OPINION ENTERED: February 23, 2012

CLAIM NO. 201000148 & 200896489

HENRY JAMES MAGEE PETITIONER

VS. **APPEAL FROM HON. OTTO D. WOLFF, ADMINISTRATIVE LAW JUDGE**

SIDNEY COAL/CLEAN ENERGY
and HON. OTTO D. WOLFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AFFIRMING IN PART, VACATING AND REMANDING

* * * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Henry James Magee ("Magee") seeks review of a decision rendered March 10, 2011, by Hon. Otto D. Wolff, Administrative Law Judge ("ALJ"), and the orders ruling on petitions for reconsideration entered May 3, 2011 and November 14, 2011. The ALJ awarded Magee temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical benefits for an

injury to his left knee sustained on January 29, 2008 while repairing a piece of equipment for Sidney Coal Company/Clean Energy ("Sidney Coal"). The ALJ dismissed Magee's hearing loss claim because he did not provide due and timely notice. The ALJ sustained Sidney Coal's petition for reconsideration by order dated May 3, 2011. Magee also filed a petition for reconsideration requesting the ALJ reconsider the percentage of impairment assigned, whether he is totally disabled and whether it was appropriate to dismiss his claim for failure to provide due and timely notice. Magee's petition for reconsideration was denied by order entered November 14, 2011.

Magee has raised three issues on appeal. He first argues the ALJ's decision is clearly erroneous and should be reversed. He next argues the ALJ erred in his consideration of extent and duration of disability in awarding PPD benefits based upon a 1% impairment rating with application of the multiplier contained in KRS 342.730(1)(c)1. Finally Magee argues the ALJ erred in dismissing his hearing loss claim for failing to provide due and timely notice. We affirm in part, vacate and remand.

Magee testified by deposition on May 19, 2010, and again at the hearing held on January 26, 2011. Magee was

born on February 16, 1947 and is a resident of Inez, Kentucky. He is a high school graduate and has a certification as a mine electrician. Magee last worked on January 29, 2008 when he was injured at Sidney Coal. Magee's work experience includes a four-year enlistment in the United States Air Force, three years as a factory worker, and underground coal mining beginning in 1975 or 1976.

On January 29, 2008, Magee was working underground as a certified electrician, which involved maintenance and repair of mining equipment. He was instructed to assist with the repair of a conveyor chain on a mining machine. Adjusting the chain required him to walk around the machine several times. As he was walking around the machine, his foot became tangled causing him to fall and twist his left knee out of place. He was able to eventually get up and complete his shift. He reported the accident to his supervisor and completed an accident report when he returned to the surface.

When Magee got home from work, his knee was swollen, and he sought treatment from Dr. Chaffin, his family physician. Dr. Chaffin ordered an MRI, placed Magee on crutches, and ordered physical therapy. Dr. Chaffin eventually referred Magee to Dr. Ireland, an orthopedic

surgeon, who performed surgery in April 2008. Magee testified he currently takes medication for pre-existing heart and back conditions, as well as his left knee condition. He also takes medication for post-traumatic stress syndrome resulting from his military service. Magee testified he does not believe he can return to his previous job because he is unable to bend over, get on his hands and knees and crawl.

Regarding his hearing loss, Magee testified at his deposition his hearing was tested every year he worked for Massey, and he was advised he had some hearing loss. Continued testing demonstrated a progressive hearing loss. He wore hearing protection in the mines, but was exposed to "banging and clanging". The longer he worked in mining, the less he was able to hear. He once had his hearing tested by a doctor who advised he was losing his hearing, and it was work-related. He did not obtain hearing aids because he could not afford them.

At the hearing, Magee testified as follows:

> Q. As far as your hearing loss, I think you - - you went to see Doctor Manning. I think I sent you over there and you saw him on January the 19th of '09. Do you recall going to Prestonsburg and - -
>
> A. Yeah.

Q. - -seeing a doctor for your hearing? Did it - - before you saw him, had any doctor ever told you that you had a hearing loss that was caused - - let me finish. - -that was caused by you working in the mines?

A. Well, Massey gives hearing tests every year. And I wish I'd kept them, 'cause each- -you know, they give you a test. And, each year they'd say - - you know, they said, well, you're going downhill, you know. And, they said, you know, won't be long before you'll have hearing aides[sic]. And, I- -wore protection, safety glasses, because if they caught you on the mine property and- -and you weren't wearing all you- -your glasses, your hearing aides[sic], everything, you know, they would- -they would write you up and you'd- -you may end up with some time off. I mean, they were strict on it. So- -and, plus, I'm not going to take a chance- - I don't want to go deaf.

