

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402498

ALVIS GREGORY,
EMPLOYEE

CLAIMANT

STATE HIGHWAY & TRANSPORTATION DEPT.,
EMPLOYER

RESPONDENT

ARKANSAS INSURANCE DEPARTMENT,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 7, 2006

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

Claimant represented by the HONORABLE R. GUNNER DELAY,
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE WILLIAM WHARTON,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals from an opinion filed by an administrative law judge on April 11, 2005. The administrative law judge found, in pertinent part, "The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his cervical spine on March 1, 2004, while working for the respondent. The claimant is entitled to reasonable and necessary medical treatment for his cervical spine problems. The claimant has

proven by a preponderance of the evidence that he is entitled to temporary total disability from October 6, 2004, to a date to be determined." After reviewing the entire record *de novo*, the Full Commission finds that the claimant did not prove by a preponderance of the evidence that he sustained a compensable injury to his cervical spine on March 1, 2004, while working for the respondent. We therefore reverse the opinion of the administrative law judge.

I. History

The claimant, age 62 (10/08/42) worked for the respondent as senior mechanic. Although the claimant's specialty is in computers and electronics, he worked on all of the respondent's equipment. On March 1, 2004, the claimant sustained an admittedly compensable injury to his left shoulder while putting a fuel pump in a welding truck. The respondent paid the claimant the appropriate associated benefits for his left shoulder injury, which included a 9% impairment rating.

The claimant now alleges that he also injured his neck during this incident. However, the respondent has controverted the claimant's claim for benefits pertaining to his neck/cervical spine in its entirety. Therefore, the

claimant has brought this claim asserting his rights to benefits for his cervical spine condition.

On March 24, 2004, the claimant was seen by Dr. Robert Bebout due to complaints and problems with his right shoulder. Dr. Bebout reported in pertinent part:

Mr. Gregory is a 61-year-old male, right hand dominant, who injured his left shoulder at work on 03/01/2004. He was removing a gasoline tank from a car. The jack slipped and put sudden strain on his shoulder, causing pain and injury. He has been having difficulty ever since. He has most recently been in an arm sling and has been unable to work....

Dr. Bebout reported that an MRI showed a rotator cuff tear and displacement of the biceps tendons out of the groove. He further reported that plain films showed significant degenerative disease at the acromioclavicular (AC) joint and there was a large spurring on the distal clavicle inferior eroding into the rotator cuff space. Dr. Bebout's impression was "acute rotator cuff with degenerative joint disease of the AC joint," for which he recommended Mumford acromioplasty repair of the rotator cuff.

Therefore, on April 1, 2004, the claimant underwent surgery to his left shoulder, which was performed by Dr.

Bebout. The claimant was seen on April 16, 2004, by Dr. Bebout for follow-up after having undergone Mumford acromioplasty. Although the claimant's rotator cuff was intact, he had an inflamed, thickened bursa, which was excised as well. Dr. Bebout reported that additional exercises would be added as the claimant improved, and continued his off work status.

The claimant was seen by Dr. Bebout on April 30, 2004 for follow-up of his shoulder surgery. The claimant's rotator cuff was found to be intact, but he was somewhat stiff on that side. Since the claimant was not making best progress on the home program on his own, he was directed to undergo physical therapy, with recommendation for reevaluation in a month.

On May 28, 2004, the claimant was seen by Dr. Bebout for follow-up of his left shoulder surgery. At that time, the claimant had an inflamed bursa of the left shoulder along with some stiffness in the shoulder, which was causing some discomfort. As a result, Dr. Bebout continued the claimant on physical therapy as well as his home stretching program. He also continued the claimant's off work status

until his re-evaluation, which was scheduled for the next month.

Dr. Bebout saw the claimant again on June 25, 2004 for follow-up of his left shoulder surgery. At that time, the claimant had continued complaints of stiffness, for which physical therapy treatment was continued. In addition, Dr. Bebout again continued the claimant on his off work status.

On August 4, 2004, the claimant was seen again by Dr. Bebout for follow-up of his left shoulder surgery. Although the claimant had good motion in his shoulders, he was still experiencing some discomfort and weakness. On August 18, 2004, the claimant was seen for follow-up with Dr. Bebout. At that time, Dr. Bebout reported:

61-year-old male follows up. He is four and a half months now after shoulder Mumford acromioplasty and excision of inflamed and thickened bursa. He continues to have shoulder pain. He has been in therapy; although, not recently. He complains of pain in the upper arm and anterior shoulder area, especially with activity level and range of motion.

