

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F205244

LINDA A. SMART, EMPLOYEE	CLAIMANT
ST. VINCENT HEALTH SERVICES, INC., EMPLOYER	RESPONDENT NO. 1
PREFERRED PROFESSIONAL INSURANCE CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
THE RAWLINGS COMPANY	INTERVENOR

OPINION FILED AUGUST 30, 2005

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

Claimant represented by HONORABLE KENNETH E. BUCKNER,
Attorney at Law, Pine Bluff, Arkansas.

Respondent No. 1 represented by HONORABLE WALTER A. MURRAY,
Attorney at Law, Little Rock, Arkansas.

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

Intervenor represented by MR. ANTHONY BOTTORFF, The Rawlings
Company, Louisville, Kentucky.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent No. 1 appeals a decision of the
Administrative Law Judge filed on December 14, 2004, wherein

the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times, including April 25, 2002; the claimant suffered a compensable injury to her neck on that date; the benefit rate for total disability was \$425.00; and an attorney's fee for controversion is owed on temporary total disability benefits paid for a period from October 21, 2002, until on or about September 6, 2003.

3. The preponderance of the evidence shows that as a result of the claimant's compensable neck injury she continued in a healing period and was totally incapacitated to earn wages, so that she is entitled to temporary total disability benefits, for a period that included September 9, 2002, and continued through October 20, 2002.

4. The preponderance of the evidence shows that on April 25, 2002, the claimant suffered a compensable injury to her hip and left leg, arising out of and in the course of her employment, established by medical evidence supported by objective findings, for which she is entitled to benefits,

including reasonably necessary medical and related expenses.

5. As a result of her compensable hip and leg injury, the claimant remained in a healing period and was totally incapacitated to earn wages, so that she is entitled to temporary total disability benefits, from on or about September 6, 2003, until a date to be determined.

6. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

This claim involves a dispute over benefits for two possible injuries arising from the same work related accident. One of those injuries, a neck injury, was an admittedly compensable injury for which the respondents paid appropriate benefits. The second, disputed injury, was a hip injury which was controverted by the respondent. In his Opinion, the Administrative Law Judge found, in relevant part, that the claimant has met her burden of proof pertaining to the compensability of her alleged left hip injury. In accordance with this finding, the Administrative

Law Judge awarded medical benefits for the reasonable and necessary treatment of the claimant's left hip and leg condition. In addition, the Administrative Law Judge awarded the claimant temporary total disability benefits from on or about September 6, 2003, until a date yet to be determined. Finally, the Administrative Law Judge awarded the claimant additional temporary total disability benefits for her neck injury, from September 9, 2002, through October 20, 2002.

Our carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable left hip and leg injury as a result of her employment activities on April 25, 2002. Therefore, the claimant is not entitled to benefits associated with her left hip and leg condition. Furthermore, the claimant has failed to prove that she is entitled to temporary total disability benefits related to her neck injury as above described.

Respondents have stipulated that the claimant sustained a compensable neck injury on April 25, 2002.

According to the record, the claimant was in a supply closet reaching above her head for some boxes, when the boxes fell, striking the claimant on the head and causing her to stumble backwards. The claimant reportedly lost her balance, tripped on some boxes in the floor behind her, fell into some shelving, and landed on her left side. The claimant originally contended that she had sustained a neck injury as a result of this incident. The respondents accepted the compensability of the claimant's alleged neck injury and paid all reasonable and necessary benefits associated therewith. In the meantime, the claimant presented with complaints associated with her lower back, left hip, and her left leg. The claimant stated up until the time of her hearing that she had sustained an injury to her lower back as a result of the April 25th incident. However, at her hearing the claimant announced that she sustained a compensable injury to her left hip and leg as a result of that incident, rather than an injury to her lower back.

