STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. L-15273, M-11495
Byron Truax	)	
	)	By: Margaret Mangan
	)	Hearing Officer
v.	)	
	)	For: Steve Janson
	)	Commissioner
Pelletier Lumber Corp.	)	
	)	Opinion No. 21-99WC

Heard in Montpelier, Vermont on March 29, 1999
Record Closed: April 9, 1999

APPEARANCES:

Scott Skinner, Esquire for Claimant
John W. Valente, Esquire for Defendant

ISSUES:

1. Whether claimant suffered an injury by accident arising out of and in the course of his employment in April 1998.

2. If the answer to the preceding question is in the affirmative, for what period is claimant entitled to temporary total disability compensation?

3. When determining claimant's temporary total disability entitlement, what average weekly wage should be utilized in the calculation?

CLAIM:

1. Pursuant to 21 V.S.A. § 642, temporary total disability compensation from April 8, 1998 and continuing.

2. Medical benefits pursuant to 21 V.S.A. § 640.

3. Attorney fees and expenses pursuant to 21 V.S.A. § 678.

4. Pursuant to 21 V.S.A. §644, interest from the date on which the employer's obligation to pay compensation commenced.

EXHIBITS:

Joint Exhibit A: Deposition transcript of Anthony Lapinsky, M.D.

Claimant's Exhibit 1: Medical records of claimant
Claimant's Exhibit 3 (identification only): Claimant's 1998 W-2, Wage and Tax Statement
Claimant's Exhibit 4 (demonstration only): Shovel

PRELIMINARY EVIDENTIARY RULINGS:

LATE DISCLOSURE OF MEDICAL RECORDS:

At the outset of the Hearing, defendant raised an objection against the admittance of certain medical records contained within Claimant's Exhibit 1. Specifically, since several medical records, including the operative report, the final three pages of subsection four, and the final three pages of subsection five were not disclosed to defense counsel until either the morning of the Hearing or only a few days before the scheduled Hearing, defendant requested exclusion of the documents, relying upon the unfair surprise provision of Workers' Compensation Rule 7(d) and claiming detrimental prejudice.

In response, since claimant underwent his surgical procedure on February 19, 1999 and because he is still receiving medical treatment, claimant maintained that the records were extremely recent and they were provided to defense counsel as soon as practicable. Moreover, since the issue in the present case is compensability, claimant contended that the challenged records were not determinative on the issue of causation and, therefore, defendant would not endure any prejudice.

The Hearing Officer in this matter admitted the records at the Hearing. Since claimant was still receiving ongoing medical treatment, defendant could reasonably expect supplemental and updated medical records disclosure. Therefore, an objection based upon unfair surprise was not accepted. However, the Hearing Officer did find the defendant's prejudicial argument compelling. As such, she concluded that if a later review of the challenged records revealed information which would be conclusive to the outcome of the case, she stated that defendant's objection would be reevaluated, thereafter ruled upon, and the record reopened if necessary to avoid prejudice.

Acting upon this decision, the contested records were reviewed and it was ascertained that the documentation did not affect the compensability of this claim. Accordingly, the prior ruling, which admitted the records into evidence, is preserved.

JUDICIAL NOTICE OF CORRESPONDENCE:

At the conclusion of this Hearing, defense counsel asked the Hearing Officer to take judicial notice of a December 3, 1998 correspondence directed to Charles Bond, Workers' Compensation Director, and copied to claimant's counsel. In this correspondence, defendant notified claimant of his obligation to conduct a good faith job search, since Dr. Lapinsky released him with a light duty work capacity. Claimant objected to the admittance of this evidence. In addressing this dispute, the Hearing Officer asked claimant's counsel for confirmation of claimant's knowledge of his obligation to seek employment. Claimant's counsel failed to provide a direct response on this issue. Ultimately, although the Hearing Officer did not explicitly rule on this objection, she explained that she typically takes judicial notice only of the Department's forms, not of the correspondence contained within a file.

Subsequently, claimant, in a supplemental filing, moved for the exclusion of this evidence, asserting untimely introduction of evidence at the conclusion of a hearing, in violation of Workers' Compensation Rule 7. In response, the defendant contended that the Hearing had not, in fact, concluded when he requested judicial notice of the correspondence. In addition, defendants maintained that Rule 7 was not violated because claimant had been aware of the notice correspondence since December 1998, several months before the Hearing.

