

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F112391

WILLIAM GRAHAM, EMPLOYEE	CLAIMANT
JENKINS ENGINEERING, INC., EMPLOYER	RESPONDENT
FEDERAL INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED MARCH 12, 2004

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

Claimant represented by HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This case comes on for review by the Full Commission on appeal by respondent from an opinion filed herein by an Administrative Law Judge on July 24, 2003.

Among other things, the Administrative Law Judge entered the following undisputed findings of fact and conclusions of law:

1. On March 1, 1998, the relationship of employee-employer-carrier existed between the parties.
2. On March 1, 1998, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$240.00 for total disability and \$180.00 for permanent partial disability.

3. On March 1, 1998, the claimant sustained a compensable injury to C6-7 intervertebral disc.
4. The payments of benefits accruing through October 8, 2001, and all appropriate benefits have been paid.

However, respondents appeal the Administrative Law Judge's award of the following benefits: (1) indemnification for medical treatment received on or after October 9, 2001, particularly those rendered by and at the direction of Dr. Giles; (2) the claimant's entitlement to temporary total disability benefits accruing on or after October 31, 2001; and, (3) the claimant's entitlement to any permanent disability benefits. The respondents specifically contend that the medical treatment sought subsequent to October 2001 was not reasonable, necessary, or related to the claimant's compensable injury of 1998, and an award of temporary total disability benefits and permanent physical impairment disability benefits is, therefore, inappropriate. After conducting a de novo review of the entire record, we agree with respondents. Therefore, we find that the Administrative Law Judge's award of medical benefits subsequent to October 2001, as well as the award of temporary total disability and

permanent partial disability benefits must be and hereby is reversed.

#### History

At the time of his compensable injury of March 1, 1998, the claimant had been employed for eleven (11) years as a "pumper" for the respondent, Jenkins Engineering, Inc. As such, it was the claimant's job to service gas wells. The claimant testified that on March 1, 1998, while servicing a dehydrator on one of these wells, he noticed a "warm sensation going down [his] neck." According to the claimant's testimony, this sensation occurred while he was standing on a step ladder attempting to pour liquid from a five-gallon bucket into a funnel. Noticing only minimal pain immediately thereafter, the claimant finished servicing his route. By that evening the claimant's symptoms had increased and he felt as though he had strained a muscle. The following morning the claimant felt sharp pain between his shoulder blades on his left side with shooting pain to his left elbow. The claimant stated that his wife had to help him out of bed and assist him in dressing that morning.

Later on March 2, 1998, the claimant visited Dr. Michael Westbrook at the Westbrook Medical Clinic, whom initially assessed the claimant with myalgia for which he

prescribed Skelaxin and Naproxen. On March 24, 1998, Dr. Westbrook sent the claimant to St. Edwards Mercy Medical Center for a CT scan which revealed "central and left side herniation C6-7" with "mild minimal spurring associated with mild disc bulging." The claimant was then referred to a neurosurgeon, Dr. Joseph W. Queeney, at the Cooper Clinic.

An MRI on March 27, 1998, revealed "moderate left paracentral disk protrusion at C6-7" with "minimal central disk bulges at C5-6 and C3-4." After being advised of his options, the claimant elected conservative rehabilitative treatment which involved approximately (6) months of physical therapy, spinal adjustments, exercises, and medications. His prognosis at that time was "fair-good."

The claimant began treating with Dr. Phillip Ulmschneider at the Ozark Chiropractic Clinic on April 7, 1998. Doctor Ulmschneider gave the claimant a "favorable prognosis," and the claimant reportedly made steady progress throughout the course of this treatment. For example, by the end of August, 1998, Dr. Ulmschneider reported continuing improvement with regards to the claimant's neck pain, with occasional "flare ups" which were "mild in nature." Additionally, Dr. Ulmschneider reported that the claimant was able to use his arms without pain, and that his

headaches had lessened to twice weekly. On October 22, 1998, Dr. Ulmshneider determined that the claimant had reached maximum medical improvement (MMI), he dismissed the claimant from active treatment and care, and advised him to seek periodic treatment for anticipated "flare ups" due to his work.