The medical record reveals that the claimant has a comprehensive history of complaints regarding her left hip

and leg, which pre-dates her injury of April 2002. For example, in June of 1995 the claimant presented to the Columbia Family Clinic with complaints of "lower back pain and neck pain x3 weeks." A report of that visit reads, in pertinent part, as follows:

Had off and on over last few years.
never x-rayed. Concerned something
serious going on and requesting x-rays
today. ... On exam, does have a lot of
tenderness in lower back and upper neck
area. Paraspinous muscles are very
tender. ... Cannot remember specific
injury. Woke up with it. Takes Advil.
Lower back very tender at L4/5 area.
History of 4-wheeler accident, where
landed on lower back about 3 years ago.
Has had discomfort ever since.

Pursuant to that examination, the claimant was diagnosed with cervical degenerative disc disease, cervical and lower back pain, and lumbosacral strain. The claimant was next seen for left shoulder and arm pain on December 16, 1997. Based upon his examination of the claimant, the claimant's primary treating physician, Dr. James Adametz, stated that she had apparently "made some progress" with therapy and medication. Then, on January 30, 1998, the

claimant was reportedly involved in a motor vehicle accident, which apparently aggravated her condition. There was some concern by her examining physician, Dr. Dan Dillard, that the claimant had suffered damage to her left knee as a result of that MVA. As noted by Dr. Dillard during her follow-up appointment, the claimant was experiencing mild discomfort in her left lower leg with occasional swelling.

In a clinic note dated February 16, 1998, Dr. Adametz reported that the claimant had a "new pain in that she has some pain in her left hip that radiates down toward the knee and she has a pain around the knee. She also has pain across her low back." The claimant continued to report worsening symptoms pertaining to her back and her left hip and leg throughout the course of her treatment over the next several weeks. On March 4, 1998, the claimant underwent her first cervical surgery. On March 27, 1998, Dr. Adametz reported that the claimant seemed to be "doing extremely well" after her neck surgery, and that her chief

complaint was of low back pain. Dr. Adametz described the claimant's complaints of pain as follows:

She complained more today about her low back. She apparently has had some pain mainly off to the left side. This is in the area of the left SI joint. She does get some pain that radiates all the way down the leg, however.

Dr. Adametz prescribed the claimant Flexiril and recommended that they would try an SI joint injection should her complaints persist. As of September 29, 1998, Dr. Adametz reported swelling and bruising of the claimant's left knee, which resulted from the claimant having "taken a fall where the left leg wanted to give out on her." In addition, Dr. Adametz stated:

This is a lady who I operated on for a neck problem earlier this year. She seems to have done nicely from that. She has had a little back trouble which she has mentioned to me on a couple of occasions, but it was not bothering her back enough at the time that she wanted to do anything. ... She does get quite a bit of pain in her posterior buttocks and left thigh, particularly on the left side and so she is really more interested in pursuing this now.

Suspecting that the claimant may have a herniated disc in her lower back, Dr. Adametz ordered an MRI. This study revealed "very slight bulging discs and some facet disease" in the claimant's lumbar spine. During her April 19, 1999, examination, the claimant reported new complaints of pain in her neck and left arm, which her doctor planned to treat "symptomatically." By August 2, 1999, the claimant was showing improvement with her neck complaints, but she was still reporting numbness in her left leg, particularly around the knee, and even down around the SI distribution. The claimant continued to be treated by Dr. Adametz for reportedly worsening pain in her neck, left arm, lower back, and her left leg. In June of 2001, Dr. Adametz was considering scheduling an epidural steroid injection. Prior to this occurring, however, the claimant was involved in another MVA on August 31, 2001. Thereafter, Dr. Adametz proceeded with the steroid injection. The record reflects that the claimant was next seen for her symptoms after her work related injury in April of 2002.