Q. These doctors that you saw for Massey, did any of them actually tell you that your hearing loss was related to your - -noise in the mines?

A. Do what now?

Q. Did any of them actually tell you that your hearing loss was related to your noise exposure - -

A. Well, that- -that was the only job I had at the time.

Q. But, what I'm asking, did they tell you that?

A. Yeah.

Q. They told you that the hearing- -

> A. They said, are you wearing your protection for hearing? And, I said, yeah. And, they said, well, you know, it- -it's at a point now where you know, we- -we beat stuff, you know, I was a mechanic- -
>
> MR. STAYTON: Uh-huh. (Yes)
>
> A. Always, you know, loud noises, beating on stuff, cutting stuff with torches and everything. And, yeah.
>
> Q. Now, I realize you- -you know it, but did the doctors actually say that?
>
> A. No. They- -they would come and give us the test.

Magee filed several medical records with the Form 101 in support of his claim including the January 28, 2008 note from Dr. Chaffin which stated, "He has been having problems for the last 30 days of pain, catching, locking, and popping of his left knee." In the same note, Dr. Chaffin stated the MRI demonstrated a left medial meniscus tear and mild patellofemoral arthrosis. The operative note from April 11, 2008 reflects Magee underwent an arthroscopic partial medial meniscectomy, arthroscopic chondroplasty patellofemoral medial compartment, and arthroscopic limited synovectomy debridement of the fat pad. Dr. Ireland's records dated April 17, 2008, May 8, 2008 and July 9, 2008 reflect Magee was doing well and progressing post-operatively. Also, filed with the Form

103 hearing loss claim, Magee submitted the January 19, 1990 hearing test performed by Dr. Robert Manning, Au. D.

Magee also supported his claim with the report of Dr. Robert Lowe, a spinal surgeon in Huntington, West Virginia, who evaluated him on March 18, 2010. Dr. Lowe opined Magee had an, "excellent result post arthroscopy". Dr. Lowe diagnosed:

> 1) Complex tear of medial mediscus [sic] of the left knee
>
> 2) Localized synovitis with medial gutter fat pad syndrome
>
> 3) Medial compartments arthrosis, grade 3; patellofemoral arthrosis grade 2.

Dr. Lowe assessed a 1% impairment rating based upon the AMA Guides to the Evaluation of Permanent Impairment 5th Edition ("AMA Guides"), due to the torn meniscus, and assigned an additional 2% based upon the AMA Guides due to arthritis, for a total rating of 3%. Dr. Lowe also stated prolonged walking or squatting would be ill-advised.

Dr. Sheridan, an orthopedic surgeon, evaluated Magee on February 16, 2009 at Sidney Coal's request. Dr. Sheridan noted at the time of the accident, Magee was a 62 year-old male who twisted his left knee while walking around a piece of equipment. Magee described intermittent pain over the medial side of the left knee. Magee also

stated he experienced stiffness of, and occasional pops in the left knee. Dr. Sheridan stated Magee had a normal gait at the time of the evaluation. He also noted Magee had reached maximum medical improvement ("MMI"). Dr. Sheridan stated Magee could return to work full duty in relation to the left knee injury, with no restrictions. He also assessed a 1% impairment rating pursuant to the AMA Guides.

Magee was evaluated on April 28, 2010 at the University of Kentucky by Dr. Raleigh Jones and Dr. Jennifer Shinn, pursuant to KRS 342.315. Dr. Jones opined Magee has a work-related hearing loss compatible with, "repetitive exposure to hazardous noise over an extended period of employment". Dr. Jones assessed a 6% impairment rating based upon the AMA Guides. Dr. Jones further stated:

> I do think that he would benefit from bilateral hearing aids and I have talked to him about the importance of proper hearing protection if he is going to be exposed to any further loud noise in the future.

After reviewing the evidence of record, the ALJ found in the opinion rendered March 30, 2011:

> There is no question Plaintiff sustained an injury to his left knee on January 29, 2008, and that this injury resulted in a permanent impairment. In making the determination regarding

Plaintiff's whole personal impairment (WPI) rating this ALJ may choose from the 3% WPI rating assessed by Plaintiff's Dr. Lowe or the 1% WPI rating assessed by Defendant's Dr. Sheridan. Dr. Lowe's rating consisted of two components, 1% for the partial medial meniscectomy and 2% for arthritis of the knee. Dr. Lowe indicated Plaintiff had arthritis prior to the April, 2008 knee surgery but that it was not active. Both physicians agree Plaintiff, because of the meniscectomy, had a WPI rating of 1%. Dr. Sheridan's 1% is adopted by this ALJ as Plaintiff[sic] WPI rating for his left knee injury.

