OPINION ENTERED: June 21, 2013

CLAIM NO. 201166277

NEON FIRE & RESCUE PETITIONER

VS. **APPEAL FROM HON. JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE**

JACK MIKE CONLEY
and HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, and STIVERS, Member.

STIVERS, Member. Neon Fire & Rescue ("Neon") seeks review of the January 14, 2013, opinion, award, and order rendered by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ") finding Jack Mike Conley ("Conley") sustained work-related low back and neck injuries. The ALJ awarded permanent partial disability ("PPD") benefits enhanced by the three multiplier pursuant to KRS 342.730(1)(c)1 and

medical benefits.[1] Neon also appeals from the February 18, 2013, order ruling on the petition for reconsideration.

On November 27, 2011, Conley was working for Neon as an emergency medical technician when he was injured in a motor vehicle accident ("MVA") which occurred when the ambulance Conley was driving was struck by another vehicle and forced off the road. Conley received treatment at the scene and was taken to Whitesburg Appalachian Regional Hospital. He was discharged from the hospital on the same day. Conley then was treated by his family physician, Dr. Marlene Bielecki. Dr. Bielecki referred Conley to Dr. Duane Densler, a neurosurgeon, who saw him on one occasion. Dr. Bielecki also prescribed physical therapy which Conley underwent for three months. Later, Dr. Bielecki referred him to the pain treatment unit at Pikeville Medical Center.

For years prior to the accident Conley had been treated by Dr. Bielecki for low back problems and right shoulder pain. However, Conley denied having any neck problems prior to the accident. After the MVA, Conley maintained his low back pain was much greater, and he had developed pain in the right side of his neck which extended

[1] Although the ALJ did not initially award medical benefits for the cervical condition, in the order ruling on the petitions for reconsideration she amended the award to include medical benefits for the cervical condition.

into his arm. Conley testified that prior to the MVA his low back and shoulder problems had not caused him to miss any work, and in fact, he regularly worked overtime while employed by Neon.

Neon introduced the October 4, 2012, report of Dr. David Muffly who assessed a 5% impairment pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"), which he attributed to a pre-existing active lumbar spine condition. He also noted Conley had a pre-existing active cervical degenerative condition. Dr. Muffly did not believe there was any increase in impairment due to the MVA.

Neon introduced the report of Dr. Henry Tutt who expressed the opinion Conley had sustained "only transient myofascial injuries, i.e., lumbar sprain" which had resolved. Dr. Tutt stated Conley "possibly sustained a cervical strain although neck complaints were not initially proffered." He believed Conley also had "preexisting lumbar degenerative changes with preexisting active symptoms" which were not altered by the accident. He believed Conley was at maximum medical improvement ("MMI") and based on the AMA Guides, determined there was no

evidence Conley had altered his lumbar or cervical spine in any way as a result of the work-related MVA.

Conley submitted the Form 107-I and an attached addendum of Dr. Ira Potter, who pursuant to the AMA Guides assessed a 14% impairment rating, of which 10% was attributable to pre-existing conditions. Specifically, 5% was attributable to a cervical spine condition and 5% to a lumbar spine condition.

With respect to whether Conley sustained a work-related injury as defined by the Act, the ALJ entered the following findings of facts and conclusions of law:

> **Work relatedness/causation; Injury as defined by the ACT**. The first issue under consideration is whether Plaintiff has supported his burden of proving he suffered an injury as defined in KRS 342.0011(1) which defines "injury" as a work related traumatic event arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical evidence. Where a work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury. *McNutt Construction First General Services v. Scott*, 40 SW 3d 854 (Ky., 2001)
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> While Dr. Tutt and Dr. Muffly have determined that there is no new impairment as a result of the motor

> vehicle accident on November 27, 2011, I am more persuaded by Plaintiff's own testimony in conjunction with the opinion of his treating physician Dr. Bielecki that the increase in pain is the result of the work related motor vehicle accident as well as the opinion of Dr. Potter who evaluated Plaintiff and found that the work injury likely aggravated or aroused Plaintiff's condition into disabling reality.