Although each party raises suitable arguments, I conclude that the issue of judicial notice of this correspondence need not be addressed. After reviewing all of the submitted evidence, it is clear that the correspondence does not affect the outcome of this decision. Therefore, the merits of the parties' assertions need not be reached.

FINDINGS OF FACT:

1. Notice is taken of all forms filed with the Department in this matter. Joint Exhibit A and Claimant's Exhibit 1 are admitted into evidence.

2. At all times relevant to this case, claimant was an employee within the meaning of the Vermont Workers' Compensation Act. In addition, Pelletier Lumber was an employer within the meaning of the Vermont Workers' Compensation Act.

CLAIMANT'S EMPLOYMENT ACTIVITIES:

3. Claimant has been an employee of defendant since 1994. In that time, he has worked in several capacities. Initially, claimant's job duty consisted of stacking lumber. Subsequently, he was promoted to lumber grader. Finally, claimant became an edging machine operator. Throughout his employment with defendant, claimant's responsibilities included labor intensive activities which involved extensive bending, lifting and twisting, while maintaining a quick pace.

4. A Form 25 was never filed by the defendant in this matter. However, following the Hearing, the defendant did submit a listing of claimant's earnings. The documentation delineated claimant's earnings from the January 2, 1998 pay period through the April 10, 1998 pay period.

5. While claimant was employed for the defendant, he also shoveled manure for his landlord in order to receive a reduction in his rent. Each evening, claimant would spend approximately 40 minutes filling a wheelbarrow with eight to ten shovels full of manure, each weighing an estimated three to five pounds, which claimant would then dump in the back of the barn. Claimant testified that the shoveling could have been performed more quickly, however, he chose to pace himself when performing this activity.

6. Finally, claimant was also a member of the Vermont Army National Guard, serving in this capacity on a monthly basis. As revealed by the Form 25, for the 12 weeks prior to April 8, 1998, claimant earned $492.12 for his service to the Guard.

THE APRIL 1998 INCIDENT AND ENSUING MEDICAL TREATMENT:

7. In April 1995, claimant sustained a work-related injury to his lower back. Officially, claimant was diagnosed with lumbosacral strain. As treatment for this injury, claimant received chiropractic manipulations from Robert J. Langone, D.C. After several treatments, claimant became asymptomatic and he ceased seeking medical care.

8. Following this incident until April 1998, claimant continued in defendant's employ. The pain in his back would occur intermittently.

9. During the first week of April 1998, claimant began to notice numbness, tingling, and periodic twinges in his buttocks. Then, on the morning of April 8, 1998, while at home, claimant coughed and experienced a sudden, excruciating pain which traveled from his back down his right leg to his foot.

10. Although he was in pain, claimant proceeded to work on the morning of April 8. However, after several hours, he could no longer endure the pain. As such, he left work and sought medical attention.

11. Claimant has not returned to work with defendant nor any other employer since April 8, 1998.

12. On April 8, 1998, claimant initially sought medical treatment from Raymond Van Voorhis, D.C. The doctor related claimant's medical history as a progressive development of back pain which began to hurt slowly over time as a result of lifting at work. In addition, he recounted that when claimant coughed on the morning of April 8, claimant experienced a radiation of pain down his right leg into his foot. Having reviewed the history of claimant's condition, Dr. Voorhis then conducted an orthopedic, neurological, and X-ray examination of claimant. As a result of this exam, the doctor diagnosed claimant with sacral subluxation, lumber subluxation and sciatic neuralgia, and he proceeded to treat claimant with chiropractic adjustments and cryotherapy until May 1998.

13. After his chiropractic treatments concluded in May 1998, claimant next sought medical attention at Hardwick Health Center, primarily seeking a physical therapy referral. When evaluated by Charles G. Butterick, P.A., the claimant was diagnosed with sciatic nerve irritation. Although Physician Assistant Butterick declined to make a causal link with claimant's injury and his work because of the coughing incident, he did refer claimant to physical therapy for treatment of his condition.

