

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F906981

JOHN PEARSON,  
EMPLOYEE

CLAIMANT

WORKSOURCE, INC.,  
EMPLOYER

RESPONDENT

LIBERTY MUTUAL INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 7, 2011

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR.,  
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE LEE WARDEN, Attorney  
at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's  
opinion filed August 25, 2010. The administrative law judge  
found that the claimant proved he sustained a compensable  
injury on June 8, 2009. After reviewing the entire record  
*de novo*, the Full Commission reverses the administrative law  
judge's opinion. The Full Commission finds that the

claimant did not prove he sustained a compensable injury to his left great toe.

I. HISTORY

The record indicates that John Michael Pearson, age 43, was diagnosed with "diabetes mellitus" in October 1995. The claimant received emergency treatment in July 1999 for complaints of "pain, redness, swelling to lt foot." A physician noted erythema and swelling in the claimant's left foot in July 1999 and the assessment was "cellulitis foot." A physician noted in June 2001, "he has had diabetes for six years." A physician's assessment in March 2006 included "1) Cellulitis of the left lower extremity in a diabetic patient. 2) Diabetes, out of control."

The parties stipulated that the employment relationship existed on all relevant dates, including June 8, 2009. The claimant testified on direct examination:

Q. Will you tell us what happened on that day in relationship to your big toe.

A. I got up and went to work and over the course of the day, my foot got a little sore, and when I went home that night and took my boots off and stuff off before I took a shower and I noticed that I had a blister on my toe.

Q. When you got dressed that morning to go to work, did you have a blister on your big toe?

A. No, sir.

Q. Was your big toe sore?

A. No....

Q. And how far into the day was it before you started noticing that there was something different about your big toe?

A. Probably within the first couple of hours, it bothered me a little bit.

Q. And what were your actual job duties on that day?

A. They bring the steel out in big bundles, out to the north yard, and it was our job to take this fiberglass blanket and cover it up so the metal would cool slowly and you walk - depends on where they set it down at, you walk from like one end of the field to the other and cover up ones that come out and uncover the ones that have reached their time limits.

Q. Did you do that walking all day?

A. Yes, sir.

Q. Back and forth?

A. Yes, sir.

Q. Over and over?

A. Yes, sir....

Q. Well, did your footwear have anything to do with the development of the blister, as far as you could tell?

A. Yes, sir. Where the steel toe was inside the boot, I guess from being on my feet and walking and stuff, my feet sweating and everything, where

the edge of the steel toe was rubbing where the blister developed.

Q. Did your big toe rub up against that steel edge in that shoe?

A. Yes, sir....I could feel it pressing against the side of my foot after I had been on my feet for a little bit.

Q. When you were walking, did you repetitively move your foot in terms of stepping and walking? I mean, did you move your foot over and over in order to walk from place to place?

A. Oh, yes, sir.

Q. Were you working within any kind of time frame as far as getting your work done?

A. Yes, sir. As it comes out, we have to cover it as fast as possible, so if we're at this end and it was like down at the other end, you'd kind of have to - I guess hot step is a good term.

Q. So you walked fast?

A. Walked fast, yes, sir.

Q. And did you do that same work over and over again all through the day?

A. Yes, sir. That's what I did on my first day.

Q. Now, once you got home, did you actually inspect your foot and your toe?

A. Yes, sir. When I took my shoes and socks off. I was wanting to see why it was hurting....This side of my big toe had a blister rubbed on it....

The claimant testified that he saw his personal physician, Dr. James P. Saunders, on June 17, 2009 for what

the claimant described as his "regular diabetes checkup."

Dr. Saunders reported on June 17, 2009:

He developed an ulceration on his medial left big toe from using workboots. It had some purulent discharge but he has been using topical antibiotic ointment and the redness and swelling have decreased in the last couple of days....He began working again, and says overall he feels good....

Lesions: The medial big left toe has a 3/4 cm ulceration with pale devitalized tissue of about 1 cm surrounding it; the toe is erythematous but not warm.

Dr. Saunders assessed "Diabetic peripheral neuropathy type II" and "Cellulitis of the toes."

The claimant's testimony indicated that the respondent-employer sent him to Cooper Clinic. The claimant was seen at Cooper Clinic on July 30, 2009, at which time the Date Of Injury given was June 8, 2009. An x-ray of the claimant's left great toe was taken on July 30, 2009:

No evidence of fracture. No bony destruction or periostitis is seen to suggest osteomyelitis.

IMPRESSION:

Three views left great toe with no bony abnormalities seen.