Dr. Bebout reported that X-rays looked fine, and there was good space between the clavicle and acromion from the Mumford. In addition, he reported that the glenohumeral joint looked normal in alignment and he did not see any

arthritis of the glenohumeral joint. However, Dr. Bebout gave the claimant an injection in the bursa and sent him back for additional therapy.

On September 15, 2004, Dr. Bebout saw the claimant for follow-up of his left shoulder surgery. He reported at that time:

SUBJECTIVE: Mr. Gregory is a 61-year-old male who follows up now five months after left shoulder surgery, Mumford acromioplasty, excision of a thickened, inflamed bursa of the shoulder. The rotator cuff itself was intact. He complains of pain about the shoulder, but he also now has complaints of numbness and tingling in the thumb, index and middle finger of his left hand. He feels he is losing strength in the hand. He said he was out fishing last week when he had the acute problem with numbness into he [sic] hand and pain in the shoulder.

Dr. Bebout further reported that X-rays taken of the claimant's neck that day showed spurring with autofusion between C5 and 6 and spurring between C6 and 7, and some spurring between C4 and C5 as well. Dr. Bebout wrote, "Assessment: This could be median nerve symptoms versus a radiculopathy from his neck arthritis. I think the shoulder itself is healed up and not the source of any ongoing pain or trouble at this time." As a result, Dr. Bebout ordered an MRI of the cervical spine.

An MRI of the cervical spine was taken on September 30, 2004, with the following impression:

Mild spondylosis and right-sided foraminal narrowing C3-4. Mild spondylosis without definite foraminal narrowing C4-5. Possible small central protrusion C4-5. Central to left paracentral small disc protrusion C6-7.

On October 6, 2004, Dr. Bebout wrote:

Mr. Gregory is a 61 year old male who follows up now right at six months after left shoulder Mumford arcominoplasty and excision of a large inflamed, thickened bursa. He continues to have trouble. We did an MRI of his neck. This does show spondylitis, some small central disk protrusions, right sided foraminal narrowing and left sided foraminal narrowing at C6-7 on the left. I think that this very likely is the source of his continued pain. I do feel this is all related to his shoulder injury from work back in March the 1st, 2004 this year. I think as far as his shoulder goes he has reached maximum medical improvement there and has an impairment rating of 10% of the upper extremity for the distal clavicle resection table 27 and 6% for continued crepitation and some stiffness in the shoulder from table 18-19 for combined impairment rating of 15% to the upper extremity from the fourth edition of the guide to the Evaluation of Permanent Impairment, American Medical Association. I want to send him to neurosurgery for evaluation of his continued pain, referable to his neck but will discontinue his therapy program a this point and time. He may work but is to avoid heavy lifting and no overhead use of the extremity. He is released from our care at this time.

Although there was considerable confusion as to the impairment rating assessed by Dr. Bebout for the claimant's

compensable left shoulder injury, the parties subsequently agreed to a 9% impairment rating to the body as a whole, which respondent has paid or is currently paying.

A hearing was held in this matter on February 10, 2005. During the hearing, the claimant gave testimony. The claimant essentially testified that he was not sure whether or not he described pain in his neck as well as shoulder when he first sought treatment. According to the claimant, at that time, he thought that he had just torn his shoulder. The claimant testified that he had not had any prior problems with his neck or left shoulder before the March 1, 2004, incident.

According to the claimant, he was eventually referred to Dr. Bebout for treatment of his shoulder. The claimant testified that Dr. Bebout took x-rays of his shoulder and then operated on it, but he concentrated mainly on his shoulder. According to the claimant, Dr. Bebout referred him to Dr. Queeney because he was having a tremendous amount of pain in his neck and numbness and pain in his left hand and three of his fingers.

The claimant testified that Dr. Queeney determined that there was a protruding disk in his neck, but he did not

think it was severe enough, so as to require surgery. As a result, Dr. Queeney referred the claimant back to Dr. Bebout for treatment.