14. Acting on this referral, claimant received physical therapy treatments at Copley Hospital Rehabilitation and Physical Therapy Services. Claimant's treatments were initiated in June 1998 and they continued through the beginning of July 1998. Although he diligently attended these sessions, the physical therapy was not successful and claimant continued to experience pain.

15. As such, on July 22, 1998, claimant began treatment with Anthony S. Lapinsky, M.D., an orthopaedic surgeon, who diagnosed claimant with radiculopathy and a suspected herniated disc. Seeking confirmation of his diagnosis, Dr. Lapinsky ordered a CT scan of claimant's lumbar sacral spine. This test was performed on August 28, 1998 and the results revealed a central and right sided disc herniation at L5-S1 with apparent impingement on the right S1 nerve root.

16. In August 1998, claimant was re-evaluated at the Hardwick Health Center. On this occasion, claimant's medical condition was assessed by Allegra Shumway, M.D. After conducting an examination of claimant and concluding that the symptoms did not improve, the doctor suggested pursuing a course of epidurals. Furthermore, at this time, Dr. Shumway opined that claimant's condition was most likely work related.

17. In an August 1998 note, Dr. Lapinsky also commented on the cause of claimant's condition. He determined that the etiology of the herniated nucleus pulposus was most likely a cumulative post-traumatic condition due to repetitive lifting at work. In addition, similar to Dr. Shumway, Dr. Lapinsky also recommended a course of treatment including epidural steroids. If this treatment was unsuccessful, the doctor discussed the possibility of a surgery to decompress the nerve for pain relief of the sciatica.

18. In accordance with the medical opinions, claimant received a course of epidural injections from Anne Vitaletti-Coughlin, M.D., of the Copley Hospital Pain Clinic. Overall, claimant received numerous injections between September 1998 and November 1998. These treatments, however, were not successful.

19. Consequently, since the nonoperative treatments were maximized and failed to control claimant's pain, in a December 7, 1998 note Dr. Lapinsky recommended proceeding with surgical intervention. Since there was a concern about workers' compensation coverage for this operative procedure, in the same note Dr. Lapinsky explained that claimant's condition was the result of repetitive lifting and bending work activities. In fact, commenting on the cough incident, Dr. Lapinsky further explained that the cough was merely a symptom of claimant's condition.

20. Dr. Lapinsky's causation theory was further explained during his deposition. At that time, Dr. Lapinsky could not recall claimant informing him of either the coughing incident or his shoveling activities. Notwithstanding this lack of knowledge, Dr. Lapinsky stated that his causal opinion remained the same. Specifically, as to the coughing incident, the doctor unequivocally stated that the cough was merely a symptom of the condition, not a causative agent. When discussing claimant's shoveling activities, Dr. Lapinsky stated that, depending on the weight of the manure, the claimant's body mechanics and his pace, the shoveling, at a maximum, may have contributed to claimant's condition. Ultimately, Dr. Lapinsky concluded, overall, that claimant's condition resulted from cumulative repetitive trauma from claimant's lifting and bending activities at the lumberyard. It was this trauma that caused a degeneration which weakened claimant's disc and eventually produced a disc protrusion.

21. On February 19, 1999, Dr. Lapinsky performed surgery on the claimant and excised the herniated disc. Following this operative procedure, claimant continued to treat with Dr.

Lapinsky. In addition, claimant has reinitiated physical therapy treatments. Since the surgery, Dr. Lapinsky has not yet found claimant at a medical end result.

CLAIMANT'S WORK RESTRICTIONS:

22. On April 8, 1998, when claimant initially sought medical treatment from Dr. Van Voorhis, the doctor recommended that claimant not return to work because he felt that the lifting activities would aggravate claimant's condition and further injure him.

23. On May 12, 1998, claimant seriously injured his right arm, severing an artery, in a non-work-related incident. Claimant testified that, as a result of this injury, he did not have the use of his right arm for approximately 12 weeks

24. In July 1998, after Dr. Lapinsky examined claimant, he indicated, in a written note, that claimant could work in sedentary capacity. However, he restricted claimant from bending or lifting more than five pounds.

25. Although Dr. Lapinsky included this limited return to work information in his medical note, claimant explained that he was not aware of this recommendation. Rather, he continued to believe that he was not able to resume any employment.

