

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E904378

TEENA L. DRAPER, EMPLOYEE	CLAIMANT
DUB CLENNEY CONSTRUCTION, INC., EMPLOYER	RESPONDENT
BITUMINOUS CASUALTY INSURANCE, CARRIER	RESPONDENT

OPINION FILED MAY 3, 2006

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

Claimant represented by HONORABLE RICHARD S. MUSE, Attorney at Law, Hot Springs, Arkansas.

Respondent represented by HONORABLE RANDY P. MURPHY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed April 19, 2005.

The Administrative Law Judge entered 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. The stipulations of the parties are reasonable and hereby accepted as fact.

3. The claimant has failed to prove by a preponderance of the evidence that she is entitled to TTD or TPD benefits for the periods requested.

4. The claimant has failed to prove by a preponderance of the evidence that the additional medical treatment requested is connected to the compensable injury.

5. The respondents are directed to clear up all issues related to the \$209.00 discrepancy with Dr. Purifoy that were previously ordered by in the ALJ's opinion filed August 6, 2001, as directed herein.

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 must respectfully dissent from the Majority's opinion affirming and adopting the Administrative Law Judge's April 19, 2005 decision denying the claimant additional temporary total disability benefits, temporary partial disability benefits, and additional medical treatment. Based upon my de novo review of the record, it is my opinion that the Administrative Law Judge's opinion should be reversed.

_____This matter was the subject of a previous Administrative Law Judge Opinion which was filed on August 6, 2001. In that opinion the claimant was found to have sustained a compensable injury to her low back as a result of a specific incident on April 6, 1999, while in the employ of Dub Clenney Construction. The Administrative Law Judge ordered the respondent to pay TTD benefits from April 7, 1999 through March 1, 2000 and all reasonably related medical expenses.

_____The respondents appealed this decision to the Full Commission. The Full Commission's decision affirming the Administrative Law Judge was filed on March 21, 2002. The matter was then appealed to the Arkansas Court of Appeals. The Court of Appeals decision affirming the Full Commission was filed on January 22, 2003. The present appeal is from the hearing held on January 21, 2005.

_____The award of TTD benefits was stopped on March 1, 2000, because the claimant returned to work for a different employer. The claimant returned to work because she could no longer afford medical treatment. The claimant testified that

her new employer, Overton Electric, was aware of her back injury and were willing to accommodate by assigning others to help with her job duties when necessary. The claimant worked for Overton Electric from March 1, 2000 through January 3, 2002, for essentially the same pay as she was making while working for the respondent employer.

_____The pivotal issue in this claim is whether the "lifting episode" on December 31, 2001, is a recurrence of her initial injury, or in the alternative is just an inconsequential minor injury which would then entitle the claimant to additional benefits, including TTD, TPD and additional medical treatment. The Administrative Law Judge made the following statement concerning his decision in this claim.

When looking at the other facts, this examiner cannot help but look to the obvious. The claimant worked for nearly two years after the 1999 compensable injury and then, due to a new lifting episode 12/31/01, was never able to return to full time employment. Further, according to her physical therapist, after the 12/31/01 incident the claimant was substantially worse with different symptoms. Add in the difference between

the 1999 and 2002 MRIs, it is clear to this examiner the claimant's condition was not a natural and probable result of the first injury and therefore, additional medicals are denied. Instead, it appears the 12/31/01 was either an aggravation or a new injury that could be the responsibility of her employer at that time; however, that issue is beyond the scope of this hearing.

In my opinion, the Administrative Law Judge is mistaken in his interpretation of the evidence. I believe that the evidence shows that the "lifting episode" was either a recurrence of her initial compensable injury or an inconsequential minor injury.

_____The respondents contend that the claimant's 1999 injury was a soft tissue injury which healed and that her current problems are related to a December 31, 2001 aggravation of a pre-existing degenerative disc disease.

_____In my review of the record, I have been unable to locate any documentation classifying the claimant's April 1999 compensable lower back injury as a soft tissue injury. The claimant's MRI which was taken on October 26, 1999 states:

Mild concentric disc bulge is identified at the level of L4-5. There is slight ventral epidural defect present. The neural foramina at this level do not appear effaced. There is a small central disc herniation identified at the level of L5-S1. The right and left neural foramina at this level remain patent. The remaining intervertebral disc spaces appear intact. The signal within the vertebral body marrow is within normal range. No paravertebral mass lesions are seen.

IMPRESSION: Mild disc bulge at L4-5.
2/ Central disc herniation at L5-S1.

