

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 24, 2015

CLAIM NO. 201366877

TERRI HIBBS

PETITIONER

VS.

APPEAL FROM HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

YORK COMPANIES, INC. and
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

ALVEY, Chairman. Terri Hibbs ("Hibbs") appeals from the Opinion and Order rendered November 24, 2014 by Hon. Jane Rice Williams, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, and temporary medical benefits, but dismissing the claim for permanent benefits against York Companies, Inc. ("York"). Hibbs also

seeks review of the January 7, 2015 Order denying her petition for reconsideration.

On appeal, Hibbs argues the ALJ erred in failing to find she sustained a permanent injury as defined by KRS 342.0011(1). Hibbs also argues the ALJ erred in failing to award future medical benefits despite evidence demonstrating she sustained a harmful change to the human organism. In this instance, the ALJ failed to specifically state Hibbs sustained a temporary injury in her decision, but made such reference in her order on reconsideration. The ALJ also failed to provide a specific analysis regarding the rate and duration of TTD benefits to which Hibbs may be entitled. We therefore affirm in part, vacate in part, and remand for additional findings regarding Hibb's entitlement to TTD benefits, and to clearly stated she sustained a temporary injury.

Hibbs filed a Form 101 on October 10, 2013 alleging on April 5, 2013 she sustained injuries to her left shoulder and neck when she was struck by boxes of computers which fell from a skid. At the time of the accident, Hibbs worked for York, a temporary services company, which supplied workers for Geek Squad at a Best Buy location in Louisville, Kentucky where she was working at the time of the incident.

Hibbs testified by deposition on May 13, 2014 and at the hearing held October 8, 2014. Hibbs, a resident of Louisville, Kentucky, was born on March 15, 1973. She is a high school graduate with some college coursework. She also attended truck driving school and has a commercial driver's license. She has also taken architecture and nursing classes. She stated she injured a finger on her left hand remotely in the past, but this had resolved long before April 5, 2013. She stated she had never experienced any previous difficulty with her neck or left shoulder prior to her work injury. The only medication she was taking prior to the accident was for migraine headaches and high cholesterol. She now takes Gabapentin, Meloxicam and Cetrizine.

Hibbs testified her employment history includes working as a cook in a variety of fast food restaurants. She has also worked on various assembly lines, and in multiple warehousing facilities for several temporary agencies consisting of order selecting, stocking and shipping. She has also worked as an over the road truck driver, and as a dump truck driver. Hibbs has also worked as a technician servicing furnaces, boilers and air conditioning units. While employed by York she worked at a college textbook warehouse, for Best Buy, and for Geek

Squad. While working for Geek Squad, she unloaded items from trailers and was involved with shipping.

On April 5, 2013 she was unloading a cart containing laptop computers. Two boxed laptop computers fell from a cart, striking her on the left side of the neck, just below the ear, and in the left scapula. York was notified of the accident, and Hibbs was referred to Occupational Physician Services where she initially saw Dr. Maya¹, and eventually saw Dr. Ellen Ballard. Dr. Ballard ordered physical therapy at Frazier Rehabilitation, and eventually referred Hibbs to Dr. Thomas Becherer. Dr. Becherer ordered epidural steroid injections ("ESIs") administered by Dr. Konrad Kijewski, which she stated provided no longterm relief. She stated she aches if she does not take her medication, and experiences shooting pain on the left, on or under her scapula when lifting. She has continued to experience neck pain, numbness in three fingers of the left hand, and has limited movement with the left upper extremity.

Hibbs missed one week of work following the accident. She was then hired by Geek Squad to a light duty job. She was eventually terminated by Geek Squad due to her

¹ The records of neither Dr. Maya (whose first name was not mentioned at any point in the record), nor Dr. Ballard were filed into evidence.

restrictions, and subsequently received unemployment benefits for twenty-six weeks. She testified she is currently employed by a temporary agency, but she is between assignments.