The ALJ then determined as follows:

> **Benefits per KRS 342.730.** After careful review of the conflicting medical evidence and the well-reasoned arguments of the parties, as stated above, I am persuaded by the opinion of Dr. Potter who assessed a 14% whole person impairment rating based on the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition*, with 10% pre-existing and active at the time of the November 27, 2011 work injury and, therefore, not compensable. I am also persuaded that, due to the November 27, 2011 work injury, Plaintiff does not retain the physical capacity to return to the type of work that he performed at the time of the injury and, therefore, qualifies for the three (3) multiplier.
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> Plaintiff's award of benefits is therefore calculated as follows:
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> $516.63 x 2/3 = 344.42 x 4% x .65 x 3 = $26.86 per week

The ALJ only awarded medical benefits for the work-related injury to the low back. The ALJ's award is as follows:

> 1. Plaintiff, Mike Conley, shall recover from Defendant Employer, Neon Fire and Rescue, and/or its insurance

> carrier, the sum of $26.86 per week, from November 27, 2011, as permanent partial disability benefits, and continuing thereafter for so long as Plaintiff is disabled but not to exceed 425 weeks, with Defendant Employer taking credit for benefits already paid and with 12% interest per annum on any past due amounts.
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> 2. Plaintiff shall recover from Defendant Employer, and/or its insurance carrier, such medical expenses including but not limited to provider's fees, hospital treatment, surgical care, nursing supplies, and appliances, as may be reasonably required for the cure and relief from the effects of the work-related injury including referrals by Dr. Bielecki for treatment related to the work injury. The obligation of Defendant Employer shall be commensurate within the limits set by the Kentucky Medical Fee Schedule.

Both parties filed petitions for reconsideration. In its petition for reconsideration, Neon pointed out the ALJ had found Conley's work injury had aggravated or aroused his condition into disabling reality. However, it asserted Dr. Potter, upon whom the ALJ relied, stated the MVA aggravated Conley's pre-existing condition. Thus, relying upon Dr. Potter's opinion as the basis for determining Conley had an impairment was not consistent with the law the ALJ recited. Neon asserted Dr. Potter did not state Conley had a pre-existing dormant condition which was aroused into disabling reality.

It also asserted the mere exacerbation or aggravation of an ongoing condition is not compensable unless that previous ongoing condition is compensable. Neon contended the ALJ determined "Conley's active condition was aroused or aggravated from an already active state." Alternatively, Neon requested the ALJ make specific findings of fact whether Dr. Potter was apportioning his findings to a pre-existing dormant condition that was aroused and, if so, what the dormant condition was and how it differed from the active condition Dr. Potter had stated was in existence.

Neon also contended the ALJ erred in directing it to be responsible for the treatment of Conley's lumbar spine since his lumbar condition was active and non-compensable. It asserted since this claim was no more than an aggravation or exacerbation of Conley's active symptomatic and disabling condition, based on Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), the ALJ was compelled to limit the award of medical benefits. In the alternative, if the ALJ refused to revisit this issue, Neon requested additional findings of fact as to why the limitation on the award of medical benefits is not appropriate.

Neon also requested the ALJ to clarify what treatment was compensable. It pointed out the ALJ made no findings regarding the cervical spine.

Neon also contended that consistent with Dr. Potter's addendum, the ALJ should reconsider her opinion and find only treatment for Conley's pain is compensable. Neon stated Dr. Potter's addendum indicates he assessed an 8% impairment rating for the cervical spine condition of which 5% was active and a 7% impairment rating for the lumbar spine condition of which 5% was active. Therefore, under the AMA Guides, any impairment for a Class II disability of the cervical or lumbar spine above 5% "is due to findings of pain."

In his petition for reconsideration, Conley noted Neon had paid temporary total disability ("TTD") benefits from November 28, 2011, through April 25, 2012, and that the award should be amended to reflect he was awarded TTD benefits for that period. In addition, Conley asserted the ALJ found he was only entitled to reasonable and necessary medical expenses for the injury to his low back. Conley argued the ALJ's finding should be amended to include an award of medical benefits for the cervical condition since the impairment rating assessed by Dr. Potter encompassed impairments to the cervical and lumbar spine. Conley also

requested that the ALJ correct the calculations of benefits as he had only completed the 9th grade and had a GED; thus, he is entitled to a 3.2 multiplier.