On October 28, 1999, Dr. Shawn Purifoy, claimant's authorized treating physician, agreed that the above MRI showed a central disc herniation. From the record, it appears that the claimant has continued to receive treatment for her lower back from the date of her initial injury in April 1999 and at least through September 2004. I have also been unable to locate any medical documentation which opines that the claimant has reached MMI for her compensable lower back injury.

_____The Administrative Law Judge places great emphasis on claimant's failure to note her December 31, 2001 "lifting

episode" as a basis for denying additional benefits, the evidence shows there was no misstatement by claimant; there was no attempt to deceive; and her credibility is intact. It simply never occurred to claimant that her initial 1999 injury was not the basis for her current ongoing problems, because, as the evidence shows, it clearly was.

_____ Claimant was having back difficulties prior to the 2001 "lifting episode". An office report from Dr. Purifoy dated August 10, 2001, states:

Teena is here today because her back is bothering her. She says about every week or so she has a lot of pain in her back, mostly on the right side. Today it is really tender.

She was also seen by Dr. Purifoy on December 13, 2001, at which time she stated that "her back has been bothering her a lot more lately. She can't get through a full work day without having tremendous pain in her back." At that time Dr. Purifoy sent claimant back to physical therapy since it had been helpful in the past.

_____ Claimant returned to physical therapy on December 17, 2001. Dennis Morris, claimant's physical therapist, testified during his deposition that it was his impression that claimant had never had "100 percent resolution of her symptoms." He also stated that "I was working under the assumption that she never totally got well. Let's see. A partial recovery, tried to work again, and has gone downhill since then."

_____ Mr. Morris' deposition is worth noting here:

_____ Q. But did she, when she came to see you, attribute any of her problems to any work situations she might have had at that electric company?

[comments of attorneys omitted]

A. Only that she had continued to have pain, and she tried to work. And apparently, while she was working, she had just hurt herself at the end of December, yes, sir, of 2001.

* * * * *

A. The only injury I have noted here is that lifting episode approximately two days ago, which would make it the end of December 2001.

Q. Was this during the time that she was under your care and treatment?

A. Yes.

Q. Was she well, in your opinion, from the February, '99 occurrence, before she gave you that history of that January incident?

A. No, sir.

Q. So she was still suffering from that?

A. She had never made a full recovery, yes, sir.

Q. And from your experience - - and I know you're not qualified to read an MRI, but you tell me you have seen the report on this MRI - - can you distinguish from what you've seen between the left and right low back problem that this lady might have?

A. It's not unusual to have a central bulge or HNP, which will give symptoms one side, or bilateral, both sides, or really, move a little bit. She was pretty consistent with her history all along of where she hurt. This last episode, where she lifted and hurt on the right side could have just been a pulled muscle. It could have been an incidental injury, but was superimposed on this - -

Q. And you were still continuing to treat her for what I'm going to call the left side, for my mind.

A. I was treating her because she had never totally recovered from that first injury.

Claimant was first seen by Dr. Reza Shahim on February 7, 2002. During that office visit, Dr. Shahim reports that he reviewed claimant's lumbar spine MRI which did not show a disc herniation, but that she did have a disc protrusion at L5-S1 with loss of disc height and Type II modick changes.

The Administrative Law Judge states that one of his reasons for denying benefits is the differences between the 1999 and 2002 MRIs. I have been unable to locate a copy of the actual report for the 2002 MRI in the record. During his deposition, Dr. Shahim is questioned about the MRIs.

Q. Did you compare the 1999 and 2002 MRIs?

A. I didn't have that MRI, not that I remember.

Q. I'm going to show you Dr. Hart's report.

A. Okay.

Q. And this is the procedure he performed on March 26th, 2002; is that it?

A. Yeah.

Q. Okay. If you'll just read with me, he says he reviewed the '99 versus the 2002 MRIs. The difference in the character of the disk height and the disk protrusion of the 5, S1 slightly darkened disk at 4-5.

A. Okay.

Q. What does he mean by that, if you know?

A. Sounds like he says the scan looks a little worse.

Q. Okay.

A. But I haven't reviewed the '99 MR to tell you if there is any change.

Both Drs. Shahim and Hart opine that the 2002 MRI is a little worse than the previous MRI taken in 1999. If claimant's "lifting episode" was significant enough to qualify as an aggravation or a new injury, in my opinion there should be a greater difference between MRIs. It is

logical to expect an MRI of the lumbar spine to be a little worse after four years have elapsed.