The record reflects that the claimant saw Dr. Westbrook next again on April 4, 1999, for reported upper back pain and numbness in his hands and arms. On May 12, 1999, in a letter to an unspecified recipient, Dr. Ulmschneider described the claimant's condition as follows: "[The claimant] is currently seen once a month or as needed. He still can experience exacerbations in the neck and upper back in relation to how much work or how strenuous the work is that he must perform. He responds well to care. His prognosis is good overall."

In a letter dated June 3, 1999, from National Comp. Care, Inc., to Dr. Ulmschneider, the claimant's request for approval for further spinal adjustment therapy was denied as being medically unnecessary. There is no evidence that the claimant received further medical treatment until May 7, 2001, when he saw Dr. Westbrook for, among other things, neck pain from a possible "pinched

nerve." The claimant saw Dr. Westbrook next on July 7, 2001, and again on September 20, 2001, at which time Dr. Westbrook requested authorization for another MRI. Performed on October 3, 2001, this diagnostic test revealed a "moderate to large extruded disc posterolaterally on the left side at C6-7 which was larger than on the previous study." Upon examining the claimant on October 9, 2001, Dr. Wilbur M. Giles, a neurosurgeon at Neurological Associates, recommended that the claimant undergo an "anterior cervical discectomy and arthrodesis at C6-7," with the possibility of future surgery to level C5-6. On December 7, 2001, the claimant underwent outpatient surgery to correct his herniated disc, which, according to Dr. Giles, provided him "excellent relief." Doctor Giles eventually assigned the claimant a 10% whole body permanent impairment rating pursuant to the guidelines set forth by the American Medical Association.

#### Discussion

Based solely upon the above and foregoing medical evidence, this case would appear to be somewhat straightforward regarding the claimant's compensable injury and the necessity of his subsequent medical treatment. In summary, the parties stipulated in a prehearing Order filed

October 9, 2002, that the claimant sustained a compensable injury to his neck or cervical spine on March 1, 1998, which was within the course and scope of his employment with the respondent/employer. The claimant underwent successful conservative treatment for this injury, for which all appropriate benefits were paid by the respondent/carrier. His post-MMI recovery followed an expected course of occasional flare ups, for which he also received all necessary and appropriate treatment. After his visit with Dr. Ulmschneider in May of 1999, the claimant went for about one (1) year with no reported treatment. By about September of 2001, however, the claimant's physical condition had somehow worsened and a second MRI indicated that spinal surgery was necessary. It is this surgery and the disability associated therewith for which the claimant claims he is entitled to additional benefits. A closer examination of the record, however, raises some obvious questions as to whether the claimant's surgery of December 2001 was in fact necessitated by his injury of March 1998.

First, the claimant's testimony during his hearing of April 29, 2003, leaves questions about the circumstances surrounding his surgery of 2001. When asked about the scope of his activities after his compensable injury, the claimant

testified that he continued to perform his normal employment activities at Jenkins Engineering up until March of 2000, when he became self-employed in the same line of work. The claimant stated that he did not miss time from work while making the transition from his former employment to self-employment. The claimant further testified that his present work-related duties are essentially the same as before, but that he now works from ten (10) to thirteen (13) hours a day, seven (7) days a week. The claimant also admits to having returned to all of the former activities that he had previously enjoyed, including gun and bow hunting. The claimant, whom had returned to a fully active life, offered no plausible explanation as to why his physical condition worsened so suddenly from April of 1999 to October 2001.

