

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F200212

SARAH & ALYSA ELLENBECKER, WIDOW & MINOR CHILD OF JOHN ELLENBECKER, DECEASED EMPLOYEE	CLAIMANT
SECURITY ALERT, INC., EMPLOYER	RESPONDENT NO. 1
LEGION INSURANCE, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JANUARY 24, 2004

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

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

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

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

Decision of the Administrative Law Judge: Affirmed and
adopted.

OPINION AND ORDER

The claimant appeals from a decision of the
Administrative Law Judge filed December 17, 2003. The
Administrative Law Judge entered the following findings of
fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employee-employer-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.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact

made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion and find that claimant was performing employment services at the time of his fatal automobile accident.

The respondent employer is in the business of selling security systems to business and residential customers. The decedent was an installer of those systems. The standard practice was that the installer would arrive at the place of business at about 7:30 a.m. each morning and receive job assignments to install security systems at

locations in the central Arkansas area. It was undisputed that travel was an essential part of claimant's job duties. The respondent controverted the claim on the grounds that claimant was an independent contractor and because he was not performing an employment service at the time of his fatal accident.

Almost all of the testimony and discussion at the hearing involved whether the decedent was an independent contractor or an employee for workers' compensation purposes. The majority has found that the decedent was an employee at the time of his death, but that he was not performing employment services when the accident occurred. This finding is based upon two assumptions made by the Administrative Law Judge. The first of those assumptions is that, since the accident occurred in close proximity to the claimant's residence at approximately 12:00 p.m., he must have been going home for lunch. Additionally, the majority noted that the respondent employer's computerized record keeping system did not show that the claimant had a job assignment at the time of his accident.

I find that the majority has erred in denying the claim because their assumptions are not only based upon speculation, but are contradicted by testimony in the

record. The respondent's theory is that since their records show that the claimant had completed his job assignment in Cabot at approximately 11:30 a.m., and had no other assigned work until later that afternoon, he was returning to his home until time for his next job. However, two witnesses testified that they had spoken with the claimant shortly before his accident and he had advised them that he was traveling to a prior job site in Jacksonville to finish an earlier job.

The first of these witnesses was Brad Elsner, the Branch Manager of the office out of which the decedent received his job assignments. Mr. Elsner testified that the claimant had called him and advised him that he had damaged a customer's door while working in Jacksonville earlier, and he was going to return to repair the damage. The decedent's widow, Sarah Ellenbecker, who was also employed by the respondent employer, testified that she had spoken with her husband prior to his accident and he had likewise informed her that he was returning to Jacksonville to complete work on an earlier job.

Another assumption made by the majority is that since the accident happened near claimant's residence, shortly after 12:00 p.m., he was returning home for lunch.

However, his widow testified that in all of the time she had known him, he had never gone home for lunch. Mrs.

Ellenbecker testified that her husband always ate at fast food outlets for lunch and that he had never returned home during a workday to eat.

I also find that it is highly significant to note that the decedent's accident occurred at the intersection of State Highway 5 and Lewisberg Road. There is no dispute that the claimant would have completed a job in or around Cabot at approximately 11:30 a.m. A review of the State highway map indicates that State Highway 5 passes through portions of Cabot. It is quite possible, even likely, given claimant's familiarity with Highway 5, that he might have chosen to travel to Jacksonville on State Highway 5. This route is a commonly traveled thoroughfare and runs directly into claimant's destination city. The fact that the fatal accident occurred near the Ellenbecker residence is merely an unfortunate coincidence.

In sum, I find that the only evidence in the record that relates to the claimant's action at the time of his injury would indicate that he was traveling from one assigned job site to another to carry out his employer's interest. Further, I find that the majority's cursory

conclusion that the accident happened near the claimant's residence at the noon hour is insufficient to deny his claim. Clearly, we cannot arbitrarily disregard testimony of witnesses and substitute speculation and conjecture in place of actual evidence.

For these reasons, I dissent.

SHELBY W. TURNER, Commissioner