Dr. Terry L. Clark examined the claimant at Cooper Clinic on July 30, 2009:

This is a 42-year-old who has been working with some steel toed boots that according to him were too narrow. He developed a "blood blister" on his left great toe. Since then the toe has become

more reddened and swollen. He has developed an ulcer on the toe that he states has been draining purulent material....

He is an insulin dependent diabetic but he has continued to work in steel toed boots. He denies pain or injury elsewhere....

He has worked at Mac Steel through Work Source for 6 to 7 weeks....

He has a large ulcerated area on the left great toe distal and medially. The entire shaft of the digit is erythematous and edematous with the erythema and edema extending up to the distal aspect of the foot. He has a small amount of purulent material present. X-ray shows no definite osteomyelitis....

I will refer him to podiatry. In the meantime, work restrictions including alternate sit, stand and walk as tolerated with no pressure on the great toe....

Dr. Clark's impression was "Diabetic ulcer and cellulitis of left great toe."

Dr. John D. Wright, a podiatric surgeon, corresponded with Dr. Keith F. Holder on August 7, 2009: "On July 31<sup>st</sup> I evaluated and treated your patient, John Pearson, for an ulceration on his left great toe. Examination revealed a Wagner's Grade 3 ulceration on the plantar medial aspect of the left hallux. There was a sinus tract, which articulated from the ulcer site to the medial interphalangeal joint capsule of the hallux. There was purulent drainage noted, erythema and swelling of the left hallux. The ulceration

was debrided to necrotic tissue and a drain was applied to the ulcer site....He is to return to my office in three days and at that time I will debride the area again and possibly take more plain film radiographs to ensure that there is no indication of osteomyelitis. I will continue to follow up with Mr. Pearson until this condition is completely resolved."

Dr. Travis Goodnight performed an operation on August 21, 2009: "Incision and debridement of left great toe of the skin and subcutaneous tissue and bone." The post-operative diagnosis was "Left great toe osteomyelitis, cellulitis and abscess."

Dr. Goodnight's assessment on September 15, 2009 was "Left diabetic toe wound. Early osteomyelitis of left great toe. I'm going to continue him on antibiotics due to the osteomyelitis changes on x-ray. His wound is healing nicely. He's still not out of the possibility of losing his toe although it is much better....I will let him return to work on 9-21-09 with light duty as long as he can do a job that allows him to stand no longer than 30 minutes at a time. I've also informed him to look into better fitting shoes."

Dr. Goodnight noted during an October 6, 2009 follow-up visit, "He's going through a lawyer to see if he can obtain workman's compensation....I discussed with him that the ongoing concern for him is a chronic underlying osteomyelitis. When I see him back, I will repeat an X-ray of his foot to assure no progression of the osteomyelitis changes."

The claimant followed up with Dr. Goodnight on October 29, 2009: "Doing fine. Working at the Waffle House now....Great toe wound is 99% healed. Looks great. Swelling markedly greater. Some soft tissue swelling on the outer aspect of his foot c/w favoring that aspect of his foot to bear weight." Dr. Goodnight assessed "Left diabetic toe wound - Healed well. I've encouraged him to leave this open to air. Well fitting shoes are a priority for him and he understands this. Taking care of his feet as a diabetic is critical to avoid [any] further ulcerations or loss of tissue. I'll see him back as needed."

Dr. Saunders noted on or about December 9, 2009, "He is here for a diabetes follow-up....He is currently working at a chicken packing plant in a refrigerated section. He has another ulceration on his left lateral foot which he says is

much smaller than it was originally. He had been hospitalized for a similar lesion in August....on the lateral left foot is a 1 cm shallow ulcer with about 2 cm of surrounding erythematous tissue where a blister had unroofed. The toes of both feet are hyperemic." Dr. Saunders assessed Obesity, Diabetic peripheral neuropathy type II, and Cellulitis of the toes.

A pre-hearing order was filed on December 30, 2009. The claimant contended that "on or about June 8, 2009 he developed a blister on the big toe of his left foot as a result of improper fitting work boots." The claimant contended that he was entitled to temporary total disability benefits and reasonably necessary medical treatment. The respondents essentially contended that the claimant could not prove he sustained a compensable injury.

The parties agreed to litigate the following issues:

1. Whether the claimant's difficulties with his left big toe, on or about June 8, 2009, constitute a compensable injury under the Arkansas Workers' Compensation Act.
2. The claimant's entitlement to medical services, temporary total disability benefits from July 30, 2009 until October 29, 2009, and attorney's fee.