The claimant's first reported symptoms following her accident of April 2002, were primarily related to her neck. The claimant eventually had her second cervical surgery, which like her first neck surgery in 1998, had good results in relieving the claimant's symptoms. Then, on October 22, 2002, approximately six months after her work related incident, Dr. Edward Saer reported that the claimant was experiencing "numbness in the left leg below the knee and down into the toes." "Initially," continued Dr. Saer, "the pain was in the lower back and SI region, but it has moved more distal now." An MRI done at SVI on May 28, 2002, however, as reviewed by Dr. Saer, was unremarkable. Therefore, Dr. Saer assessed the claimant with a "probable" strain. On October 30, 2002, a total body bone scan revealed "probable" mild degenerative changes of the claimant's lower cervical spine with otherwise normal results. In spite of her worsening complaints, in his report dated January 31, 2003, Dr. Adametz concurred with Dr. Saer that there was no apparent "major problem" with the claimant's lumbar spine. Further, in a letter dated March 10, 2003, Dr. Adametz

stated that he had not evaluated the claimant's hip enough to form an opinion as to whether the claimant's complaints are related to her injury of April, 2002.

In April of 2003 the claimant received a lumbar epidural steroid injection. It was at that time that Dr. Adametz placed an indefinite lifting restriction on the claimant of no more than 10 pounds. The claimant continued to be treated by Dr. Adametz for low back and left hip and leg symptoms until he released her to Dr. Joseph on July 18, 2003. Dr. Joseph had examined the claimant on June 18, 2003, at which time he assessed her with left sacroiliitis. On September 4, 2003, Dr. Saer examined the claimant and stated that "She describes numbness in her left thigh that seems to be gradually worsening. It is going all the way down to the heel." Dr. Saer further stated that a recent MRI of the claimant's lumbar spine revealed facet arthrosis from L3-4 to L5-S1, with mild desiccation. The claimant was evaluated by Dr. Brent Sprinkle, D.O., in September of 2003, who assessed her, in part, with piriformis syndrome, for which he ordered therapy and a nerve conduction study.

Dr. Sprinkle treated the claimant conservatively with physical therapy, home exercises, steroid injections, and medications. Dr. Sprinkle eventually added left greater trochanteric bursitis to his diagnosis of the claimant's condition, for which he prescribed her a muscle stimulator. In an office note dated June 17, 2004, Dr. Sprinkle noted that the claimant's SI symptoms were greater than 51% related to her fall at work two years earlier. However, Dr. Sprinkle admitted during his deposition that he could not recall the claimant having informed him of her previous medical problems, symptoms, accidents, or otherwise, which may have affected her current symptoms. Further, Dr. Sprinkle admitted that having known about the claimant's previous medical problems might have affected his opinion concerning whether the claimant's complaints are related to her work related incident. Finally, Dr. Sprinkle admitted that he does not consider his treatment of the claimant to be a worker's compensation issue. On July 15, 2004, Dr. Sprinkle wrote that the claimant had not reached maximum medical improvement.

Ark. Code Ann. §11-9-102(4) (A) (i) defines a "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence." Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee is required to show that a causal connection exists between the injury and her employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). Finally, the injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-

102(4) (E) (i) (Repl. 2002); Clardy v. Medi-Homes LTC Servs., 75 Ark. App. 156, 55 S.W.3d 791 (2001).

In the instant case, the claimant alleges that her present left leg and hip problems resulted from her work related accident of April, 2002. The record, however, clearly indicates that the claimant's left hip and leg complaints started well before her alleged injury of April 2002. As revealed above, the claimant had received treatment for complaints identical to those allegedly arising from her most recent injury, since, at least, 1995. For example, in June of 1995 the claimant demonstrated "tenderness in lower back and upper neck area" with "very tender" paraspinous muscles. Although the claimant could not remember a specific injury, she reported that she had been experiencing these symptoms on and off for several years. In January of 1998, the claimant was involved in a MVA from which her treating physician was concerned that she had sustained damage to her left knee. Thereafter, the claimant reported gradually worsening symptoms, including pain and numbness, related to her lower back, left hip, left leg, and SI distribution. The

claimant continued to report these symptoms from 1998 up until the time that she was allegedly injured on her job in 2002. Therefore, the record clearly indicates that the symptoms related to the claimant's left hip and leg were well established by the time of her work related incident of April 2002. Furthermore, the claimant had received continuous and ongoing medical treatment for these symptoms since at least 1995. Based upon the above and foregoing, the claimant has failed to establish by a preponderance of the evidence that her left hip and leg problems are causally related to her work related incident. Rather, the record reflects that the claimant's left hip and leg problems are related to some pre-existing condition, either of independent etiology or as a result of some pre-existing low back pathology.