Claimant's pain has consistently been in her lower back, at times the pain has been worse on one side more than the other. Claimant had complained of right sided pain to Dr. Purifoy in August 2001, well before the December 2001 "lifting episode". As is shown through Dr. Bruffett's deposition testimony, claimant has been consistent in describing her source of pain.

Q. Which side did she check as being the primary source of her pain?

A. She said that her pain was in her back, buttock, and leg. Which side is affected, she checked both right and left. And if both, which side is worse, she checked left.

Respondents are responsible for benefits that result from an injury that is causally related to a compensable injury. However, the respondent is not responsible for benefits when the injury is sustained due to a non-work related, independent intervening cause which causes or prolongs disability or need for treatment.

Richardson v. ACF Industries, 2003 AWCC 120, Claim No. F100097 (June 18, 2003); A.C.A. §11-9-102(4)(F)(b). An intervening cause does not exist unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998), citing Guidry v. J& R Eads Construction Co., 11 Ark. App. 219, 669 S.W. 2d 483 (1984). The claimant's knowledge of her condition must be considered in determining whether her conduct was unreasonable under the circumstances. Lunsford v. Rich Mountain Electric Corp., 33 Ark. App. 66, 800S.W.2d 732 (1990); Lunsford v. Rich Mountain Electric Corp., 38 Ark. App. 188, 832 S.W.2d 291 (1992). However, when a primary injury is shown to have arisen out of the course of employment, the employer is responsible for any natural consequence of that injury. Wackenhunt Corp. v. Jones, 73 Ark. 158, 40 S.W. 3d 333 (2001).

A recurrence entitles claimant to additional benefits where "an injury flares up a second time, without an intervening cause, and creates a second disability..."

Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996); see also, Aluminum Co. of America v. Williams, 232 Ark. 216, 35 S.W.2d 315 (1960) ([T]hat where a second complication is found to be a natural and probable result of the first injury, the employer remains liable.).

Claimant was questioned by her attorney about the December "lifting episode".

Q. There are some records here from Dr. Purifoy, January 8, 2002, which I think Mr. Murphy alluded to at one time or another, that says you were here today because your back was bothering you again. You had picked up a can of paint a week ago and your back had been hurting ever since. Do you remember anything like that?

A. Yes, I do.

Q. Do you remember anything about the size of the can of paint that we are talking about?

A. No, I sure don't. I just picked up a bucket of paint, a can of paint. I don't really even have a clue. I don't remember it.

Q. When I was talking to you a few minutes ago you told us that you understood that you had a

restriction on lifting of no more than 20 pounds. Is that right?

A. I didn't have a restriction at that time but, yes, I was restricted.

Q. Have you always observed that as being your restriction?

A. Yes, sir.

Q. And when I'm talking about this can of paint here, am I talking about something that weights not over 20 pounds or over 20 pounds?

A. No, it don't weigh 20 pounds?

In my opinion, there was not an independent intervening cause in this claim. Drs. Shahim, Hart, Bruffett and Mr. Morris all indicate that claimant has the same pain she has had since her initial on-the-job injury. It was not unreasonable under the circumstances for claimant to pick-up a can of paint weighing less than 20 pounds. In my opinion, claimant has proven that the December 2001 "lifting episode" was merely a recurrence or possibly even a completely inconsequential event as claimant has been naturally and probably deteriorating since her original injury.

Entitlement to medical benefits can be demonstrated by showing they are "reasonably necessary in connection with" the compensable injury, without necessarily proving that the claimant was in a healing period. Ark. Code Ann. §11-9-508. The claimant also carries the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary in connection with the compensable injury. Norma Beaty v. Ben Pearson, Inc., Full Commission Opinion, Filed February 17, 1989 (Claim No. D712291).

The Commission has the discretion to decide what weight to give to the testimony presented by the physician. Questions of credibility and the weight sufficiency to be given the evidence are matters within the province of the Commission. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Medical opinions must be stated within a reasonable degree of certainty. Crudup v. Regal Ware Inc., 341 Ark. 804, 20 S.W.3d 791 (2001); Ark. Code Ann. §11-9-102(16)(B). Expert opinions bases on "could", "may", or "possibly" lack the definiteness required to prove

causal connection. Frances v. Gaylord Container Corp., 341 Ark. 527, 20 S.W.3d 280 (2000). Additionally, the Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate claimant's claim. Preacher v. Cave City Nursing Home Inc., 2004 AWCC 14 Claim No. E512363, citing Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983). However, where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. Huffy Service First v. Ledbetter, 76 Ark. App. 533, 69 S.W.3d 449 (2002), citing Howell v. Scroll Tech., 343 Ark. 297, 35 S.W.3d 800 (2001).

