under the provision of T.C.A. § 50-6-114.

The disability plan, a certified copy of which is part of the technical record, contains the following language:

SALARY CONTINUATION PLAN

Our Salary Continuation Plan protects you during a short-term disability - an illness or injury that keeps you away from your job for a period of six (6) weeks or less. If such a disability occurs and it is medically certified, you become eligible for Salary Continuation.

Since the plan pays 100% of your salary, it can play a key role in sustaining your income. Here is what the plan offers - If you are absent for more than one (1) week and are under a doctor's care, you will be placed on medical leave of absence. The leave of absence date will be retro-active to the first day absent. Your salary will be continued at 100% coordinated with any other type of disability pay, according to the following schedule: (R.Vol. I, P.14). (emphasis added).

The testimony of Christie Shannon included the following:

- Q. (By Mr. Lay) Let me back up. The Short-Term Disability Program, was that something that was administered by WORLD COLOR or some other persons?
- A. By WORLD COLOR.
- Q. And does this short-term disability program permit its benefits to offset temporary total disability benefits?
- A. You are going to have to rephrase the question, Mr. Lay, I don't -

- Q. Yes. Under the terms of this program what happens when temporary total disability benefits are paid?
- A. And it should have been the short-term?
- Q. And you're receiving short-term disability benefits.
- A. It will offset up to 100 percent.
- Q. Okay. Is that how the plan is routinely administered?
- A. Yes, it is. It is administered as a salary replacement, it is not to double indemnify employees.

The issue as presented to the trial judge involves a construction of a statute and a contractual document. Our review is accordingly de novo on the record without presumption in favor of the correctness of the trial court. Crowder v. Morris, 975 S.W. 2d 308, 311 (Tenn. 1998), Guiliano v. Cleo, Inc., 995 S.W. 2d 88, 95 (Tenn. 1999).

As to the intent of T.C.A. § 50-6-114 we adopt the language of the opinion in the Stavropoulos v. Saturn Company, 1999 W.L. 194152 (Tenn. S.P. Workers' Comp.) as follows:

The intent of the statute is to guarantee that employees receive the full benefit of a workers' compensation statute, and to relieve employers from the burden of twice compensating its employees by paying both disability and workers' compensation benefits for the same injury and at the same time.

After consideration of the rules of judicial construction of statutes and contracts as set out in case law we agree that in ruling on the offset issue, the trial court, in effect, substituted the words "expressly provides" for the word "permits" in the statute and, in effect rendered meaningless the disability plan provision that payments under the plan would be "coordinated with any other type of disability pay." We find that a fair reading of the employer's disability plan in this case permits an offset as contemplated by § 50-6-114(b). We therefore reverse the judgment of the trial court on this issue.

In her brief on appeal plaintiff insists, for the first time, that the statutory requirement that the disability plan be "employer funded" was not established by the proof. "Under Tennessee law, issues raised for the first time on appeal are waived." Black v. Blount, 938 S.W.2d 394, 403 (Tenn. 1996). See also Tenn. R. App. P. 36(a). We find that plaintiff has waived consideration of the issue by this Court.

The judgment of the trial court disallowing set-off is reversed. Costs on appeal are assessed to the plaintiff, Gloria Ann Johnson.

HENRY D. BELL, SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon motion for review filed by the appellee, Gloria Ann Johnson, pursuant to Tenn. Code. Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeal Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs are taxed to the plaintiff, Gloria Ann Johnson.

It is so ORDERED.

PER CURIAM

Holder, J., not participating