

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F200212**

<b>SARAH &amp; ALYSA ELLENBECKER, WIDOW &amp; MINOR CHILD OF JOHN ELLENBECKER, DECEASED EMPLOYEE</b>	<b>CLAIMANT</b>
<b>SECURITY ALERT, INC., EMPLOYER</b>	<b>RESPONDENT #1</b>
<b>LEGION INSURANCE, CARRIER</b>	<b>RESPONDENT #1</b>
<b>DEATH &amp; PERMANENT TOTAL DISABILITY TRUST FUND</b>	<b>RESPONDENT #2</b>

**OPINION FILED DECEMBER 17, 2003**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on September 18, 2003, at Little Rock, Pulaski County, Arkansas.

Claimants represented by the HONORABLE KEVIN ODUM, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE DAVID HOFFMAN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the Honorable TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of medical and funeral expenses, dependency benefits and attorney's fees.

At issue is whether or not the deceased's death was caused by a compensable injury as defined by Ark. Code Ann. §11-9-102..

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant and benefits must be denied.

## STATEMENT OF THE CASE

The parties have agreed to the following stipulations: The deceased was involved in a motor vehicle accident on August 8, 2001, while earning sufficient income (\$525.00 weekly), to be entitled to a compensation rate of \$350.00, in the event this claim is found to be compensable. Although Legion Insurance has been involved in liquidation in the state of Pennsylvania, the respondents have no objection to proceeding with the workers' compensation hearing in Arkansas.

The claimant contends the deceased was an employee of the respondent-employer when he was involved in a compensable injury. The claimants seek payment of medical and funeral expenses, dependency benefits and attorney's fees.

Respondent No. 1 contends the deceased was an independent contractor and they are not liable. Alternatively, in the event the deceased is found to be their employee, he was not performing employment services at the time of his death. He was involved in a motor vehicle accident on his way home for lunch.

Respondent No. 2, the Fund, concedes that based on the documentary evidence provided (marriage license, birth certificate, etc.), the claimants would be entitled to dependency benefits if the claim is found to be compensable.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits as contained in the transcript.

The following witnesses testified at the hearing: Tony Brown, manager of the Memphis branch, Brad Elsner, former manager of the Little Rock branch and Sarah Ellenbecker Elsner, the widow. Credibility was a problem for both the claimant and the respondent.

The deceased sustained multiple injuries in a motor vehicle accident on Wednesday, August

8, 2001, in front of his home at noon. He was air lifted to Baptist Hospital where he died a short time later. He is survived by his daughter. His widow remarried August 5, 2002. The deceased worked as an installer of security systems. His wife worked for the same company as a sales representative.

According to Sarah Ellenbecker Elsner, John Ellenbecker worked exclusively for Security Alert, Inc. He was expected to provide his own vehicle and gas but he was compensated at a flat rate if the drive exceeded the usual 60 mile radius. He was paid by the job and received a paycheck once a week.

On the day of his death, John Ellenbecker had jobs in Jacksonville and Magness Creek and planned to drive to Austin, Arkansas in the afternoon to install smoke detectors in a home where he had previously installed a security alarm system. There was no separate work order for this job. Sarah Ellenbecker Elsner stated John Ellenbecker didn't eat lunch at home – he ate at fast food restaurants.

Brad Elsner, formerly a Cabot police patrolman for two years, began work for the respondent-employer in late 1999 or early 2000 as a sales representative before becoming branch manager. He was a friend of the deceased and hired him as an installer in May, 2001. Mr. Elsner resigned October 2001 amid allegations that he stole equipment, which he denies.

According to Mr. Elsner, installers were expected to report to the Little Rock office at 7:30 a.m. and travel in a 60 mile radius. The training and equipment were provided by Security Alert. There were no installers in the Little Rock branch that worked for competitors. The installers were paid by the job and received on-the-job training and supplies from the company. Installers provided their own tools, vehicles and gas.

Mr. Ellenbecker called Mr. Elsner on August 8, 2001 and told him he was worried about being fired for mistakes on a job in Jacksonville. He was on his way to the Jerry Davis residence in Austin to finish a job and he made no mention of stopping for lunch.

Mr. Elsner explained that although the computer might show the job as finished so the installer could be paid, in reality the job was incomplete and the installer might have to make additional trips, not logged on the computer to finish the job. They were paid a set amount no matter how many trips it took to complete the job.

On August 8, 2001, Mr. Elsner called the Memphis office to notify them of Mr. Ellenbecker's accident and subsequent death. He spoke with Tom and Tony Brown, however he has no recollection of receiving a memo from Mr. Brown confirming their telephone conversation.