Second, the claimant's reluctance to be forthcoming during his hearing regarding certain information cast serious doubt upon the claimant's credibility. Specifically, when the claimant was questioned about neck problems or injuries prior to his compensable injury, he testified that while getting out of his company truck "sometime in 1996," he had experienced a "twinge" in his neck that lasted a couple of days then went away. When asked if he had sought medical treatment for this problem, the

claimant stated, "I think I saw [Dr.] Westbrook and he just determined that it was a crick in my neck or something of that nature." When asked whether he had any other neck problems subsequent to the afore mentioned and prior to his March 1998 compensable injury, the claimant responded "No."

During cross examination, however, the respondents' attorney presented evidence in the form of medical reports from Doctors Westbrook and Queeney which indicated that the claimant had experienced neck pain for two years prior to his compensable injury of 1998.

Specifically, in his report dated March 2, 1998,

Dr. Westbrook wrote, "pain **X 2 years** getting worse."

(Emphasis added) The following excerpt is taken from

Dr. Queeney's report dated March 27, 1998.

The patient is a 33-year-old right-handed male who presents for surgical evaluation of neck and upper extremity pain. He states that this began initially on 10/24/96 while he was at work. This apparently occurred while he was getting out of a truck. He has had several episodes of this since that time which have all occurred at work approximately two to three times per year. The most recent injury was on 3/1/98. (Emphasis added) (

When pressed with this evidence, the claimant finally admitted having reported the above information to Doctors Westbrook and Queeney.

Next to consider is the testimony of Dr. Giles. The Administrative Law Judge found that it was the expert opinion of Dr. Giles that the medical services provided to the claimant, specifically the interior cervical diskectomy infusion performed on December 7, 2001, were "connected with or necessitated by" the claimant's compensable injury of March 1998. In making this determination, the Administrative Law Judge relied largely on a letter from Dr. Giles to claimant's counsel dated January 10, 2003, and on the doctor's testimony by deposition taken on February 24, 2003. In the afore mentioned letter, Dr. Giles stated, "The disc reported on his MRI scan 3/27/98 indeed was the cause of the anterior cervical diskectomy and fusion I performed 12/7/01." During his deposition, Dr. Giles testified, in relevant part, that he believed the problems for which he performed surgery on the claimant were related to his compensable injury of 1998. He also testified that it is "unlikely" that the damaged disc became symptomatic due to any intervening cause.

There is little doubt that, in the words of the Administrative Law Judge, the retired Dr. Giles is a "very competent neurosurgeon" with expertise in the treatment of neck and cervical injuries. The doctor himself noted that he had performed nearly seventeen thousand (17,000) surgeries such as the one he performed on the claimant, over a twenty-eight-year (28 year) period of time. The afore mentioned statements taken alone might make it appear that the surgery performed by Dr. Giles on the claimant in December of 2001 was reasonably necessary in connection with the claimant's compensable injury. Upon further examination of Dr. Giles testimony, however, this assumption is weakened. Specifically, Dr. Giles admitted to having had no prior knowledge of the claimant's medical history upon seeing him for the first time on October 9, 2001. Concerning the cause of the claimant's complaints at the time of this visit, Dr. Giles claimed to have relied largely on statements and information provided to him by the claimant. For example, according to Dr. Giles, the claimant complained chiefly of progressive neck, shoulder, and arm pain since the date of his compensable injury. Furthermore, when questioned regarding the degree of severity between the results of the MRI taken in October of 1998, as compared to the MRI done in

October of 2001, Doctor Giles noted that the MRI of 1998 did not show what he would consider to be an "extruded fragment," whereas the MRI of 2001 did. But, when asked if he had been offered any explanation by the claimant as to a possible cause of the increased findings on the more recent MRI, Dr. Giles responded, "No. [The claimant's] only complaints to me was that it progressed over a period of time." Moreover, Dr. Giles denied having any knowledge, other than the claimant being self-employed, of the claimant's activities between March 27, 1998, and October 3, 2001. Doctor Giles also denied having any way of determining with medical certainty whether the claimant's disc "blew out" suddenly or whether it protruded over a period of time. In response to being questioned as to how he connected the cause for the surgery of 2001 with the findings from the MRI done in 1998, Dr. Giles stated, "Because by [the] history that [the claimant] gives me, he had continued to have some complaints of neck and shoulder discomfort on an intermittent basis all the way from 1998 ... following an injury that showed a fairly large disc protruding of the C6-7 level. By the history that he gives, this progressed over a period of time ... ." (Emphasis added) Finally, Dr. Giles stated that, "Based upon the complaints that [the claimant]