As to Dr. Lowe's additional 2% for the presences of mild arthrosis, there is no proof that it is contributing to Plaintiff's impairment, it was present before the injury and, per Dr. Ireland's input, has not advanced since her [sic] surgery, its[sic] just there.

Plaintiff contends Defendant is permanently totally disabled. Permanent total disability is defined in KRS 342.0011 (1) (c) as the condition of an employee who, due to an injury, has a permanent disability rating and a complete and permanent inability to perform any type of work as a result of an injury. Work is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011 (34).

For a permanent total disability award, non-work related impairments and conditions shall not be considered in determining whether the employee is totally disabled. KRS 342.730 (1) (a).

In determining whether a worker is totally disabled, the ALJ must consider several factors including the workers' age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. Ira A. Watson Dept. Store v. Hamilton, Ky., 34 S.W. 3d 48 (2000)

Plaintiff's Age

Plaintiff's age is a factor that suggests Plaintiff is at permanent total disability status. Plaintiff is 64 years old and was age 60 at the time of his injury. KRS 342.730(1)(c)3, gives statutory recognition to the fact that an injured employee, age 60, has sustained, due to his advancing age, an impact on his post-injury earning capacity.

Education Level

Plaintiff has a 12th grade education, and is an underground mine certified electrician. In his work as an electrician he was required to repair machinery and equipment and to maintain machinery and equipment. Plaintiff, through formal education and on-the-job training, has attained an education level that does not suggest he is permanently totally disabled.

Vocational skills

As above indicated, Plaintiff has learned to repair and maintain the heavy machinery and equipment utilized in mining. He has learned these skills over the last 30 years, and is well skilled in repairing and maintaining heavy equipment and electrical systems. These skills are needed in the coal mining region of Kentucky. Having these

skills suggests Plaintiff is not permanently totally disabled.

Medical restrictions

Plaintiff has minimal medical restrictions. As noted by Dr. Lowe, "Were he to consider reworking; prolonged walking or squatting could be ill advised." Dr. Sheridan opined Plaintiff could return to work full duty without restrictions. Dr. Ireland, Plaintiff's treating surgeon, indicated in April 2008, that Plaintiff was doing well. There does[sic] not appear to be any precise restrictions on Plaintiff's capacities to work. He is to avoid long distance walking and prolonged squatting, but these relatively mild conditions should not preclude Plaintiff from obtaining work in his area of training and in his geographical area.

Plaintiff has not persuaded this ALJ that he is unable to provide services to another in return for remuneration on a regular and sustained basis. Surely he can utilize his training and skills to find work. To be deemed permanently totally disabled one must be unable to perform any type of work, KRS 342.0011 (11) (c). This ALJ is not persuaded that can be said about this Plaintiff; consequently, it can only be concluded that Plaintiff is not permanently totally disabled.

Having determined Plaintiff is not at PTD status, it is next appropriate to ascertain whether Plaintiff is entitled to the three multiplier pursuant to KRS 342.730 (c) (1) 1. It is of [sic] the opinion of this ALJ that Plaintiff can obtain "work" as defined in the Act, but it is apparent to this ALJ he cannot do the work he

was doing when injured. As described by Plaintiff his work required him to squat much of the time, because he was often working in low coal. He was required to walk long distances from the end of the tramline to the head wall of the mine. He has been advised to not squat or walk for prolonged periods, tasks that he was required to do in the job he was doing when injured, consequently, this ALJ is persuaded Plaintiff is entitled to the three multiplier provided under KRS 342.730(1)(c)1.

Having ascertained Plaintiff has a whole person impairment rating and a multiplier, it is next appropriate to determine when Plaintiff is entitled to receive TTD benefits. Temporary total disability is defined in KRS 342.0011 (11) (a) as the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement which would permit a return to employment. Plaintiff was injured on January 29, 2008. He testified that on the morning of January 29, 2008, he went to see Dr. Chaffin and was promptly placed on crutches, sent for an MRI and x-rays and referred to PT. He could not work on crutches, therefore he is entitled to receive TTD benefits commencing on January 30, 2008.

It is next necessary to determine when Plaintiff’s status changed. Dr. Lowe indicated Plaintiff attained MMI status on April 11, 2008, but this input is not correct for the date of Plaintiff’s surgery was April 11, 2008. Dr. Sheridan, in his February 16, 2009 IME report wrote, "Claimant is at maximum medical improvement for the left knee injury 1/29/08", Dr. Sheridan

is the only involved physician who specifically (an accurately) addresses the MMI status question. Consequently, Plaintiff is deemed to have attained MMI status on February 16, 2009.