At the time of her hearing, the claimant withdrew her allegation that she had sustained a compensable low back injury as a result of the work related incident of April 25, 2002. Therefore, the Administrative Law Judge did not make a finding as to the compensability of the claimant's

originally alleged low back injury. However, the evidence preponderates against the claimant having sustained an injury to her low back as a result of her work related incident of April 2002. Rather, the preponderance of the evidence indicates that the claimant's low back problems are pre-existing, and that they are, more likely than not, caused by a degenerative condition, and probably exacerbated by some type of non-work related incident such as her MVA of 1998.

As for additional temporary total disability benefits related to the claimant's neck injury, the claimant has failed to prove by a preponderance of the evidence that she was totally incapacitated from earning wages during that time for which additional benefits have been awarded. Moreover although the claimant may have still been within her healing period for her left hip and leg condition, which based upon the record possibly appears to be chronic, the claimant has failed to present evidence that she was still within her healing period concerning her neck. Temporary total disability is that period within the healing period in

which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002). Based upon a lack of medical evidence proving otherwise, the claimant has failed to establish by objective medical evidence that she is entitled to additional temporary total disability benefits for her neck injury.

Based upon the above, the decision of the Administrative Law Judge is hereby reversed and this claim is denied in its entirety.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the opinion of the Majority finding that the claimant failed to prove by a preponderance of the evidence that she sustained a compensable left hip and leg injury as a result of her employment activities on April 25, 2002. I must also respectfully dissent from the majority opinion that as a result of failing to prove a compensable left hip and leg injury, the claimant is not entitled to benefits associated with her left hip and leg condition. Furthermore, I respectfully dissent from the Majority opinion finding that the claimant failed to prove that she is entitled to temporary total disability benefits, related to her compensable neck injury, from September 9, 2002, through October 20, 2002.

This is a dispute for two possible injuries from the same incident at work, an admittedly compensable neck injury and a disputed left hip and leg injury.

The incident occurred on April 25, 2002, when the claimant was working in a supply closet, boxes fell from a shelf above, striking her on the head and causing her to stumble backward and fall into shelving, ultimately landing on her buttocks, harder on the left side.

The respondents acknowledged that the claimant suffered a neck injury and began paying benefits, including the expenses of the surgery performed on September 23, 2002, and a period of temporary total disability benefits after the surgery from October 21, 2002, until on or about September 6, 2003. The respondents also conceded that an attorney's fee was due for the above mentioned period of temporary total disability benefits.

The claimant contended that she is entitled to two additional periods of temporary total disability benefits, one before and one after the period voluntarily paid by the respondents. The first period begins September 9, 2002, before the claimant's September 23, 2002 neck surgery, and continues until October 20, 2002. The second period begins on or about September 7, 2003, and continues until a date

yet to be determined. The claimant further contended that the incident at work resulted in a compensable left hip and leg injury for which appropriate benefits should be paid.

The respondents accepted the neck injury as compensable and began paying benefits at the proper rate but suspended them on September 9, 2002. There is no information in the record as to why benefits were ceased on that date. The claimant requested a hearing on January 10, 2003 for the resumption of temporary total disability benefits, medical benefits and permanent partial disability. Prior to the hearing the respondents verbally advised that they would bring the claimant's benefits current and the hearing was cancelled. A consent order was never signed or entered by the respondents. It appears from the record that the claimant was paid benefits from October 21, 2002, through September 6, 2003. It is not clear from the record as to why October 21, 2002 was chosen as the date to resume benefits.