gave me, I have no reason to believe that it [markedly herniated disc] is not related to the initial injury he described and it is the same disc that he showed on the scan in 1998." (Emphasis added)

#### Conclusion

Arkansas Code Annotated § 11-9-508(a) (1996), states that an employer shall provide "such medical ... services ... as may be reasonably necessary in connection with the injury received by the employee." (Emphasis added) What constitutes reasonable and necessary treatment under this section is a question of fact for the Commission.

Georgia-Pac. Corp. v. Dickens, 58 Ark. App. 266

(1997); (citing Gansky v. Hi-Tech Eng'g, 325 Ark. 163, 924 S.W.2d 790 (1996)). As previously noted, the parties in this case stipulated to the compensable injury of March 1, 1998, for which the respondents provided all appropriate medical treatment and benefits. The claimant reached MMI some seven months later and was released to return to a full range of activities.

Additionally, the claimant must prove by a preponderance of the evidence that he is entitled to compensation, Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d (1995), and that the physical condition for which

he required additional medical treatment (here, disk surgery), is causally related to his compensable injury. Harris Cattle Co. v. Parker, 256 Ark. 166, 506 S.W.2d 118 (1974). Here, the claimant fails in both regards to prove his case. To begin with, and in support of his position on appeal, the claimant contends that the respondents err in their argument that no causal connection exists between the claimant's compensable injury of 1998 and his surgery of 2001, (versus, trying to prove that an *independent intervening cause* accounts for the change in the claimant's physical condition during that time). The claimant further contends that because he was offered surgical intervention for his compensable injury of 1998, this proves by "logical interpretation" that the claimant's surgery of 2001 flowed as a natural consequence from that injury. Furthermore, the claimant indicates that he discontinued conservative treatment for his compensable injury when respondent/carrier refused to pay for additional treatment, after which time "uncontroverted evidence" shows that his physical condition continued to decline until surgery was no longer optional.

In response to the above, the Arkansas Court of Appeals in Stephenson v. Tyson Foods, Inc., 70 Ark. App. 263 (2000), stated that the court is obligated to determine

whether the Commission's findings are supported by substantial evidence. Whether the existence or nonexistence of evidence of a given fact is "logical" is not an issue for the court to resolve. Stephenson, Id. In the Stephenson case, the claimant prevailed in her argument that her surgery to repair a herniated disk was causally related to her compensable injury which had occurred some six months prior. There, however, the court found that the claimant's physical problems initially went undiagnosed due to failure by the treating physician to perform appropriate diagnostic testing. In the present case, the appropriate tests were performed in a timely fashion and the claimant was fully informed of his treatment options. Although surgery was offered as one of "several treatment options," Dr. Queeney explained to the claimant that surgical treatment for cervical pain tends to be "hit or miss" and is less "predictable" than when surgery is performed for other types of pain, i.e., radicular. Thus, the claimant made an informed decision to use a more conservative treatment plan which, by all reports, was successful. As for the claimant's contention that his physical condition continued to worsen over time, the evidence does not support this claim. By all credible accounts, the claimant followed a predictable