Notice of Hearing loss

An ALJ's determination of whether notice of an injury was timely given is a mixed question of fact and law. Harry M. Stevens Co. v Workers' Compensation Board, 553 S.W. 2d 852 (Ky.,[sic] App. 1977).

There is conflicting testimony by Plaintiff as to when he was told his hearing loss was related to his work in the underground mines. In his discovery deposition (p. 20) he testified that, yes he was told by his prior employer's examining physician, some ten years before the work incident, that he had a work related hearing loss. Apparently he was told this after each annual hearing test he underwent in the ten years preceding his work for Defendant. He knew he was plagued with this worsening problem when he started working for Defendant but apparently declined to tell Defendant about his occupational disease hearing loss. Per KRS 342.316 (2), notice of such an injury shall be given to the employer as soon as practicable after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to appraise him that he has contracted the disease, or a diagnosis of the disease is first communicated to him, whichever shall first occur." With this statutory requirement it can be said Plaintiff should have given notice of his predicament on the first day he was given an opportunity to work for

> Defendant. He knew he had the problem of increasing hearing loss. But, on page 20 of the Final Hearing transcript, he answered, "No" to the question, "Now, I realize you…you knew it but did the doctors actually say that?" On page 21, of the Final Hearing transcript he answered "Yeah" to the question, "Was that the first time a doctor (Manning) actually told you that?" He saw Dr. Manning one time on January 19, 2009, and filed his hearing loss claim on January 26, 2010. His Final Hearing testimony squarely contradicts his Discovery Deposition testimony. This ALJ is not persuaded Plaintiff gave timely notice of his hearing loss.
>
> It is also noteworthy that Plaintiff did not present any proof that his hearing loss increased after commencing to work for Defendant. To prove such a point it would be necessary for Plaintiff to compare the last of his prior test results more recently obtained.

On reconsideration, the ALJ determined, in the order entered November 14, 2011, as follows:

> Plaintiff petitioned the ALJ to reconsider three (3) points:
>
> 1. Reconsideration of the question of the percentage of functional impairment assessed by the ALJ;
>
> 2. Reconsideration of whether Plaintiff is totally disabled; and,
>
> 3. Reconsideration of whether dismissal of Plaintiff's hearing loss claim, due to Plaintiff giving untimely notice to Defendant, was appropriate.

> Defendant responded to points one (1), two (2) and three (3) of Plaintiff's Petition contending the points raised constituted an attempted re-argument of the merits of the claim. Plaintiff's contentions do attempt to re-argue the facts and thus the points raised in Plaintiff's Petition constitute impermissible topics for consideration. Points one (1), two (2) and three (3) of Plaintiff's Petition is [sic] **OVERRULED** and shall not be reconsidered.
>
> Defendant asked the ALJ to reconsider if the ALJ, in the Opinion, used the incorrect maximum PTD rate rather than the maximum PPD rate. The incorrect rate was used and to ascertain Plaintiff's weekly benefit. This is a patent error appearing on the face of the Opinion. There is merit to Defendant's contention and thus Defendant's request for reconsideration shall be SUSTAINED.

It is well established the claimant in a workers' compensation claim bears the burden of proving each of the essential elements of his cause of action before the ALJ, including the fact he provided due and timely notice of the work-related injury to his employer. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Where the claimant is unsuccessful with regard to that burden, the question on appeal is whether the evidence compels a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence

that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be overturned. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The extent of an ALJ's discretion and authority in deciding disputed issues in workers' compensation proceedings is both wide ranging and well established. In rendering a decision, KRS 342.275 and KRS 342.285 grant the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Although a party may note evidence that would have supported a different outcome than that reached by the ALJ, such evidence is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky.

1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

As outlined in his opinion, the ALJ relied primarily upon the opinion of Dr. Sheridan, and set forth the reasons he did so, and why he rejected the opinions of Dr. Lowe. We cannot say the ALJ's reliance upon Dr. Sheridan's opinions, and awarding PPD benefits based upon a 1% impairment rating rather than the 3% rating assessed by Dr. Lowe, is so unreasonable based upon the evidence the decision must be reversed as a matter of law. Likewise, the ALJ provided an analysis outlining why he did not believe Magee was permanently totally disabled.

As the Court held in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000), one of the functions of the ALJ, as fact-finder, is to translate the lay and medical evidence when determining the extent of an employee's occupational disability at a particular point in

time. Substantial evidence exists to support the ALJ's findings, and a contrary result is not compelled. Accordingly, we affirm the ALJ's determination Magee is entitled to PPD benefits based upon a 1% impairment rating with the application of the three multiplier pursuant to KRS 342.730(1)(c)1.