26. In August 1998, when he was re-evaluated at the Hardwick Health Center by Dr. Shumway, the medical note indicated that some sort of a six-month disability form was completed for claimant.

27. In a September 16, 1998 record, Dr. Lapinsky excused claimant from full participation in his National Guard drills. However, he did allow claimant to continue in a light duty capacity. Specifically, he restricted claimant from lifting more than 10 pounds, bending below the waist, operating the tank, working at heights, and participating in any physical fitness tests.

28. Despite his doctor's recommendation, claimant refused to partake in his National Guard drills altogether. By way of explanation, claimant testified that he believed that the restrictions would not be honored by the Guard and, therefore, he feared injury.

29. Furthermore, notwithstanding his doctor's release for the National Guard, claimant testified that he still did not believe that he was released to return to any employment activities.

30. Disregarding his earlier September note, in December 1998, Dr. Lapinsky clarified his opinion as to claimant's duties with the National Guard. He stated that claimant's condition would worsen if he participated in climbing or lifting activities and physical fitness training. Therefore, he recommended that claimant's drills be waived until three months following the surgical procedure which was scheduled for February 1999.

31. Following the surgical procedure, Dr. Lapinsky has not yet assessed claimant with any type of work capacity.

ATTORNEY FEES AND COSTS:

32. In the event that he prevails, the claimant has requested attorney fees in the amount of 20% of the benefits awarded, not to exceed $3,000. He has also submitted evidence of expenses in the amount of $263.91.

CONCLUSIONS OF LAW:

1. In a worker's compensation claim, it is the burden of the claimant to establish all facts essential to support his claim. *Goodwin v. Fairbanks, Morse and Co.*, 123 VT. 161 (1963).

CAUSATION:

2. Sufficient competent evidence must be submitted verifying the character and extent of the injury and disability, as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 VT. 367 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden & Martin Lumber Co.*, 112 VT. 17 (1941).

3. Accordingly, as a threshold matter, claimant carriers the burden of establishing, as the more probable hypotheses, that his back condition is causally related to his physically strenuous work activities while employed by defendant. After a thorough review of the submitted evidence, it is evident that claimant has satisfied this burden with ample medical evidence.

4. In his expert medical opinion, Dr. Lapinsky opined that claimant's back condition resulted from his employment duties with defendant. Specifically, he concluded that the cumulative repetitive trauma from claimant's lifting and bending activities at the lumberyard caused a degeneration in claimant's back which weakened the disc and produced a disc protrusion. *See Campbell v. Savelberg, Inc.*, 139 VT. 31 (1980) (recognizing the compensability of gradual onset cases). This medical evidence sufficiently establishes the causal connection between the claimant's injury and his employment.

5. Although defendant attempts to equate the coughing incident with the cause of claimant's condition, this conclusion has been emphatically rejected by the medical expert. Dr. Lapinsky, on several occasions, stated that the cough was merely a symptom of claimant's condition, rather than a causative agent. The Department finds this to be the more probable hypothesis and, therefore, the defendant's argument must fail. *See Sicotte v. Brattleboro Retreat*, Opinion No. 71-96WC (Nov. 25, 1996); *Ploesser v. Northeastern HVAC*, Opinion No. 51-95WC (Aug. 8, 1995) (reasoning that expert testimony establishing work activities, instead of a cough while the claimant was at home, as the more probable cause of a claimant's herniation satisfies the causation requirement).

6. Additionally, defendant attempts to establish that claimant's condition was caused by his shoveling activities. However, this contention must also fail. Dr. Lapinsky did not definitively opine on the effects of claimant's shoveling activities. Furthermore, even if he had concluded that the shoveling contributed to claimant's condition, Dr. Lapinsky also explicitly stated that claimant's work activities contributed to his disability and, therefore, the requisite causal element has clearly been satisfied.

7. Accordingly, claimant has sufficiently established, as the more probable hypothesis, that his physically strenuous work activities while employed by defendant caused his back condition.

TEMPORARY TOTAL DISABILITY:

8. Since claimant's back injury has been found compensable, the next issue for resolution is his entitlement to temporary total disability.

