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TEXAS
HARRIS COUNTY

VERDICT of the WEEK

WORKPLACE SAFETY

Negligent Supervision

Welder working without tie-off fell to concrete floor

VERDICT (P)	**$1,835,000**
NET	**$917,500**
CASE	Bobby Jones and Kelly Jones v. Ellwood Texas Forge Corp., No. 2002-48971
COURT	Harris County District Court, 151st, TX
JUDGE	Caroline Baker
DATE	1/28/2005
PLAINTIFF ATTORNEY(S)	**Joseph "Joe" B. Stephens**, The Stephens Law Firm, Houston, TX
DEFENSE ATTORNEY(S)	**Norman E. Snyder Jr.**, Tucker, Taunton, Snyder & Slade, Houston, TX (Ellwood Texas Forge Corp.) **Kathryn Anderson**, Tucker, Taunton, Snyder & Slade, Houston, TX (Ellwood Texas Forge Corp.) **Chad Forbes**, Wright, Brown & Close, Houston, TX (Ellwood Texas Forge Corp.) **Scott Talbot**, Harris & Harris, Austin, TX (intervenor - Service Lloyds Insurance Company-WC Carrier)

FACTS & ALLEGATIONS On July 27, 2001, at the Ellwood Texas Forge Corp. plant in Houston, plaintiff Bobby Jones, a welder, was told by his supervisor, a maintenance contractor, to climb on machinery 12 feet in the air, without tie-off protection. There was no place to tie off because of the plant's high ceilings. Although Jones was experienced and recognized the need for tie-off protection, he followed his supervisor's orders. While atop the machinery, Jones slipped on a slick lubricant or lost his balance and fell 12 feet below onto a hard concrete surface.

Jones sued Ellwood alleging that under Chapter 95 of the Texas Civil Practice and Remedies Code that Ellwood had the right to control the manner and details of the work being done by its contract maintenance workers. He claimed that Ellwood was negligent and grossly negligent in failing to provide a safe place to work for contract workers because it knew that workers had no place to tie off and they would likely be killed or seriously injured if they fell to the concrete and steel below.

Jones put on proof that Ellwood allowed the work to continue unsafely on numerous maintenance jobs, including this one. On the safe work permit for this job, an Ellwood supervisor in charge of the job specifically approved in writing the manner in which the work was to be done, and he gave written approval for the work to be done in an unsafe manner, in violation of company policy. Further, even after Jones received catastrophic injuries, Ellwood's maintenance supervisor allowed the job to be completed without fall protection. Moreover, Jones contended that the first time in company history that his job was ever done in compliance with company policy was when Ellwood's managers participted in a repair job during trial.

Ellwood argued that it asked Jones' employer's crew to install an air-conditioner on top of the equipment but that Ellwood did not control the manner or details of the job. It contended that it hired Jones' employer on a time and materials basis and paid

an hourly wage for skilled workers and a supervisor to oversee that the job was done correctly and safely. Ellwood blamed both Jones and his employer for not following the plant's fall protection rules. A contested issue at trial was whether the Ellwood employee knew that the job was being performed without fall protection.

INJURIES/DAMAGES *back; fracture, heel; wrist*

Jones' fall shattered both of his heels, broke his wrist and injured his back. He was unaware that a disc had herniated until after doctors discovered it through testing. His medical expenses were in excess of $100,000. Jones may not be able to work again due to his permanent injuries. He has an 11th-grade education and three small children to support.

Jones' wife sought damages for past and future loss of household services and loss of consortium.

The plaintiffs' counsel admitted to the jury that Jones was partially at fault and asked the jury to apportion responsibility.

Ellwood contended that when Jones fell, he broke both of his heels and his wrist but he did not complain of back pain until many months after the accident. They added that Jones stated that he wanted to go back to work.

RESULT Judge Caroline Baker granted Ellwood a directed verdict on the issue of malice or gross negligence, so exemplary damages were not submitted to the jury.

Ellwood asked the judge to find that Jones' exclusive remedy was worker's compensation insurance provided by his employer, arguing outside the presence of the jury that Jones was its borrowed employee and that the contractor's insurance gave it worker's comp protection. Judge Baker declined, and she allowed the jury to decide the case. She denied defendant's JNOV where defendant again requested her to reconsider her ruling based upon the assertion that Ellwood's worker's compensation coverage precluded Jones' recovery.

The jury found that (1) Ellwood had a right to control the work done on its premises; (2) Jones and Elwood were each 50% negligent; and (3) the danger was not open and obvious to Jones.

Jurors awarded Jones $$1,695,000 and his wife, Kelly, $140,000. Less comparative fault but adding prejudgment interest, the total award will be $941,274, the plaintiff's counsel reported.

The plaintiffs' counsel reported that the jury foreman stated that the award would have been more than double the amount except for three ultraconservative jurors.

BOBBY JONES	$108,000 past medical costs $600,000 future medical costs $162,000 past lost earnings $675,000 future lost earnings $100,000 past pain and suffering $50,000 future pain and suffering $1,695,000
KELLY JONES	$20,000 past loss of consortium $50,000 future loss of consortium $10,000 Past Loss of Household Services $60,000 Future Loss of Household Services $140,000
DEMAND	$900,000
OFFER	None; refused to mediate
INSURER(S)	**AIG** for Ellwood Texas Forge Corp.
TRIAL DETAILS	Trial Length: 9 days Trial Deliberations: 2 days Jury Vote: 11-1
PLAINTIFF EXPERT(S)	**David R. Mack, M.D.**, orthopedic surgery, Houston, TX (foot surgeon - by deposition) **Michael Graham, M.D.**, orthopedic surgery, Houston, TX (spinal surgeon - by deposition) **David A. David, Sr.**, safety, Rowlett, TX (liability) **Mark D. Barhorst, M.D.**, pain management, Houston, TX (live - plaintiff's doctor)
DEFENSE EXPERT(S)	**Waymon Johnston, Ph.D.**, safety, The Woodlands, TX

POST-TRIAL The plaintiffs have filed a motion for judgment NOV. They contend that the judgment should disregard the jury's comparative negligence finding because of error in instructing the jury that Jones was negligent in the face of conflicting evidence on the issue.

–Don Maines

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