Claimant was first seen by Dr. Shahim on February 7, 2002. At that time, he referred her to the pain clinic for management of her low back pain. Claimant was then seen by Dr. Hart from March 11, 2002 through April 10, 2003. While under Dr. Hart's care, claimant received epidural steroid injections which helped to alleviate her

pain for a short time. Because of claimant's apparent failure of conservative care, Dr. Hart performed a diskography on April 10, 2003.

As I started injecting the 5-S1, immediately almost the dye entered the nucleus pulposus. We had complete anterior and posterior extension on the dye all the way to the posterior annulus fibrosis to a moderate bulge at the anterior epidural space. At the same time we could see the abnormal morphological appearance circumferentially disrupting the disk in which it leaked completely through. We could see that it took more than 3.25 cc which is more than twice the normal volume, pressure less than 20 psi. At the same time this was subjectively very painful, reproducing bilateral back, buttock, and posterolateral thigh pain complaints, right slightly greater than left side to the knee consistent with the pain that she has had over the last several years!

... the 3-4 and 4-5 disks appeared to be normal, 5-S1 on the other hand was completely abnormal with a significant circumferential disruption. This also had an abnormal pressure volume and also this is where the pain was reproduced concordantly.

I would like to get her back to Dr. Shahim at this time for surgical re-evaluation.

Dr. Shahim was deposed on April 17, 2003. At the time of his deposition, Dr. Shahim had not seen claimant in over one year. Dr. Shahim testified that he had reviewed Dr. Hart's discogram and that he would be willing to operate if he saw claimant and she had persistent pain and the positive discogram. Claimant's next appointment with Dr. Shahim was on May 13, 2003 at which time he made the following observations and recommendations.

I believe Ms. Draper is symptomatic from discogenic back pain. I suspect that if we had done a discogram on her a year ago she would have had the same discographic appearance of disc disruption...

My preference for her would be to undergo evaluation by Dr. Hart for IDET or other minimally invasive intradiscal treatment as may be recommended by Dr. Hart.

I will plan on following up with her after evaluation by Dr. Hart.

Claimant was then sent for an independent medical evaluation with Dr. Bruffett on July 9, 2003. Dr. Bruffett suggested claimant undergo an aggressive trunk stabilization

program. He also made the statement that "[he] think[s] Ms. Draper sustained a specific injury to her back in April, 1999 and has been symptomatic from that time to the present time."

Claimant was seen again by Dr. Hart on July 26, 2004. At that time, he recommended that she return to Dr. Shahim or Dr. Bruffett for further treatment. Dr. Hart states in his report from that date:

It makes no sense for me to continue to do percutaneous procedures in a disc that is basically gone. So basically it boils down to this. There is no doubt to a degree of medical certainty and probability that Ms. Draper has legitimate reasons why she hurts. She has severe disc disruption at the 5-S1 level.

The last medical report in the record is from Dr. Shahim on September 14, 2004, which states:

Since Ms. Draper has not had any recent MRI of the lumbar spine, I recommend obtaining an MRI of the lumbar spine. She most likely will require lumbar decompression and possible fusion at L5-S1. I will plan on following up with her after the MRI.

Based upon the foregoing evidence, it is my opinion that claimant has met her burden of proving that further medical treatment is reasonably necessary and related to her compensable low back injury.

Claimant is asking for TTD benefits from February 1, 2002 through March 23, 2004; and from August 13, 2004 through a date yet to be determined. In my opinion, claimant has proven by a preponderance of the evidence that she is entitled to TTD benefits for the above mentioned periods of time.

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). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. Id. The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. V. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when

the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. Crabtree, supra. The question of when the healing period has ended is a factual determination for the Commission.

The healing period is defined as that period for healing of the injury that continues until the employee is as far restored as the permanent character of the injury will permit. Arkansas Highway & Transp. Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Id.; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Conversely, the healing period has not ended so long as treatment is

administered for the healing and alleviation of the condition. McWilliams, supra; J.A. Riggs Tractor v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). The determination of when the healing period ends is a factual determination to be made by the Commission. McWilliams, Parker, supra. In Pallazollo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S.W.2d 938 (1994), the Court of Appeals stated that in order to be entitled to temporary total disability compensation for an unscheduled injury, a claimant must prove that he remained within his healing period and that he suffered a total incapacity to earn wages (citing Arkansas State Highway & Transp. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981)).