9. A claimant is totally disabled for work under 21 V.S.A. § 642 while he is either: (1) in the healing period and not yet at a maximum medical improvement, *Orvis v. Hutchins*, 123 Vt.18 (1962), or (2) unable as a result of the injury either to resume his former occupation or to procure remunerative employment at a different occupation suited to his impaired capacity, *Roller v. Warren*, 98 VT. 514 (1925). It is only when maximum earning power has been restored or the recovery process has ended that the temporary aspects of the workers' compensation are concluded. *See Moody v. Humphrey*, 127 Vt. 52, 57 (1968); *Orvis, supra*; *Sivret v. Knight*, 118 VT. 343 (1954).

10. As revealed by the medical evidence in this case, it is apparent that claimant is entitled to temporary total disability from the time of his injury, April 8, 1998, until July 22, 1998, when claimant was first evaluated by Dr. Lapinsky. This conclusion is based upon Dr. Van Voorhis's recommendation that claimant not return to work because he felt that the lifting activities would aggravate claimant's condition and further injure him.

11. To dispute claimant's entitlement to temporary total disability, defendant maintains that since claimant's non-work-related May 1998 injury to his right arm debilitated his work capacity for 12 weeks, claimant should not receive compensation for this period. Defendant asserts that there is no justification for the continuation of temporary benefits because claimant's employment was diminished as a result of a personal ailment unrelated to his employment. However, based upon the medical records in this case, this argument cannot be sustained. Since claimant was still disabled as a result of his back condition, his simultaneous arm disability cannot nullify his entitlement to temporary total benefits.

12. Defendant further contends that claimant is not entitled to temporary total disability following his initial examination by Dr. Lapinsky. In July 1998, after Dr. Lapinsky examined claimant, he indicated, in a written note, that claimant could work in a sedentary capacity restricting claimant from bending or lifting more than five pounds.

Moreover, Dr. Lapinsky testified during his deposition that claimant always possessed a sedentary work capacity. In response to this argument, claimant explained, in a believable and credible manner, that at that time he was not aware of this recommendation and he honestly believed that he was not able to resume employment.

13. Workers' Compensation Rule 18(a)(3) establishes an obligation on the part of the employer to notify a claimant of his release to return to work and his obligation to conduct a good faith job search. Defendant has failed to establish that during the summer of 1998, after Dr. Lapinsky determined that claimant possessed a sedentary work capacity, claimant was apprised of this information. There is no evidence to refute claimant's lack of knowledge on this issue. Therefore, claimant's entitlement to temporary total disability must continue through the summer of 1998.

14. However, in September 1998, claimant did become aware of Dr. Lapinsky's opinion as to his work capacity. Specifically, in a September 16, 1998 record, Dr. Lapinsky released claimant to his National Guard duties, restricting him to light duty which included restricting claimant from lifting more than 10 pounds, bending below the waist, operating the tank, working at heights, and participating in any physical fitness tests. Although claimant testified that he still did not believe that he was medically cleared to return to any employment activities, despite his release for Guard duty, the Department does not find this to be a feasible and credible response. Claimant should have reasonably known that he would be able to return to work in a limited capacity. At a minimum, the Guard clearance should have logically induced claimant to conduct an inquiry into this work capacity status. As such, at this point in time, claimant's period of temporary total disability must cease.

15. Therefore, in light of the foregoing conclusions of law, claimant is entitled to temporary total disability benefits from the onset of his injury, April 8, 1998 until September 16, 1998, when claimant should have reasonably been aware of his work capacity.

16. However, since claimant underwent a compensable surgery on February 19, 1999 in order to treat his work-related back condition, the temporary total disability analysis is not complete. Presently, as follow up care for his operative procedure, claimant continues to treat with Dr. Lapinsky and he is currently receiving physical therapy treatments. Since the surgery, claimant has neither been found to be at a medical end result nor assessed with a work capacity. As such, claimant is also entitled to temporary total disability benefits from February 19, 1999 and continuing until Dr. Lapinsky either finds claimant at a medical end point or releases him to return to an employment position.

AVERAGE WEEKLY WAGE:

17. Since claimant has established his entitlement to temporary total disability, his average weekly wage must be computed.