It is my opinion, that the preponderance of the evidence shows that the claimant is entitled to temporary

total disability benefits for the time period from September 9, 2002, through October 20, 2002.

In order for the claimant to receive temporary total disability benefits from September 9, 2002 until October 20, 2002, the record must show that she was within her healing period and completely incapacitated to earn wages as a result of a compensable injury. Arkansas Highway & Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981).

There is no indication in the record that the claimant was released to return to work between September 9, 2002 and October 20, 2002. The record reflects that the claimant was under the active care of doctors and unable to work since April 25, 2002.

A report from Dr. W. Joseph in April 30, 2002, states that he would recheck the claimant in a week and she would be off work during the interim. On May 6, 2002, Dr. R. Joseph reported that he would see the claimant back in two weeks and she was to continue to be off work. Dr. R. Joseph referred the claimant to Dr. Adametz on

May 20, 2002. There was no indication in that report that the claimant could return to work.

On June 21, 2002, Dr. Adametz recommended an MRI scan of the claimant's cervical spine and commented that if the scan did not show a "major abnormality" in the neck she could return to work at that point. Of course, it would not be necessary to return the claimant to work unless he considered her then to have been off work because of the condition of her neck. After the scan had been performed later in June, Dr. Adametz wrote on July 22, 2002, that he was recommending surgery at C4-5. This is consistent with a "major abnormality" in her neck that would prevent her from returning to work, consistent with his earlier comment. Her surgery on September 23, 2002, is also an indication that her condition and ability to work had not improved since July 22, 2002. On October 21, 2002, Dr. Adametz stated: "She has been off work now ever since an injury back in April 2002." Dr. Saer's October 22, 2002, report stated that the claimant last worked on April 25.

There is no indication that the claimant was other than within her healing period and totally incapacitated to earn wages from September 9, 2002 through October 20, 2002. Therefore, it is my opinion that the claimant has met her burden of proving entitlement to temporary total disability benefits for the above referenced time period.

The claimant's cervical spine is not a basis for the final period of temporary total disability beginning September 6, 2003, since the record indicates that her healing period had ended and the focus of her medical care had shifted to her leg and buttock pain. The claimant's primary treating physician for her neck condition, Dr. Adametz, filled out a statement of disability on April 4, 2003, which indicated her limitations, and stated that her last visit would be April 7, 2003. In his deposition, he confirmed that April 7, 2003, was her last visit and that he was then focusing on the left SI joint which he injected. He also confirmed that his note of July 18, 2003, referring the claimant back to Dr. Joseph, was for treatment of the SI joint or lower back. Thus, the

record indicates that the claimant's neck injury had stabilized and had reached the end of the healing period before the beginning of the final period of temporary total disability requested by the claimant.

However, the claimant also contented that the final period of temporary total disability was the result of a compensable hip and leg injury caused by the same incident in April, 2002. Because the respondents controverted the hip and leg condition, the claimant has the burden of proving the occurrence of such an injury, and establishing the injury by medical evidence, supported by objective findings, Ark. Code Ann. §11-9-102(4)(D), where objective findings are considered to be those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16).

In my opinion, the claimant has met her burden of proving a compensable injury to her left hip and leg. The occurrence itself is hardly in dispute, even though symptoms involving the claimant's low back and legs were less pressing than her cervical spine problem, and possibly more

difficult for her physicians to clearly assess. However, when the claimant was seen by her physician on April 30, 2002, he noted that she complained of "low back" pain, had point tenderness over the left SI joint; a positive left straight leg raise. His assessment also included "lumbar spasm" and he prescribed Skelaxin for spasm. Dr. Ralph Joseph noted on May 6, 2002, that the claimant had developed pain in the left posterior hip with paresthesias down the back of her left leg intermittently. His assessment included sacroilitis, with some intermittent sciatica. His notes indicated that the claimant could not sit and do her computer work due to sacroilitis. Dr. Ralph Joseph indicated that the claimant suffered from sacroilitis and had received steroid injection therapy in his May 20, 2002 note.