In my opinion, there is no question that claimant is still within her healing period. There is no evidence in the record to suggest a finding of maximum medical improvement or that claimant's compensable injury has reached the level where nothing further can be done medically to improve it. Claimant has shown by a

preponderance of the evidence that she is still within her healing period.

The main issue as to claimant's entitlement to TTD benefits is whether she was totally incapacitated from earning wages. In my opinion, claimant has met her burden and is entitled to TTD benefits for the time periods requested.

It should be noted that workers' compensation case law does not award a claimant TTD benefits only when a physician removes a claimant from work, but rather when a claimant demonstrates that she is totally incapacitated from earning wages. Although no specific work restriction were assigned to claimant, Dr. Bruffett's deposition testimony shows claimant's restrictions were self-imposed, and based entirely on how well claimant could deal with her own pain:

Q. You leave that pretty much up to the patient to gauge what the patient should or shouldn't do?

A. Sure.

Q. It's kind of a common sense-type approach?

A. Yeah. I mean, I don't really say that I would restrict her activities. I told her she could do whatever she felt like she could do. But she might have some limitations, based on her pain.

* * * * *

Q. -You don't recommend that Ms. Draper remain off work. Is that a fair statement?

A. I would think - I would leave that more up to her.

* * * * *

Q. Do you recommend to her that she return to jobs which require her to lift 70 to 75 pounds of steel right now?

A. Well, again, that's sort of up to her. I think she's going to be more symptomatic; I think she's going to have more back pain if she tries that. But if that's - but I wouldn't restrict her from doing that, if she found enjoyment in that....

Q. But if she does it at this time, in your medical opinion, is that going to make her condition worse?

A. It'll probably make her pain worse.

Claimant's medical records also demonstrate that her physicians were in agreement with claimant's assessment that she could not work. This is clearly shown by Dr. Bruffett's July 9, 2003 evaluation wherein he states:

After 3 months of the aggressive exercise program, I think she ought to be allowed to return to work if she desires. I really do not have any specific "restrictions" to place upon her. She can go back to doing whatever she wants, but she does not feel she is going to be able to do aggressive heavy lifting and I think that is probably reasonable.

This statement shows that Dr. Bruffett agrees with claimant as to her ability to work as of that time. Claimant has made efforts to return to work and each time her compensable injury has become more painful. In my opinion, it is clear that claimant would prefer to work if possible, but until her compensable injury is fully treated she is still in her healing period and totally incapacitated from earning wages. Claimant should be entitled to TTD benefits from February 1, 2002 through March 23, 2004; and from August 13, 2004 through a date yet to be determined.

Claimant is also requesting TPD benefits from March 24, 2004 through August 12, 2004. Claimant returned to work in March 2004 until August 2004, the period between her total incapacity to work, in an attempt to regain her employment and some semblance of normalcy in her life. However, claimant's pain became such that she could not keep working.

"[T]emporary partial disability is that period within the healing period in which the employee suffers... a decrease in his capacity to earn the wages he was receiving at the time of the injury." Arkansas State Hwy. & Transp. Dep't v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981).

Claimant was entitled to \$329.00 weekly average wage based upon her initial benefits. While working for Overton Electric, a separate employer from her initial injury, during the period of months noted, claimant's wages were \$150.00 per week, and she was performing light duty work.

Although claimant was able to work during the months noted, she was still suffering from the effects of the compensable injury. It is clear that claimant saw a decrease in her wages during the period in which she tried to return to employment, which would entitle her to TPD benefits.

In my opinion claimant has proven that the December 2001 "lifting episode" was merely a recurrence or possibly even a completely inconsequential event. I also believe it is clear from the record, that the medical treatment claimant has received and her proposed medical treatment is reasonably necessary and related to her compensable injury.

In my opinion, claimant has shown that she was within her healing period and totally incapacitated from earning wages during the periods of February 1, 2002 through March 23, 2004; and from August 13, 2004 until a date yet to be determined. As such, she would be entitled to TTD benefits for these time periods. Finally, in my opinion, claimant has met her burden of proving a decrease in wage

earning because of her compensable injury during the period of March 24, 2004 through August 12, 2004, entitling her to TPD benefits.

For the foregoing reasons, I must respectfully dissent from the Majority's opinion affirming and adopting the Administrative Law Judge's April 19, 2005 opinion.

SHELBY W. TURNER, Commissioner