After a hearing, an administrative law judge filed an opinion on August 25, 2010. The administrative law judge

found, among other things, that the claimant sustained a compensable injury to his left big toe on June 8, 2009. The administrative law judge awarded medical treatment and temporary total disability benefits.

The respondents appeal to the Full Commission.

## II. ADJUDICATION

### A. Compensability

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4) (Repl. 2002), provides:

(A) "Compensable injury" means:

(i) An 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;

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(a) Caused by rapid repetitive motion....

(D) A compensable injury must be established by medical evidence supported by objective findings as defined in subdivision (16) of this section.

(E) BURDEN OF PROOF. The burden of proof of a compensable injury shall be on the employee and shall be as follows:

(i) For injuries falling within the definition of compensable injury under subdivision (4) (A) (i) of this section, the burden of proof shall be a preponderance of the evidence; or

(ii) For injuries falling within the definition of compensable injury under subdivision (4)(A)(ii) of this section, the burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment.

Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

1. Specific Incident

An administrative law judge found in the present matter that the claimant proved he sustained a compensable injury which was "caused by a specific incident" and was "identifiable by time and place of occurrence." The Full Commission reverses this finding. Administrative law judges and the Full Commission are charged with strictly construing the provisions of Act 796 of 1993. See Ark. Code Ann. §11-9-704(c)(3) (Repl. 2002). A strict construction of the statute does not require, as a prerequisite to compensability, that the claimant identify the precise time and numerical date upon which an accident occurred. See *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001). Instead the statute only requires that the

claimant prove that the occurrence of the injury is capable of being identified. *Id.*

In the present matter, the claimant did not prove the occurrence of an injury which was capable of being identified. The claimant's testimony did not describe an injury which was caused by a specific incident or was identifiable by time and place of occurrence. The claimant testified that his left foot became sore "over the course of the day" while at work on June 8, 2009. The claimant testified that his left great toe began bothering him "probably within the first couple of hours" on June 8, 2009. The claimant testified that he developed a blister "I guess from being on my feet and walking and stuff, my feet sweating and everything, where the edge of the steel toe was rubbing where the blister developed." There was no part of the claimant's testimony from which the Commission could conclude that the claimant injured his left great toe as the result of a specific incident identifiable by time and place of occurrence.

Nor did the medical evidence demonstrate that the claimant injured his left great toe as the result of a specific incident identifiable by time and place of

occurrence on June 8, 2009. Dr. Saunders simply noted on June 17, 2009, "He developed an ulceration on his medial left big toe from using workboots." Dr. Clark reported on July 30, 2009 that the claimant had been "working with some steel toed boots that according to him were too narrow. He developed a 'blood blister' on his left great toe." Nor were there any reports from Dr. Wright or Dr. Goodnight indicating that the claimant had sustained an injury as the result of a specific incident identifiable by time and place of occurrence.

The claimant on appeal cites *Cedar Chem. Co. v. Knight*, 372 Ark. 233, 273 S.W.3d 473 (2008) and argues that the Court has determined that a specific incident "is not limited to a single event, but can involve a series of distinct related actions or events over a brief or limited period of time." In *Cedar Chem. Co.*, the Supreme Court of Arkansas affirmed the Commission's finding that the claimant proved he sustained a compensable injury. The Full Commission found in *Cedar Chem. Co.* that the claimant had sustained a "specific-incident workplace injury" while the claimant was coming down a set of steps; the Court held that

the Full Commission had reasonably concluded that the claimant sustained an "acute injury." *Id* at 238-39.

The facts of *Cedar Chem. Co.* are readily distinguishable from the present matter, because neither the documentary evidence of record nor the instant claimant's testimony demonstrate that there was a specific incident identifiable by time and place of occurrence. We also note that a treating physician in *Cedar Chem. Co.* had opined that the claimant sustained an "acute injury." *Id* at 238 and 241. In the present matter, there was no expert opinion from a treating physician stating that the claimant had sustained an "acute injury" or an injury resulting from a specific incident identifiable by time and place of occurrence. The Full Commission reverses the administrative law judge's finding that the claimant proved he sustained a compensable injury which was caused by a specific incident which was identifiable by time and place of occurrence.