The claimant further testified that he has not received any workers' compensation benefits for his neck condition. According to the claimant, he continues to have problems with his neck, which include symptoms of numbness or drawing on the left side of his face, along with pain in his neck and shoulder and hand. The claimant testified that the pain also goes down into his first two fingers and his thumb. According to the claimant, these symptoms affect his ability to lift and grip things.

On cross-examination, the claimant testified that he has not worked for the respondent since March 2, 2004. The claimant testified that since this time, he has worked on his vehicle and done some work on one of his ex-boss's (Aubrey Bowen) vehicles, which entailed hooking up a computer to it and putting a sensor light on it.

The claimant testified that he noticed the pain in his neck after his shoulder surgery. According to the claimant, he mentioned it to the people in therapy and they thought it might be a pinched nerve, but they continued with the

therapy. He also testified that Dr. Bebout gave him cortisone shots in an attempt to relieve his pain. The claimant admitted that Dr. Bebout did not begin treating him for his neck, hand, and arm pain until August or September. The claimant admitted that it was not until December 10, 2004 that he was able to get in to see Dr. Queeney about this condition.

The claimant admitted to having participated in eight or nine fishing tournaments since his injury. He also admitted to loading and unloading his boat. According to the claimant, Darrell Roper and he have rented a building, which is used for recreation, as they have a pool table and their fishing equipment is stored there. The claimant testified that the only vehicles he has worked on at this building during the last year has been his own, his ex-boss's and another friend of his, Johnny Cart. According to the claimant, he worked on Mr. Bowen's car for compensation. The claimant testified that none of the work that he performed on these vehicles violated the restrictions that had been placed on him by his doctor.

The claimant testified that Dr. Bebout released him from care on October 6, 2004 due to his shoulder injury.

According to the claimant, at that time, he directed the claimant to avoid heavy lifting, and instructed him not to perform any overhead use of the extremity. The claimant testified that he told the respondent about his restrictions, but they did not have work available for him because the minimum weight lifting requirement for the Highway Department is 50 pounds.

Kenneth Tucker, who works for the respondent as equipment maintenance supervisor, also gave testimony during the hearing. According to Mr. Tucker, he is responsible for all of the equipment at district headquarters (which is located in Fort Smith), and he also maintains the shop operations at the district as well as all of the repairs, as he is supervisor of all of the mechanics. According to Mr. Tucker, in July of 2004, he stopped by the claimant's shop to check on him, and found him working on an air conditioner of a Dodge car at that time. Mr. Tucker testified that he is a mechanic and there is no question in his mind that the claimant was working on an air conditioner. Mr. Tucker testified:

Q. Tell Her Honor, if you would, what you observed.

A. When I walked in, he was working on the compressor, putting a clutch on the compressor. The compressor was loose from the engine. When I walked in, he walked away and sat down. We talked a little bit, discussed his working on the vehicle, and I told him if he was able to work at home, he should be able to come back to work. He told me at that time he had to go back to the doctor the 29th of July and --

Q. When Mr. Gregory says that he was not working on an air conditioner and has not worked on an air conditioner in a vehicle in the last year, you don't agree with that do you?

A. No, sir.

Q. So he must, at the very least, be mistaken.

A. Yes, sir.

Q. And this happened in July of last year?

A. It was July 16th.

Q. This was sometime after his surgery; is that correct?

A. I'm not sure when the surgery date was.

On cross examination, Mr. Tucker testified that he was at the claimant's shop for approximately 15 minutes. On recross, Mr. Tucker testified that the claimant told him that he was doing all of the work (the disassembling of the air conditioner) himself.

Kim McDowell, who works for the respondent as assistant district maintenance superintendent, also gave testimony

during the hearing. Mr. McDowell essentially testified that Mr. Tucker reports directly to him and the claimant reports to Mr. Tucker. According to Mr. McDowell, he is a fisherman, as is the claimant. Mr. McDowell testified he saw the claimant at a Wal-Mart fishing tournament this last summer (of 2004) while he was off on workers' comp. Mr. McDowell further testified that the claimant had won a door prize. According to Mr. McDowell, he observed the claimant pick up a box and carry it off to his truck.

On cross-examination, Mr. McDowell testified that the department requires that an individual be able to lift at least 50 pounds as a general rule.