In support of her claim, Hibbs filed the report of Dr. Anthony McEldowney who evaluated her on September 19, 2013. Dr. McEldowney noted the April 5, 2013 accident, after which Hibbs missed one week of work. He noted she then returned to light duty. Hibbs complained of pain in the left side of the neck, left shoulder and left upper back. She also reported difficulty with overhead activity involving her left hand. He also reviewed MRI reports.

Dr. McEldowney diagnosed a left neck direct impact contusion with resultant cervical radiculopathy, caused by the work incident. He noted Hibbs had pre-existing dormant cervical conditions which were aroused into disabling reality by the work incident. Dr. McEldowney noted Hibbs has restricted range of motion and decreased grip strength, in addition to pain and tingling into her left arm and shoulder. He recommended a bilateral upper extremity EMG and possibly a myelogram. He also stated Hibbs may possibly require a discectomy and fusion. Dr. McEldowney stated Hibbs had not reached maximum medical improvement ("MMI"), and needs the testing he indicated. However, if she does

not have the testing, she has reached MMI. He stated if additional testing is denied, he would assess a 15% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He recommended restrictions of no overhead lifting, carrying, reaching, or repetitive activities with the left arm. He also stated Hibbs should not climb ladders, work at unprotected heights, or keep her neck in a static position for lengthy periods of time.

Hibbs also filed the September 25, 2013 note from an office visit with Mary Drewery, APRN, at Portland Health Center. Nurse Drewery referred Hibbs to an orthopedic surgeon for evaluation of her neck and left upper extremity pain. She restricted Hibbs to lifting less than five pounds.

The records of Dr. Kijewski, the pain management physician who administered the ESIs, were introduced. He first saw Hibbs on June 27, 2013, and noted complaints of pain on the left side of the neck which radiated to her left shoulder. He administered ESIs on November 21, 2013 and December 12, 2013. On January 9, 2014, he administered a cervical medial block and diagnosed Hibbs with cervical spondylosis, radiculopathy, degenerative disc disease, and

myalgia/myositis. Dr. Kijewski restricted her to lifting less than five pounds.

Hibbs also filed the June 14, 2013 office note of Dr. Becherer who noted the April 5, 2013 incident where computers fell onto Hibbs. Hibbs reported sneezing worsens her condition. She also complained of tingling and numbness into the third through fifth digits of the left hand. He noted the cervical MRI showed a disk protrusion on the left at C5-C6, and on the right C6-C7 with osteophytic changes at each level. Dr. Becherer noted Hibbs had sustained a cervical strain superimposed upon degenerative changes. Dr. Becherer recommended physical therapy and ESIs.

York filed Dr. Becherer's January 31, 2014 office note. Dr. Becherer noted Hibbs' symptoms were unchanged from the previous visit. He noted some breakaway weakness in the left shoulder when testing her strength. He stated the MRIs showed only arthritic changes, and specifically noted, "Since there is nothing on clinical exam or the previous MRI of surgical concern, we will just need to see her in the future on an as needed basis".

York filed the July 31, 2013 report of Dr. Michael Best who noted the occurrence of the incident, and further noted Hibbs had no history of previous neck or shoulder treatment. Dr. Best diagnosed Hibbs with neck and shoulder

pain. He stated she had reached MMI and has a 0% impairment rating for her complaints. He noted the MRI demonstrated mild disc protrusions with no disc herniation or nerve root impingement. He stated Hibbs' complaints were not due to the arousal of pre-existing dormant non-disabling conditions into disabling reality. He opined no restrictions should be imposed, and Hibbs needs no additional treatment or medical care.

York also filed the March 3, 2014 report of Dr. Michael Doyle. He noted Hibbs complained of trapezius swelling with no contusion, trapezius pain, and tingling with numbness in three fingers in the left hand. He diagnosed a mild cervical strain superimposed upon pre-existing degenerative disc disease with multiple protrusions. He noted Hibbs had no radiculopathy corresponding with the disc protrusions. Dr. Doyle disagreed with the 15% impairment rating assessed by Dr. McEldowney, and found the 0% assessed by Dr. Best more appropriate. He stated Hibbs had reached MMI, and would have no impairment due to the April 5, 2013 incident. Dr. Doyle opined the physical therapy and ESIs ordered by Dr. Becherer were appropriate. He stated Hibbs should engage in cervical range of motion exercises. He found no

neurosurgical reason for restrictions, but recommended Hibbs avoid overhead activities to avoid future injury.