In the February 18, 2013, order ruling on the petition for reconsideration, the ALJ amended the award of medical expenses to include the "treatment of the work related injury to the low back and for the cervical condition." The ALJ also amended the award to include an award of TTD benefits spanning the period from November 28, 2011, through April 25, 2012, which was to be followed by the payment of PPD benefits for a period of 425 weeks. The ALJ overruled all other aspects of Conley's petition for reconsideration. Concerning Neon's petition for reconsideration, without expressly overruling the petition for reconsideration, the ALJ stated as follows: "The remaining issues argued by Defendant Employer are merely a reargument of the merits of the claim and not proper for reconsideration."

On appeal, as it did in the petition for reconsideration, Neon argues the ALJ's reliance upon Dr. Potter's opinions and her decision regarding apportionment were clearly erroneous. It asserts Dr. Potter did not express the opinion Conley had a dormant degenerative condition which was aroused into disabling reality.

Instead, Dr. Potter stated Conley had a pre-existing active lumbar and cervical condition which was somewhat disabling and required frequent medical care. Neon maintains Dr. Potter expressed the opinion there had been an exacerbation of Conley's pre-existing condition which was already disabling prior to the work injury. Further, Dr. Potter and the other examining physician did not state Conley's pre-existing condition was dormant. Thus, the ALJ's finding Conley had a compensable impairment due to an arousal of a dormant condition was error. Since Dr. Potter did not state in the Form 107 or his addendum that Conley had a pre-existing dormant condition which was aroused into disabling reality, the ALJ could not rely upon his opinions as the basis for an award.

Citing Calloway Co. Fiscal Court v. Winchester, 557 S.W.2d 216 (Ky. App. 1977), Neon also contends it has long been Kentucky law that a mere exacerbation or aggravation of an ongoing condition is not compensable unless the previous ongoing condition is compensable. Further, it contends in order for a condition to be compensable it must be an arousal or exacerbation of a dormant condition, not an active one. Neon argues the ALJ basically determined Conley's active condition was aroused

or aggravated from an already active state. Therefore, Dr. Potter's opinion cannot constitute substantial evidence.

Next, Neon submits the ALJ erred by ordering it to be responsible for treatment of Conley's lumbar and cervical spine. It argues because the ALJ determined Conley had active and non-compensable cervical and lumbar conditions, the ALJ improperly transferred the responsibility for the treatment of clearly non-work-related non-compensable conditions to Neon. Neon asserts as follows:

> The arbitrariness of this award is clearly exhibited by the ALJ's specific finding that the Petitioner is responsible for any referrals by Dr. Bielecki, which would essentially include the previous referrals for a neurosurgical consult and pain management, for treatment for the work injury.
>
> Thus, Neon argues as follows:
>
> > As this claim was clearly no more than an aggravation or exacerbation of the Respondent's active, symptomatic and disabling condition (as per the report of Dr. Potter as relied upon by the ALJ) the ALJ is compelled to limit any award of medicals to the date of this opinion based upon the holding in Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001).

Therefore, Neon contends the ALJ must limit the award of any medical benefits to those conditions which are found to

be work-related. Consequently, any continuing medical treatment for the pre-existing lumbar and cervical spine conditions must be found non-compensable as a matter of law. Neon reiterates its argument the ALJ has essentially found only treatment for pain is compensable. Neon also reiterates its argument the ALJ is compelled to limit any award of medicals to the date of this opinion based on the holding in Robertson v. United Parcel Service, supra.

Conley, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of his cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Conley was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). In that regard, an ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W. 3d 283 (Ky. 2003). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). 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 other conclusions or

reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Because we believe the ALJ misunderstood Dr. Potter's opinions in determining Conley sustained a work-related injury, we vacate the award and remand. In resolving the issue of whether Conley sustained a work-related injury, the ALJ cited to the law regarding the arousal of a dormant degenerative condition into disabling reality by work-related trauma which results in a functional impairment. The ALJ also stated she was "more persuaded by [Conley's] testimony in conjunction with," Dr. Bielecki's opinion "that the increase in pain is a result of the work-related MVA," as well as Dr. Potter's opinion who found the work-related injury "likely aggravated or aroused [Conley's] condition into disabling reality." In the Form 107 and the attached addendum, Dr. Potter did not express the opinion Conley had a pre-existing dormant condition which was aggravated or aroused into disabling reality by the work injury. Rather, in the Form 107, Dr. Potter provided the following diagnosis:

1. Cervical sprain/strain
2. Right cervical radiculitis
3. Cephalgia
4. Cervical degenerative disc disease
5. Multilevel cervical disc protrusions

6. Lumbosacral sprain/strain
7. Left lumbosacral radiculitis

In explaining the causal relationship, Dr. Potter stated as follows:

> Mr. Conley's impairment was caused by the work-related MVA on 11-27-11 as described in section B (Plaintiff History) above superimposed upon a considerable pre-existing history of neck & lower back pain that was already in an active and somewhat disabling state and had been sufficient enough to have warranted frequent medical care leading up to the MVA. The MVA was 11-27-11 was the proverbial "last straw" that permanently aggravated his pre-existing condition and transformed it to into a greater disability reality.