The memo is dated August 13, 2001 and summarizes two telephone conversations with Mr. Elsner on August 10, 2001 and August 13, 2001. According to Mr. Brown, Mr. Elsner reported that the deceased had finished work in Jacksonville and Cabot and then went home for lunch on the day of the accident. He had another job in the afternoon. Mr. Elsner stated that he did not speak with Mr. Brown on August 13, 2001 because he was not in the office on that date. He also didn't recall mentioning the afternoon job in Austin to Mr. Brown.

Tony Brown has worked for the company for six years in Illinois and Tennessee. He is a friend of the owner, Frank Benson, Jr., and Mr. Brown's wife, nephew and brother are also employed by the company.

Mr. Brown stated that he spoke with Brad Elsner about Mr. Ellenbecker's death and summarized their telephone conversation in a memo dated August 13, which was faxed to Mr. Elsner. Mr. Brown could not explain why the memo was not addressed to Mr. Elsner nor could he

provide confirmation that the fax had been received by the Little Rock office. Mr. Brown had no explanation why his computer showed the August 13 memo was actually generated on August 22.

According to Mr. Brown, the installers trained by Security Alert were free to work for their competitors. Installers were paid by the job (installation, authorized service call) and earnings varied from week to week. The company considered installers employees until May, 2001 when they stopped withholdings and reported income on W-9 forms as independent contractors. It should be noted that the Internal Revenue Service publishes pamphlets on the distinction between independent contractors and employees because it is so widely misunderstood. Simply changing from a W-2 to a W-9 form does not change the nature of the employment relationship.

Mr. Brown conceded that if the installer had all ready been paid for a job and returned to finish installation, the second trip would not be logged on the computer.

### **FINDINGS AND CONCLUSIONS**

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717.

There are a variety of factors to be considered when determining the employment relationship. Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982), Silvicraft, Inc. v. Lambert, 10 Ark. App. 28, 661 S.W.2d 403 (1983). The relative weight to be given to these factors is a question of fact for the Commission to determine:

- (1) the right to control the means and the method by which the work is done
- (2) the right to terminate the employment without liability
- (3) the method of payment, whether by time, job, piece or other unit of measurement
- (4) the furnishing, or the obligation to furnish, the necessary tools, equipment and materials

- (5) whether the person employed is engaged in a distinct occupation or business
- (6) the skill required in a particular occupation
- (7) whether the employer is in business
- (8) whether the work is an integral part of the regular business of the employer  
and
- (9) the length of time for which the person is employed.

The evidence of record shows the business hired, supervised and paid workers. The installers were trained by the company and provided with job assignments and supplies. The job was not highly skilled, requiring only a couple of weeks training. The required tools were limited to a drill, a ladder and a device used to pull wiring. Installation of the alarm system was an integral part to the success of the security business. The installers were expected to attend meetings at the company at a set time. The installers were required to be available for full time work and work in locations designated by the company. The installation was supervised by Kerry Copeland. John Ellenbecker had a continuing relationship with the business, working there for several months, and was paid weekly by the job. He had no investment in the business and did not make a profit or suffer a loss from the business. The business had the right to fire him and he had the right to quit without liability. He did not offer his services to the general public. Based on these factors, I find that the deceased was an employee, not an independent contractor.

In order to be compensable, an injury must also occur while the employee is performing employment services. Employment services are performed when the employee does something that is generally required by his or her employer. The test is whether the injury occurred within the time and space boundaries of the employment when the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly. Collins v. Excel Specialty

Products, 347 Ark. 811, 69 S.W.3d 14 (2002), Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002).

The evidence of record shows John Ellenbecker was injured in front of his residence during the noon hour with no correlating work order. Accordingly, I find the deceased was not performing employment services at the time of the accident. Therefore, this is not a compensable injury as defined by Ark. Code Ann. §11-9-102.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on August 8, 2001 at which time the deceased was earning sufficient wages to be entitled to a compensation rate of \$350.00, in the event this claim is found to be compensable.
2. The claimant has proven by a preponderance of the credible evidence of record that the deceased was an employee of the company, not an independent contractor.
3. The claimant has failed to prove that the deceased was performing employment services at the time of the accident.
4. The claimant has failed to prove by a preponderance of the credible evidence that the deceased sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
5. Respondent No. 1 is liable to Ms. Linda Parker for court reporting fees and expenses pursuant to Commission Rule 20.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge