

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON
April 2000 Session

JANICE FORBES, ET AL. vs. CNA INSURANCE COMPANY, ET AL.

**Direct Appeal from the Obion County Chancery Court
No. 20,609 W. Michael Maloan, Chancellor**

No. W1999-00710-WC-R3-CV - Mailed August 22, 2000; Filed October 24, 2000

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 defendants CNA Insurance Company and Day After Day Service, Inc. appealed the judgment of the Chancery Court of Obion County awarding plaintiff Janice Forbes, for deceased husband Jerry Forbes, death benefits for the death of Jerry Forbes from a work-related heart attack. For the reasons stated in this opinion we affirm the judgment of the trial court.

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

HENRY D. BELL, SP. J., delivered the opinion of the court, in which JANICE M. HOLDER, J., and MARTHA B. BRASFIELD, SP. J., joined.

William F. Kendall, III, Jackson, Tennessee, for the appellant, CNA Insurance Company.

Ricky L. Boren, Jackson, Tennessee, for the appellee, Janice Forbes.

OPINION

Appellee Janice Forbes for her deceased husband Jerry Forbes brought suit against appellants CNA Insurance Company and Day After Day Services, Inc. claiming a right to workers' compensation for the death of Jerry Forbes. In their Answer to appellee's complaint appellants admit that Jerry Forbes was Day After Day's employee on the date of his death, but denied that his death occurred in the course and scope of his employment and denied that his death arose out of his employment.

The trial date was March 3, 1999. The court heard testimony from appellee Janice Forbes, Doug Brewer, President of Day After Day Services, Inc. and entered into evidence the depositions

of an unavailable witness, James R. Fitzgerald, and of two medical doctors, Maury Bronstein, M.D. and Pervis Milnor, Jr., M.D. At the conclusion of the trial the trial judge stated his findings and holding that Jerry Forbes' heart attack was both in the course of and arising out of his employment with Day After Day Services. Judgment was entered in accordance with the trial judge's findings and ruling and in accordance with matters stipulated by the parties.

Jerry Forbes was approximately fifty-eight years of age and had obtained a G.E.D. at the time of his death in February, 1998. He had been in the Marine Corps for fourteen years and thereafter was a truck driver for thirty years. Mr. Forbes had been a long haul truck driver for Day After Day continuously for more than thirty-two months immediately preceding his death. Day After Day is a transportation service for hire with twenty-three drivers.

Mr. Forbes reported to Day After Day's dispatcher on a regular basis and would receive instruction as to the load for him to pick up, designated by trailer number, and the destination. Once the load had been delivered Forbes would notify the dispatcher by telephone and await instructions as to the load to be picked up and returned to Tennessee. If a driver is too sick to drive he is expected to notify the employer and someone would be dispatched to pick up the driver. Mr. Forbes' regular run was from Union City, Tennessee, to Wisconsin passing through Illinois and returning with a load to Union City, Tennessee.

Mr. Forbes was contacted on late Thursday afternoon to drive his load from Union City, Tennessee to Wisconsin. Once he arrived in Wisconsin he became ill and was hospitalized on February 6, 1998, at Lakeland Medical Center in Elkhorn, Wisconsin. Mr. Forbes upon admission gave a history that approximately two to three days prior he began developing symptoms of upper respiratory infection including cough and upper respiratory congestion. On the day prior to admission he developed hiccups which were unrelenting at times and, sometime thereafter, began developing vomiting which was associated with retching and produced approximately a half cup of bright red color per episode. He vomited approximately five to six times on the day leading up to admission. While hospitalized he underwent a procedure which revealed esophagitis of the distal one-third of the esophagus with no ulcer and a moderate size hiatal hernia. It was noted that he had significant coronary artery disease and had undergone triple vessel coronary bypass with grafting in 1993 in Nashville, Tennessee. He was a smoker. While hospitalized the plaintiff continued to run a fever and was discharged on February 8, 1998. At the time of discharge he still had a temperature of 102.4 degrees. At that time he was told his diagnosis was viral bronchitis and that he could remain in the hospital until he felt one hundred percent recovered. He stated that he wanted to go home and was told to use his judgment as to whether to drive or not. Mr. Forbes, according to his log, started driving Day After Day's rig on his return trip at noon on February 8. Later that day James Fitzgerald, also a driver for Day After Day, while proceeding northbound on the interstate near Effingham, Illinois, saw the rig driven by Jerry Forbes proceeding southbound. They had a brief, and not altogether coherent, conversation over their CB radios in which James Fitzgerald understood Forbes to say that he felt bad. Thereafter, at approximately 8:30 p.m. the rig driven by Mr. Forbes was discovered off the pavement and lying on its side in a ditch. Mr. Forbes was removed from the

cab of the tractor and transported to the emergency room at the hospital at Mayfield, Kentucky where he was pronounced dead.

On the issue of medical causation the evidence consisted of Jerry Forbes' medical records and the depositions of Dr. Milnor and Dr. Bronstein based upon their review of the medical records. These experts are contemporaries practicing cardiology in the same community. Dr. Milnor apparently has more familiarity with the literature on the relationship between long haul truck driving and heart attacks. Dr. Milnor in his deposition in September, 1998, opined that plaintiff had significant coronary artery disease resulting in bypass surgery in 1993; that coronary artery disease does not disappear but remains on an ongoing or progressive basis; and that because of this pre-existing condition Mr. Forbes would be susceptible to any type of stress either physical or mental which might result in myocardial infarction. Dr. Milnor's further opinion was that long haul truck driving, particularly for substantial periods of time, is quite stressful and sets up emotional responses and fatigue responses which result in inappropriate cardiac activity. It was his opinion that the emotional response and/or the physical response were precipitating factors in producing Mr. Forbes' myocardial infarction. Dr. Milnor further testified that his opinion was supported by medical literature that showed that truck drivers who were hooked up to heart monitors frequently developed cardiac irregularities or arrhythmia while driving. Dr. Milnor also testified that Mr. Forbes could have had his heart attack which caused him to run off the road, or the running off the road could have caused his heart attack, but in either event the heart attack would be related to the stress and strain of driving his truck.

In Dr. Bronstein's deposition in February, 1999, he expressed the opinion that long haul truck driving is not stressful to experienced truck drivers. Dr. Bronstein conceded that physical and/or emotional stress can trigger a heart attack or arrhythmia attack. He further conceded that, without more information of what went on during Mr. Forbes eight hours of driving, he could not rule out to any degree of medical certainty that the driving played some role in his death.

The trial judge in his findings and conclusions, stated from the bench on the record, found that Mr. Forbes "certainly" was "about the work of his employer at the time of his demise." The panel agrees.

On the issue of medical causation the panel has considered the facts in the medical records and the other evidence presented at trial. The panel, as required, has made an independent evaluation of the deposition testimony of the two cardiologists. Humprey v. David Witherspoon, Inc., 734 S.W. 2d 315 (Tenn. 1987). The panel agrees that the preponderance of the evidence was, as found by the trial court, in the favor of the plaintiffs/appellees.

The judgment of the trial court is accordingly affirmed and remanded for such further proceedings as may be appropriate. Costs on appeal are assessed against CNA Insurance Company and Day After Day Service, Inc.

HENRY D. BELL, SPECIAL JUDGE

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ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals 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 Memorandum Opinion of the Panel should be accepted and approved; 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 on appeal are taxed to the Appellant CNA Insurance Company and Day After Day Service, Inc.

IT IS SO ORDERED.

PER CURIAM