Pursuant to the AMA Guides, Dr. Potter assessed a 14% impairment. Dr. Potter stated Conley had an active impairment explaining as follows:

> A. For affirmative answer, specify condition producing active impairment.
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> 1. Cervical & lumbar degenerative disc disease
>
> 2. Chronic cervical & lumbar sprain/strain
>
> B. For affirmative answer, specify percentage of impairment due to the prior active condition.
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> Within a reasonable degree of medical probability, Mr. Conley had prior cervical & lumbar conditions consistent with DRE Category II. His pre-existing impairment was likely 10% whole person (5% whole person relative to his

> cervical spine combined with 5% whole person relative to his lumbar spine)

Significantly, in its petition for reconsideration, Neon pointed out Dr. Potter did not state there had been an arousal of a dormant condition into disabling reality. It insisted Dr. Potter merely stated there was a further aggravation of a pre-existing active condition and requested additional findings on this issue. In the order ruling on Neon's petition for reconsideration, the ALJ did not specifically overrule the petition for reconsideration; rather, she stated it was a re-argument of the merits and not proper for reconsideration. The ALJ did not address the need for additional findings of fact on this issue.

Although a portion of the petition for reconsideration may have been a re-argument of the merits, a portion also requested additional findings and clarification of what was obviously a misunderstanding of the evidence by the ALJ. Thus, the ALJ erroneously failed to clarify the basis for her determination Conley sustained a 4% impairment as a result of the November 27, 2011, work injury. Therefore, the matter must be remanded to the ALJ for additional findings of fact and an explanation of the

basis for her determination Conley has a 4% impairment as a result of the November 27, 2011, MVA.

We disagree with Neon that upon remand the ALJ cannot rely upon the opinions of Dr. Potter in support of an award of benefits. We have reviewed Calloway Co. Fiscal Court v. Winchester, supra, and find it inapplicable. In Calloway Co. Fiscal Court, supra, the Board merely determined a subsequent injury was an aggravation of a previous injury and the second event did not result in a compensable injury. We are also unpersuaded by Neon's assertion Calloway Co. Fiscal Court, supra, supports the premise that the law in Kentucky is that a mere exacerbation or aggravation of an ongoing condition is not compensable unless the previous ongoing condition is compensable. In fact, we disagree with Neon's assertion this is the law in Kentucky.

An award of PPD benefits must be based upon impairment which a work injury causes, and any pre-existing active impairment preceding the injury must be excluded and not considered when determining the impairment solely attributable to the injury and thus compensable. Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d at 183; *see also* Reinbold v. Ford Motor Co., 2003-SC-0705-WC; 2004 WL 1907756 (Ky. 2004).

When a work-related injury is superimposed upon a pre-existing active condition which is impairment ratable under the AMA Guides and which affects the same body part, the claimant's permanent partial disability is determined by subtracting the pre-existing impairment rating from the overall impairment rating. Whether a claimant has a pre-existing active impairment, resulting in an exclusion from a potential permanent partial disability award, must be determined in accordance with the AMA Guides. *Cf.* Penick v. United Partial Service, 2005-CA-000208-WC, 2005 WL 1252344 (Ky. App. 2005).

Here, it was Dr. Potter's opinion that Conley had pre-existing active cervical and lumbar conditions which were aggravated by the November 27, 2011, MVA resulting in further injuries to the cervical and lumbar spine. In his addendum, Dr. Potter stated Conley had a "cervical region impairment of 8%" and a "lumbar regional impairment of 7%" which resulted in a 14% whole person impairment based on the combined values charts of the AMA Guides. In the Form 107, Dr. Potter stated Conley had a pre-existing 5% impairment for an active lumbar condition and a 5% impairment for an active cervical condition. Thus, on remand, the ALJ is permitted to rely upon Dr. Potter's opinions in determining Conley has a 4% impairment as a

result of injuries to the cervical and lumbar spine since his opinions are consistent with the applicable Kentucky law.