A Prehearing Conference was held in this claim on November 29, 2004, and as a result, a Prehearing Order was entered in this matter on December 1, 2004. The following stipulations were submitted by the parties and accepted by the administrative law judge:

- 1). The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2). On March 1, 2004, the relationship of employee-employer-carrier existed between the parties.
- 3). The claimant sustained a compensable injury to his left shoulder on March 1, 2004.

- 4). Medical expenses have been paid.
- 5). Respondents have accepted and are paying an impairment rating of 9% for the claimant's left shoulder.

By agreement of the parties the issues to be litigated were limited to the following:

- 1). Compensability of the claimant's cervical spine problems of March 1, 2004.
- 2). Related medicals.
- 3). Temporary total disability (TTD) from date of last payment.
- 4). Attorney's fees.

In regard to the foregoing issues the claimant contended that he sustained an injury to his cervical spine on March 1, 2004, that he is entitled to TTD to a date yet to be determined, and that he is entitled to the payment of medical expenses, and that he is entitled to an attorney's fee.

In contrast, the respondent contended that the claimant's cervical/neck complaints are not causally related to the March 1, 2004 work-related injury to the left shoulder.

After a hearing before the Commission, the administrative law judge found, in pertinent part, "The

claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his cervical spine on March 1, 2004, while working for the respondent. The claimant is entitled to reasonable and necessary medical treatment for his cervical spine problems. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from October 6, 2004, to a date to be determined."

The respondent appeals to the Full Commission.

II. Adjudication

In the present matter, the claimant contends that on March 1, 2004, he sustained a compensable accidental injury to his neck/cervical spine, in addition to his admittedly compensable left shoulder injury. Ark. Code Ann. § 11-9-102(4)(A)(i) (Repl. 2002) defines "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 was required to show that a causal connection existed between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "'in the course of employment' when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly." City of Eldorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987). Under the statute, for an accidental injury to be compensable, the claimant must show that he/she sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. *Id.* Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in § 11-9-102(16). 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). 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).

Questions concerning the credibility of witnesses and the weight to be given their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or any witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id.

The administrative law judge found that the instant claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his cervical spine on March 1, 2004, while working for the respondent. The Full Commission reverses this finding. In our opinion, a review

of the evidence demonstrates that the claimant did not prove by a preponderance of the evidence that on March 1, 2004, while working for the respondent, he sustained a compensable injury to his cervical spine, in addition to his compensable left shoulder injury.

Although the medical evidence establishes the existence of a small protrusion at C4-5 pursuant to an MRI dated September 30, 2004, we do not find that the evidence establishes a causal connection between the claimant's cervical problems identified in this MRI and his injury of March 1, 2004. Specifically, although the claimant alleges that he experienced problems with his neck after his left shoulder surgery, there are no medically documented complaints relating to his neck until September 15, 2004, almost some six and a half months after his original compensable shoulder injury. In fact, the claimant told Dr. Bebout during his September 15th visit that he was out fishing the prior week when he experienced an acute onset of problems with numbness into the hand and pain in his shoulder. In addition to this, the claimant admitted to having engaged in several fishing tournaments and there is considerable evidence demonstrating that he performed work

on various vehicles while off work for his shoulder injury. In comparing the claimant's testimony to the preponderance of the evidence, the Full Commission finds that the claimant has not presented credible evidence that he sustained a cervical injury arising out of his employment.

We recognize Dr. Bebout's expert opinion wherein he states, "We did an MRI of his neck. This does show spondylitis, some small central disk protrusions, right sided foraminal narrowing and left sided foraminal narrowing at C6-7 on the left. I think that this very likely is the source of his continued pain. I do feel this is all related to his shoulder injury from work back in March the 1st, 2004 this year." However, the Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. Maverick Transp. v. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000). The Full Commission places no weight on Dr. Bebout's opinion in the present matter, because it was based on an inaccurate history provided him by the claimant. Therefore, in light of the claimant's various physical activities during his healing period, considering that the claimant experienced an acute onset of cervical related symptoms

while fishing, and because the claimant did not complain of cervical problems until some six and a half months after his original compensable injury, the Full Commission finds that it would require speculation and conjecture to causally link the claimant's cervical problems to his work activities on March 1, 2004. Speculation and conjecture cannot supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). As a result, the Full Commission finds that the claimant failed to prove that his cervical problems arose out of and in the course of his employment with the respondent.