We next turn to the ALJ's determination Magee did not provide due and timely notice of a work-related hearing loss. As noted by the ALJ, the evidence regarding when Magee first learned he had a hearing loss, and when he was first apprised it was work-related is equivocal at best. Magee underwent annual hearing tests for years prior to working for Sidney Coal which he claims demonstrated a gradual worsening of his hearing. Magee may or may not have been advised his hearing loss was work-related, although his testimony is unclear. The evidence does not establish whether Sidney Coal ever inquired if he had a hearing loss, nor even required a pre-employment physical examination or hearing test. Magee began working for Sidney Coal in 2007. He had a work-related injury to his left knee on January 29, 2008, from which he never returned to work. A hearing test was performed by Dr. Manning on January 19, 2009 advising Magee he had a work-related hearing loss. No notice was provided to Sidney Coal until

the filing of the Form 103 on January 26, 2010, a year and seven days later, not seven days as Magee argued in his brief before the ALJ.

In the case *sub judice*, the ALJ determined Magee first knew of his hearing loss prior to working for Sidney Coal. Hearing loss is a cumulative trauma injury within the context of the definition of injury pursuant to KRS 342.011(1). Cumulative or gradual trauma injuries must be distinguished from acute trauma injuries where a single traumatic event causes the injury. The Supreme Court in Hill v. Sextet Min. Corp., 65 S.W.3d 503, 507 (Ky. 2001) noted:

> Implicit in the finding of a gradual injury was a finding that no one instance of workplace trauma, including those specifically alleged and those of which the employer was notified, caused an injury of appreciable proportion.

In Randall Co. v. Pendland, 770 S.W.2d 687, 688 (Ky. App. 1989), the Kentucky Court of Appeals adopted a rule of discovery with regard to cumulative trauma injuries holding the date of injury is "when the disabling reality of the injuries becomes manifest." In Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999), the Supreme Court of Kentucky defined "a manifestation of disability" in a cumulative trauma or gradual injury claim as follows:

> In view of the foregoing, we construed the meaning of the term 'manifestation of disability,' as it was used in Randall Co. v. Pendland, as referring to physically and/or occupationally disabling symptoms which lead the worker to discover that a work-related injury has been sustained.

Id. at 490.

In other words, a cumulative trauma or gradual injury manifests when "a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work." Alcan Foil Products v. Huff, 2 S.W.3d 96, 101 (Ky. 1999). A worker is not required to self-diagnose the cause of a harmful change as being a work-related cumulative trauma or gradual injury. *See* American Printing House for the Blind v. Brown, 142 S.W.3d 145 (Ky. 2004). Rather, a physician must diagnose the condition and its work-relatedness.

In this instance, we do not believe Magee was required to provide notice of a work-related hearing loss when he was hired by Sidney Coal, and we therefore vacate that portion of the ALJ's decision dismissing the hearing loss claim for failure to notify Sidney Coal of a work-related hearing loss when he was hired. As pointed out by the ALJ, Magee stated "yeah" in response to an inquiry as to whether he was advised he had a work-related hearing

loss prior to his employment with Sidney Coal. It is also noted Magee responded "no" to the same inquiry only a few moments later. Despite his equivocal testimony, the evidence does not clearly establish Magee knew he had a work-related hearing loss at the time he was hired, and the extent of that loss. No documentation of previous hearing tests outlining either a hearing loss or a determination of work-relatedness of hearing loss was submitted. We deem the ALJ's basis for determining Magee did not provide due and timely notice to be insufficient to permit meaningful review on appeal. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

That said, Magee underwent a hearing test by Dr. Manning at the request of his attorney on January 19, 2009. No notice was provided to Sidney Coal of Dr. Manning's assessment of a work-related hearing loss until January 26, 2010, a year and seven days later. On remand, the ALJ must determine whether Magee provided due and timely notice of his hearing loss, after his evaluation by Dr. Manning. We are not attempting to substitute our judgment for that of the ALJ. The ALJ may well determine due and timely notice of the hearing loss was not provided subsequent to being apprised of the work-related hearing loss by Dr. Manning.

Accordingly, the decision rendered March 10, 2011, and the orders ruling on the petitions for reconsideration rendered on May 3, 2011, and November 14, 2011, by Hon. Otto D. Wolff, Administrative Law Judge, are hereby **AFFIRMED** in part, **VACATED** and **REMANDED,** for further findings consistent with the views expressed in this opinion.

ALL CONCUR.

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