## 2. Rapid Repetitive Motion

The administrative law judge also found that the claimant's "initial blister was caused by rapid repetitive motion and was the major cause of his ultimate need for medical services and disability." The Full Commission

reverses this finding. The test for interpreting "rapid repetitive motion" is two-pronged: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W.2d 644 (1998). As a threshold issue, the tasks must be repetitive, or the rapidity element is not reached; the repetitive tasks must be completed rapidly. *Id.*

The claimant contends that he proved a compensable injury to his left great toe caused by rapid repetitive motion at work on June 8, 2009. The claimant argues that his job duties required walking "back and forth, over and over, all day." Nevertheless, the record in the present matter does not show that the claimant's walking duties at work constituted rapid repetitive motion. The evidence does not demonstrate that the claimant sustained an injury to his left great toe as the result of rapid repetitive motion. Nor does the record show that the claimant's left great toe "rubbed" against his work boot in a rapid repetitive manner, or that the "hot step" described by the claimant at hearing constituted rapid repetitive motion involving his left great toe. The claimant did not prove that he was engaged in

repetitive tasks performed rapidly which caused an injury to his left great toe.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding that the claimant proved he sustained a compensable injury to his left great toe on June 8, 2009. The claimant did not prove by a preponderance of the evidence that he sustained an accidental injury to his left great toe which was caused by a specific incident identifiable by time and place of occurrence. The claimant did not prove by a preponderance of the evidence that he sustained an injury to his left great toe which was caused by rapid repetitive motion. This claim is denied and dismissed.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

After my de novo review of the entire record, I must respectfully dissent from the majority opinion, because I agree with the Administrative Law Judge's opinion that the claimant proved that he sustained a compensable injury, either by specific incident or by rapid repetitive motion. The claimant, on his first day of work in employer-issued steel-toed boots, developed a blister on his left big toe which became infected and eventually required surgery.

**SPECIFIC INCIDENT**

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (4) (D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by

a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The majority has found that the claimant failed to satisfy the requirement that he prove that the injury was caused by a specific incident. In Cedar Chemical Co. v. Knight, 372 Ark. 233 (2008), the Supreme Court held that the claimant had established a specific incident injury, where he had described, in detail, his job duties and the events surrounding the onset of his pain. The Court placed significance on the claimant's prompt reporting of the onset of pain to his employer and the consistent history of injury he provided to his treating physician. These facts, and the Commission's finding that the claimant was credible, were sufficient to meet the standard of specific incident injury.

In Cedar Chemical, the claimant was descending a flight of stairs when he noticed pain in his left knee, around 11:00 a.m., although he could not identify any specific incident that caused the pain. As part of his job duties, the claimant was required to ascend and descend up to three flights of stairs five to eight times throughout the day. After first noticing the pain, the claimant

continued to work for about three hours until a half-hour break, after which he could not put much weight on his leg.

The majority has distinguished Cedar Chemical and the current claim by stating that the record did not show there was a specific incident identifiable by time and place and because there is no expert testimony that the claimant suffered an "acute injury" or injury from a specific incident. I disagree.

The claimant has indeed sustained a specific incident injury identifiable by time and place. The claimant testified that he had to walk all day in his job, and that he could feel the edge of the steel in the toe of his boot rubbing against his left big toe as he walked. He noted that it was very hot, that his feet were sweating and that he needed a wider boot. Within the first couple hours of his workday, the outside of his left big toe began to bother him, and when he got home, he discovered a blister there.

This is a specific incident. There is no question of how the claimant was injured. He wore ill-fitting boots at the direction of his employer and in the course of performing his job duties, walking around a field covering

hot piles of steel "as fast as possible" and uncovering other piles, in one hundred degree weather, the outside of his left big toe began to bother him as he felt the edge of the steel in the toe of the boot rub the outside of his left big toe within a couple hours of starting work.

There is no difference between the Cedar Chemical incident and this one, to the detriment of the claimant. In fact, the current claim is a better example of a specific incident. In each, the claimant went about his duties, and at one point in the day, each felt pain at a particular time, and each continued to work. The current claimant is actually more specific as to the events surrounding his injury. He was required to walk in steel-toed boots. He noticed within the first two hours of his shift that the steel of the toe of the boot was rubbing on his left toe and bothering it. The Cedar Chemical claimant was descending stairs, per usual, and felt pain with no explanation.

The Supreme Court placed emphasis on the fact that the Cedar Chemical claimant "described in detail his job duties and the events surrounding the onset of his pain." The current claimant has done the same.