course of treatment with a very good outcome. So good, in fact, that he was eventually able to return to his full range of activities, after which the claimant received no reported medical treatment for his compensable injury for about a year prior to his surgery of 2001. If anything, it is illogical to conclude that his condition in 2001 is causally related to his compensable injury if such conclusion is based primarily upon the fact that the claimant chose conservative treatment over his surgical option. The weight of the credible evidence in this case does not support this conclusion, in that this would suggest that surgery at the time of the claimant's compensable injury was not optional, but, was in fact, inevitable. This, in turn, would lead reasonable minds to assume that the claimant failed or refused to follow medical recommendations at that time. The evidence in this case contradicts this assumption. Finally, documented evidence shows that the claimant was denied additional spinal adjustment therapy because it was no longer medically necessary. In his testimony, however, the claimant indicated that he did not return to Dr. Ulmschneider because "He [Ulmschneider] scared me off." This statement not only contradicts credible evidence, but it makes no sense whatsoever.

It is the function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994); See also, Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Id. Upon weighing the claimant's testimony in this case, it is found lacking for the following stated reasons. First, when questioned during his hearing about prior neck/back injuries, it appears that the claimant attempted to minimize the significance of this issue in order to offset any potentially negative impact it may have on the issue of his compensable injury and subsequent treatment. Supra. The claimant denied altogether having had neck or back problems prior to his compensable injury of 1998, except for a "twinge" in his neck in 1996. When pressed with medical documentation which contradicted his testimony, the claimant reluctantly admitted to having made complaints to his doctors of on-going problems of at least two years prior to his compensable injury. Supra. Evidence shows that the

claimant even told Dr. Queeney of a specific date on which a prior injury had allegedly occurred. Supra. Such inconsistency casts dispersions on the claimant's testimony as a whole.

Turning our attention now to Dr. Giles' testimony, the Commission has previously found that a claimant's belief, no matter how sincere, is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617) More specifically, a medical opinion based solely upon the claimant's history and subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer, Id. Furthermore, the findings of the Administrative Law Judge on the issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d 275 (1987). Moreover, and more importantly, the Commission is not bound by a doctor's opinion which is based largely on facts related to him by the claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983) Clearly, the testimony

of Dr. Giles in this case reflects that his opinion was based almost entirely upon information provided to him by the claimant. Supra. No conclusive evidence was ever presented to explain how the claimant went from "mild," "minimal" bulging in 1998, to full-blown disk extrusion in 2001. Dr. Giles admitted that he attributed this phenomena to the claimant's compensable injury based entirely upon facts and history provided to him by the claimant. Supra Doctor Giles opinion was, at best, speculative, in that it was based upon information provided by the claimant, who in my opinion, is not a credible source of information.

Finally, in contradiction to the theory that the second complication was a "recurrence" of the claimant's compensable injury, it is well established that the claimant's conservative treatment following his compensable injury was successful and that his prognosis was optimistic. It is well established that the claimant's recovery remained steady and on track. And, it is also well established that the claimant reached MMI some seven months post-injury, and aside from occasional flare-ups, his life returned to normal. The claimant's testimony regarding his extended work hours proves that, if anything, his activities increased over what he had done before his injury. For it to be found

that the claimant suffered a reoccurrence of his compensable injury of March 1998, would require us to resort to conjecture and speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. Of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991) The medical opinion of Dr. Giles was not supported by objective medical evidence, but was based upon information provided to him by a claimant whose testimony was less than credible. Accordingly, a preponderance of the credible evidence does not support the Administrative Law Judge's finding.

In light of the above and foregoing, we further find the claimant is not entitled to temporary total disability from October 31, 2001, nor is he entitled to permanent partial disability. Temporary total disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood, and is awarded during that time that when an employee with a scheduled injury is within his healing period. Arkansas Code Annotated §11-9-521(a). Permanent partial disability is determined by the preponderance of the evidence upon a showing that the compensable injury was the "major cause" of the disability or impairment. Arkansas Code Annotated §11-9-

102 (14). As both the temporary total disability and permanent partial disability are related or caused by a medical procedure that we find is not related to claimant's compensable injury, we further find that it was incorrect to award the claimant indemnity benefits relating to this surgery.