Objective findings include the muscle spasm noted early in the record and Dr. Sprinkle's findings when he later became the claimant's treating physician for her left hip and leg problems. In his deposition, Dr. Sprinkle testified about the existence of palpable tightness in the muscle when he pressed it in relation to her piriformis syndrome. He

described her condition as taut band, almost like a knot-like feeling in the muscle itself. He also stated that the claimant's piriformis syndrome would have been worsened if her symptoms were in fact more intense after the incident at work. This is consistent with the claimant's testimony about her worsening condition.

Dr. Adametz wrote, on May 22, 2002, that the claimant felt that her low back was worse and felt different to her than it had been previously. His note indicated that the claimant had undergone physical therapy and a SI joint injection but she thought it actually made her low back worse instead of better. He noted tenderness around her SI joints with the left side being worse. Dr. Adametz wrote that the claimant may have a SI sprain, but it had not responded to the injection and he thought that a MRI of the lumbar spine should be taken. The MRI report dated May 28, 2002, indicated that the SI joints were not seen well on either side. On June 21, 2002, Dr. Adametz indicated that the claimant has still got pain in her back and even somewhat down her legs and she still had some tenderness

around her left SI joint. He noted that the claimant said that the shot from DR. Joseph did help a small amount but she really had done better one time with an epidural steroid injection given to her by Dr. Adametz. He noted that the claimant was still having a lot of trouble with muscle spasms in the low back and neck. The claimant saw Dr. Adametz on July 22, 2002, at which time he noted that she was having some pain in her low back but directed most of his comments to her need for a possible cervical spine surgery.

The record indicates that the claimant continued to receive active medical care that was reasonably necessary for her left hip and leg condition while she was treated for her neck injury and recovered from her neck surgery. Dr. Adametz, eventually, referred the claimant back to Dr. Joseph for additional care of her left hip and leg problems. She also received appropriate medical attention from Dr. Saer and Dr. Sprinkle. In my opinion, the preponderance of the evidence, including medical records and the claimant's testimony, shows that the claimant has

continued in a healing period and has been totally incapacitated to earn wages as a result of her compensable left hip and leg condition during the requested second period of temporary total disability beginning on or about September 7, 2003, and continuing until a date yet to be determined.

The claimant's history of prior symptoms does not preclude the occurrence of a compensable injury in April, 2002. The record and the claimant's testimony indicate that prior to April, 2002, the claimant had symptoms involving her low back and legs that had last been treated by Dr. Adametz on November 19, 2001. It was not necessary for the claimant to return to the doctor until after she had been hurt at work in 2002. The medical record and the claimant's testimony indicated that her symptoms were different at the time of the injury. Similarly, in his deposition, Dr. Joseph stated, "Now, clearly, she had some similar complaints like in '97 or '99 or so, but this seemed to bring on new symptoms." Thus, in my opinion, the

preponderance of the evidence shows that the claimant suffered an injury during the incident in April, 2002.

Based on the foregoing, I find that the claimant proved by a preponderance of the evidence that she is entitled to temporary total disability benefits for the time period from September 9, 2002, through October 20, 2002. I also find that the claimant has met her burden of proving a compensable injury to her left hip and leg, for which she is entitled to benefits. Finally, I find that the preponderance of the evidence, including medical records and the claimant's testimony, shows that the claimant has continued in a healing period and has been totally incapacitated to earn wages as a result of her compensable left hip and leg condition during the requested second period of temporary total disability beginning on or about September 7, 2003, and continuing until a date yet to be determined.

Accordingly, for those reasons set forth above, I respectfully dissent from the majority opinion.

SHELBY W. TURNER, Commissioner