The majority has emphasized that there was an expert opinion from the treating physician that the claimant sustained an "acute injury" in Cedar Chemical. This testimony was necessary, because that claimant merely felt pain descending the stairs. There was no event known to the claimant except that the pain started as he was descending the stairs. The Supreme Court quoted the Commission as saying that the doctor had opined that the torn meniscus was the result of the work place injury, and later the Court described that as an opinion regarding the claimant's acute injury. There is no expert opinion that the claimant's blister was a result of a work place injury. It is obvious that the claimant's blister was the result of a work place injury. The Commission does not need an expert to come to that conclusion. The injury was the rubbing of the edge of the steel toe of the boot against the outside of the claimant's left big toe, causing discomfort and then a blister, which required medical treatment.

This claim can be distinguished from Weaver v. Nabors Drilling USA, 98 Ark. App. 161, \_\_\_ S.W.3d \_\_\_ (2007), where the claimant was performing his job duties when he started to feel his hands "tingling" or "burning."

He only proved that he had an injury and that he felt pain while at work, and he failed to show that a specific incident occurred at work. To the contrary, the current claimant can identify the cause of his injury and when it began.

In addition, I note that an "incident" is defined as an occurrence of an action or situation that is a separate unit of experience." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 609 (Merrian-Webster Inc. 1985). I submit that the claimant's injury was an incident, a separate unit of experience, that occurred over the span of an entire work shift, or a series of incidents, each a separate unit of experience, every time the outside of the claimant's left big toe rubbed against the edge of the steel toe of the improperly sized boot.

The claimant sustained an injury as the result of a specific incident, identifiable by time and place of occurrence.

#### RAPID REPETITIVE

The claimant also argued, and the Administrative Law Judge agreed, that his injury was compensable because it was caused by rapid repetitive motion, under Ark. Code Ann.

§11-9-102(4) (A) (ii) (a). The standard set out in Malone v. Texarkana Pub. Schs., 333 Ark. 343, 969 S.W.2d 644 (1988), for analyzing whether an injury is caused by rapid repetitive motion, is a two-pronged test: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. As a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. Westside High School v. Patterson, 79 Ark. App. 281, 86 S.W.3d 412 (2002). Arguably, even repetitive tasks and rapid work, standing alone, do not satisfy the definition; the repetitive tasks must be completed rapidly. Westside High School, supra.

The majority found that the claimant did not prove the rapid repetitiveness of the walking which his job required, or the rubbing which occurred in his boot. The claimant explained that he and his co-workers covered big bundles of freshly processed steel with fiberglass blankets to control the speed at which they cooled. The blankets also had to be removed. These bundles were in a field. He walked all day, back and forth, over and over. He explained that as the steel bundles were brought out, "we have to cover it as fast as possible, so if we're at this end and it was like down at the other end, you'd kind of

have to - I guess hot step is a good term." He also stated that he "walked fast." Whether one looks to the small motion of the side of the steel toe of the boot rubbing against the claimant's left big toe or to the act of walking, the claimant did testify that the action was fast, actually "as fast as possible" and that it occurred all day, over and over again.

If the motion at issue was a series of movements to make a shoe or process a part in a machine, then specific testimony as to the precise motions would be necessary for the Commission to make a determination of rapid repetitiveness. However, the motion here is walking. There is no need for an expert or the claimant to explain to the Commission what motions are involved in walking. The claimant did explain the precise motions involved in the rubbing of the steel edge against his toe. That motion is very simple. The edge rubbed his toe with each step.

Because his job was to walk from pile of steel to pile of steel, covering the hot ones "as fast as possible" and uncovering the cooled ones, all day, the motions were rapid and repetitive both. Walking is obviously repetitive, as it is merely the same motion of one's legs and feet, left

alternated with right. It is common sense, as well, that the walking was rapid for purposes of the Act. The issue is not whether the claimant walked rapidly, but whether the motions of his feet, in particular his left foot, were rapid for the act. In Boyd v. Dana Corp., 62 Ark. App. 78, 966 S.W.2d 946 (1998), a series of repetitive motions, performed 115 to 120 times per day separated by periods of only 1.5 minutes, constituted rapid motion within the meaning of the statute. In High Capacity Prods. v. Moore, 61 Ark. App. 1, 962 S.W.2d 831 (1998), movements repeated every fifteen seconds were found to be sufficiently "rapid". Even a casual walk will produce repeated motions of the left foot of more than one every fifteen seconds, and the claimant testified that he had to get the hot piles of steel covered as quickly as possible and that he walked across the field, from pile to pile, and alongside the piles to cover and uncover them, all day.

Both the motion of the claimant's left foot and the motion of his left toe inside the boot were rapid repetitive for purposes of the Act.

I would award the claimant medical and indemnity benefits, as well as an attorney's fee, for compensable injury to his left big toe.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

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PHILIP A. HOOD, Commissioner