18. 21 V.S.A. § 650 and Workers' Compensation Rule 15 dictate the proper method for calculation of this figure. To determine a claimant's average weekly wage, the total gross wages for the 12 weeks preceding his injury, not including the week of the injury,

are combined and subsequently, divided by twelve. *See* 21 V.S.A. §650; *Workers' Compensation Rule 15*. If the claimant is regularly employed by multiple insured employers at the time of the injury, the same calculation is performed for each employer and the average weekly wages are combined. *See* 21 V.S.A. §650; *Workers' Compensation Rule 15*.

19. In this case, based upon the earnings listing submitted by defendant, claimant's average weekly wage for Pelletier Lumber is $408.05. As evidenced by the Form 25 and the requisite calculations, claimant's average weekly wage for his service to the National Guard is $41.01. Therefore, claimant's overall average weekly wage, combining his earnings from defendant and the National Guard, is $449.06.

20. Although claimant asserts that the twenty dollars per week, which he received from his landlord in exchange for his shoveling activities, should be included in the average weekly wage figure, this cannot be accepted. There has been no evidence submitted that claimant's landlord was an insured employer and, therefore, in accordance with the pertinent statute and the applicable Rule, this compensation cannot be included. *See* 21 V.S.A. §650; *Workers' Compensation Rule 15*.

21. Since the claimant's average weekly wage has been determined, claimant's compensation rate for his temporary total disability entitlement must be calculated by taking two-thirds of his average weekly wage. *See* Workers' Compensation Rule 15 and 21 V.S.A. §642. As such, as of April 8, 1998, claimant's temporary total disability rate is $299.37, which is thereafter adjusted to $311.64 on July 1, 1998. *See* Workers' Compensation Rule 16.

22. Finally, in completion of his entitlement determination, claimant also qualifies for dependency benefits for one child from April 8, 1998 and for three children from August 22, 1998.

ATTORNEY FEES, COSTS AND INTEREST:

23. 21 V.S.A. §678(a), which discusses awards for costs and attorney fees, provides:

> Necessary costs of proceedings under this chapter shall be assessed by the commissioner against the employer or its workers' compensation carrier when the claimant prevails. The commissioner may allow the claimant to recover reasonable attorney fees when the claimant prevails.

24. As evidenced by the statute, an award for reasonable costs is mandatory, as a matter of law, if the claimant prevails in a workers' compensation proceeding. *Pederzani v. The Putney School*, Opinion No. 57-98WC (Oct. 6, 1998); *Fredriksen v. Georgia-Pacific Corp.*, Opinion No. 28-97WC (Oct. 17, 1997). Therefore, since claimant has prevailed in this matter, he is awarded $263.91 for his expenses.

25. An award of attorney fees is a matter of the Commissioner's discretion. *Aker v. ALIIC*, Opinion No. 53A-98WC (Nov. 5, 1998); *Pederzani, supra*; *Fredriksen, supra*. Since claimant prevailed in this case as a result of his attorney's involvement, attorney fees in

the amount of 20% of the total benefits, not to exceed $3,000, is awarded.

26. Finally, 21 V.S.A. §664 addresses the issue of awarding interest in workers' compensation cases. If an employee prevails at a hearing, the commissioner's award shall include interest at the statutory rate on the total amount of unpaid compensation and it shall be computed from the date on which the employer's obligation to pay compensation began. Since the claimant prevailed in this matter, he is entitled to interest at the statutory rate of 12% from April 8, 1998, the date on which the employer's obligation to pay compensation began.

ORDER:

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law, defendants are ordered to:

1. For the period of April 8, 1998 through September 16, 1998, pay claimant temporary total disability compensation, at a rate of $299.37, as of April 8, 1998, which is thereafter adjusted to $311.64 on July 1, 1998;

2. For the period of February 19, 1999 and continuing, pay claimant temporary total disability compensation, at a rate of $311.64 on July 1, 1998;

3. Pay claimant dependency benefits for one child from April 8, 1998 and three children from August 22, 1998;

4. Pay all medical expenses associated with the treatment for claimant's work related injury;

5. Pay claimant attorney fees in the amount of 20% of the total benefits, not to exceed $3,000;

6. Pay claimant expenses in the amount of $263.91;

7. Pay claimant interest on his total benefits at the rate of 12% from April 8, 1998.

DATED in Montpelier, Vermont, this 29th day of April 1999.

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Steve Janson
Commissioner