Therefore, having found that the claimant failed to prove by a preponderance of the evidence that he suffered a compensable cervical injury, the Full Commission further finds that the claimant is not entitled to any reasonable and necessary medical treatment for his cervical spine problems, nor is he entitled to temporary total disability compensation for this condition.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove by a preponderance of the evidence that he sustained a compensable injury to his cervical spine on March 1, 2004,

while working for the respondent. We therefore reverse the opinion of the administrative law judge. This claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the Majority opinion finding that the claimant did not sustain a compensable injury to his cervical spine. In my opinion, the preponderance of the evidence shows that the claimant sustained a cervical spine injury and that the injury was due to the work-related accident on March 1, 2004. I further find that the claimant, as a result of his cervical injury, was in his healing period and unable to work beginning October 6, 2004. As such, he should have been

awarded temporary total disability benefits for that time period. Accordingly, I would have affirmed the decision of the Administrative Law Judge.

The claimant sustained an admittedly compensable injury on March 1, 2004. The injury occurred when a 35 gallon gas tank that was full of gas fell onto the claimant. The claimant testified that the tank weighed over 100 pounds. As a result of the incident, the claimant sustained a torn rotator cuff in his left shoulder, for which the respondent accepted and paid benefits. The claimant now contends that in addition to his shoulder injury, he also sustained a cervical spine injury as evidenced by a disc protrusion at level C6-7.

The Majority opines that the claimant did not show causation because there is no evidence he complained about neck pain until September 15, 2004. The Majority further asserts that the claimant's condition was caused by his fishing or his working on cars after his injury. Lastly, they contend that the opinion of the claimant's treating physician, Dr. Bebouts should be disregarded because it is allegedly based on an inaccurate history.

While the Majority is correct in noting that there is no medical documentation of cervical spine problems prior

to September 15, 2004, I find the claimant has shown causation to prove he sustained a compensable injury to his cervical spine. The claimant testified he suffered from cervical pain shortly after his shoulder surgery. The evidence also indicates he continued to complain of shoulder pain during the course of his treatment and while he did not specifically complain of cervical pain, his treating physician, Dr. Bebouts opined that the claimant's cervical neck herniations were due to his admittedly compensable work injury.

The Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Further, a medical opinion based

solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617). 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 the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

In this instance the Majority asserts that Dr. Bebout's opinion was based on an "inaccurate history" and that therefore his opinion should be disregarded. The Majority further notes that the claimant complained of an "acute problem" on September 15, 2004 and that therefore Dr. Bebout's assessment is incorrect.

I find that Dr. Bebout's opinion was not based on an inaccurate history. On September 15, 2004 the claimant reported that he had been fishing, indicating that Dr. Bebout was well aware the claimant was active. Despite this information, Dr. Bebout concluded that the claimant's cervical injuries were directly attributable to the admittedly compensable injury back in March 2004.

Additionally, while the Majority notes the claimant's pain was "acute", I note that Dr. Bebout's related the claimant's injury back to the March 2004 incident. Furthermore Dr. Bebout's indicated the claimant had, "continued pain." In my opinion, the use of the words, "continued pain", supports a finding that the claimant had been suffering from pain related to his cervical injuries prior to their first mention in the medical report on September 15, 2004.

The Majority also argues that the claimant's cervical injuries were due to him working on cars outside of work after his injury or due to his participating in fishing activities. I find that there is insufficient evidence to support a finding that the claimant's activities caused him to have herniated discs in his cervical spine. The claimant testified that he primarily used his right arm in these activities and said his activities were within his medical restrictions. In my opinion, this shows it is unlikely he sustained his cervical injury due to either his mechanic work or due to his fishing. Furthermore, as noted above, even the claimant's treating physician did not attribute the claimant's injuries to anything other than his work-related injuries. Accordingly, I find that to conclude the claimant injured himself by fishing or by doing mechanic work,

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amounts to impermissible conjecture and speculation on the part of the Majority.

For the aforementioned reasons, I respectfully dissent from the Majority opinion.

SHELBY W. TURNER, Commissioner