In addition, we disagree with Neon's assertion the ALJ's award of medical benefits as stated in the original award is contrary to Kentucky law. In the January 14, 2013, opinion, award, and order the ALJ awarded reasonable and necessary medical expenses for the cure and relief of the work-related injury to the low back. The ALJ subsequently amended the award in the February 18, 2013, order to reflect Conley was entitled to an award of medical expenses related to the treatment of the "work-related injury to the low back and for the cervical condition." The ALJ specifically noted Conley was receiving treatment prior to the work injury which was not the obligation of Neon's carrier. Clearly, the ALJ did not award medical benefits for anything other than the work-related injury. Similarly, in the award of medical benefits, the ALJ stated Conley was only entitled to recover the medical expenses which may reasonably be required for the cure and relief from the effects of the work-related injury including referrals by Dr. Bielecki for treatment related to the work injury. In the opinion, award, and order, and the order ruling on the petition for reconsideration, we find nothing

requiring Neon to be responsible for anything other than medical expenses related to treatment of the work-related injuries. On remand, if the ALJ again relies upon Dr. Potter's opinions, an award of medical benefits consistent with the initial award of medical benefits would be appropriate.

Further, we find no basis for the assertion the ALJ essentially found only the treatment for Conley's pain is compensable. We note Neon's argument is based on its interpretation of the AMA Guides and not on any medical opinion or evidence contained within the record. Therefore, the ALJ was not required to award medical benefits solely for the treatment of pain associated with the compensable cervical and lumbar injuries.

Finally, on remand, assuming the ALJ again relies upon Dr. Potter's opinions, we find no merit in Neon's argument that the ALJ is compelled to limit any award of medical benefits to the date of the opinion based on the holding in Robertson v. United Parcel Service, supra. Rather, the converse is true.

In FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the Supreme Court instructed that KRS 342.020(1) does not require proof of an impairment rating to obtain future medical benefits, and the absence of a

functional impairment rating does not necessarily preclude such an award. On remand, if the ALJ determines Conley has a permanent functional impairment rating as a result of his injury, then Conley must receive an award of future medical benefits. This Board has consistently held that a worker who has established a work-related permanent impairment rating has also established a disability for purposes of KRS 342.020 and is entitled to future medical benefits. We interpret the Court's holding in FEI Installation, Inc. v. Williams, supra, to mean that where there is evidence of a permanent impairment rating in accordance with the AMA Guides, as a matter of law, it is error for an ALJ to rule broad-spectrum and prospectively that future medical care is unreasonable and unnecessary, notwithstanding non-specific expert medical testimony to the contrary. In such circumstances, pursuant to KRS 342.020(1), a general award of future medical benefits is mandated. In FEI Installation, Inc. v. Williams, supra, the Court noted as follows:

> Under 803 KAR 24:012; *Mitee Enterprises v. Yates*, 865 S.W.2d 654 (Ky. 1993); and National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky. App. 1991), an employer is free to move to reopen an award to contest the reasonableness or necessity of any medical treatment and also whether the need for treatment is due to the effects of the injury.

Id. at 319.

If on remand the ALJ again finds Conley sustained a physical injury meriting an impairment rating as a result of the work injury of November 27, 2011, Conley, by statute is entitled to medical benefits. In such circumstances, pursuant to KRS 342.020(1), a general award of future medical benefits is mandated, and as noted by the Court:

> [u]nder 803 KAR 25:012; Mitee Enterprises v. Yates, 864 S.W.2d 654 (Ky. 1993) and National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky. App. 1991), an employer is free to move to reopen an award to contest the reasonableness or necessity of any medical treatment and also whether the need for treatment is due to the effects of the injury.

FEI Installation, Inc. v. Williams at 319.

Accordingly, the January 14, 2013, opinion, award, and order and the February 18, 2013, order ruling on the petition for reconsideration of the ALJ determining Conley sustained work-related cervical and lumbar injuries and awarding TTD benefits, PPD benefits, and medical benefits are **VACATED**. This matter is **REMANDED** to the ALJ for entry of an amended opinion and order in conformity with the opinions expressed herein.

ALVEY, CHAIRMAN, CONCURS.

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