Therefore, for those reasons stated herein, we find that the decision of the Administrative Law Judge should be reversed and this claim for benefits denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

\_\_\_\_\_ I must dissent from the Majority's finding that the treatment rendered and surgery performed by Dr. Giles is not compensable because this holding is erroneous and clearly contrary to the weight of the evidence in the record.

The Majority discounts Claimant's testimony and that of Dr. Giles in which Dr. Giles opined that Claimant's 2001 surgery was necessitated by his 1998 injury by reasoning that Claimant continued in the same line of work and that he resumed his former recreational activities during this period. The Majority further reasons that Dr. Giles's testimony is additionally unreliable because Dr. Giles relied on the history Claimant relayed to him in order to form a medical opinion. Such rationale is weak and unconvincing.

There is no evidence of any other incident other than his 1998 compensable injury that could be responsible for Claimant's condition. Instead, the only medical opinion in the record, that of Dr. Giles, sufficiently establishes that Claimant's surgery was necessitated by his 1998 injury:

The disc reported on his MRI scan 3/27/98 indeed was the cause of the anterior cervical diskectomy and fusion I performed 12/7/01. According to current American Medical Association Guidelines, Mr. Graham's permanent impairment is 10% to the body as a whole and I do feel with a reasonable degree of medical certainty that the herniated disc at the 6-7 level is the major cause of his current rating.

While Dr. Giles, a very competent and experienced neurosurgeon, testified that he did use the history relayed to him by Claimant in forming his medical opinion, it is readily apparent that his opinion is not dependent solely on the history he received from Claimant:

Q: Is there any way that you can state with a reasonable degree of medical certainty that the problems for which you performed surgery in December of 2001 were in fact associated with the findings that you saw on March 27 th - - or on the MRI of March 27 th of 1998 as opposed to some independent intervening activity that occurred between the times of those two diagnostic tests?

A: Within a reasonable degree of medical certainty based on the history that he gives me that he had continued neck and intermittent shoulder and arm pain from 1998, I think it is related to that injury in March of '98.

Q: And I understand, it's related. I guess my question is: It appears to me that with a continued - - right all the way up to a heavy labor job that he performed between March of 1998 and the date that you performed surgery in December of 2001, that the cause of the disc to actually extrude as you indicated may well be associated with work-related activities or other activities as opposed to the original incident?

A: That could well be the case. **But I think that that's unlikely to be based on the fact that that disc became symptomatic as a result of what happened in March of '98. Therefore, anything that happened thereafter, even if he slung a sledgehammer at another occupation, that disc has already been damaged and therefore related to what happened in March of '98.**

Q: But the slinging a sledgehammer or whatever activities would come after that, in your mind, would not increase the risk of fragmenting the disc?

A: **The disc was already injured. You can say it could increase the risk. Well, anything could increase the risk. You could brush your teeth and increase the risk.**

(Deposition pp. 10-11, emphasis added). It is evident from the above quoted testimony that Dr. Giles' opinion is based on Claimant's condition at the time of his 1998 injury and not dependent solely on the history Claimant relayed to him.

In addition to the fact that the only medical opinion in the record establishes that Claimant's 2001 back surgery was necessitated by his 1998 injury, Claimant credibly testified that he had continual pain related to his 1998 injury. The Majority's criticism of Claimant's testimony with regard to a prior injury is irrelevant to this injury in dispute and, therefore, does not weigh on

Claimant's testimony regarding the injury at issue here. See Guidry v. J & R Eads Const. Co., 11 Ark. App. 219, 224 (1984) (lack of credibility must bear on a disputed issue to be relevant).

Because I find that the record, including the only medical testimony in the record and claimant's undisputed testimony, establishes that claimant has proved beyond a preponderance of the evidence that his 2001 surgery is related to his 1998 injury, it is my opinion that the Administrative Law Judge's opinion should be affirmed.

SHELBY W. TURNER, Commissioner