A benefit review conference ("BRC") was held on August 13, 2014. The BRC order and memorandum reflects the parties stipulated Hibbs sustained a work-related injury on April 5, 2013. The contested issues to be resolved included whether Hibbs retains the capacity to return to the type of work performed on the date of injury; benefits per KRS 342.730 (with multipliers); credit for unemployment benefits; underpayment of TTD benefits; and whether the injury is temporary or permanent. These issues were reiterated in the transcript of hearing.

The ALJ issued an opinion and order dismissing on November 24, 2014. The ALJ determined, "Hibbs suffered only a temporary strain, now resolved". The ALJ stated she relied upon Dr. Best's opinion, and determined Hibbs did not meet her burden of proving a harmful change. The ALJ then stated, "The determination of a total disability award remains within the broad authority of the ALJ. *Ira A. Watson Department Store v. Hamilton*, 34, S.W.3d 48 (Ky. 2000)".

The ALJ noted TTD benefits were paid appropriately, and credit for unemployment is not applicable. Specifically, the ALJ stated as follows:

Hibbs did receive TTD for approximately 5 weeks when she was off work from June 25, 2013 through July 31, 2013. She returned to work for a period of time until Geek Squad had no more work for her. According to her, Geek Squad could not accommodate her restrictions but the only restrictions found in the record were by Dr. McEldowney in September 2013. As noted above, his opinion is not followed herein. Furthermore, at the time, Geek Squad had no more work for Hibbs, according to the evidence of record, there were no restrictions. Thus, Plaintiff's restrictions at that point were self-imposed.

As the evidence does not show a period of TTD payments overlapping payment of unemployment benefits, there is no credit.

The ALJ then stated, "For the reasons set forth above, **IT IS HEREBY ORDERED** that Plaintiff, Terri Hibbs' claim for additional benefits is **DISMISSED** as noncompensable."

Hibbs filed a petition for reconsideration, requesting additional findings of fact of these issues: 1) the ALJ erred by finding she only sustained a temporary strain which had resolved, without making additional findings; 2) whether there was any pre-existing active impairment or condition, and whether her current complaints are related to the work incident; and 3) whether she is entitled to future medical benefits. Hibbs also argued the ALJ erred in finding she is currently working, and requested

this error be corrected. Hibbs also argued the ALJ erred in relying upon the opinions of Drs. Best and Doyle.

The ALJ entered an order denying the petition for reconsideration on January 7, 2015. The ALJ again stated Hibbs had suffered only a temporary injury which was now resolved, and cited to Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001). The ALJ also admitted the evidence was confusing regarding whether Hibbs is currently working. She stated Hibbs testified she was currently employed by another temporary agency, but not presently assigned to a position. The ALJ then stated, "whether Plaintiff was working at the time of the hearing is no longer relevant."

On appeal, Hibbs argues the ALJ erred in failing to find she sustained a permanent injury, and in failing to award future medical benefits. Hibbs, as the claimant, bore the burden of proving each of the essential elements of her cause of action, including whether she sustained a permanent injury, and whether she is entitled to future medical benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). We acknowledge KRS 342.285 designates the ALJ as the finder of fact, and as such is granted the sole discretion in determining the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt,

695 S.W.2d 418 (Ky. 1985). Likewise, the ALJ, as fact-finder, may choose whom and what to believe and, in doing so, may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

The ALJ must also provide findings sufficient to inform the parties of the basis for the decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

Here the parties stipulated Hibbs sustained a work-related injury on April 5, 2013. While it is acknowledged the ALJ in her decision implicitly made the finding the injury was temporary, she did not clearly say so, despite making such reference in her order on reconsideration. Likewise, although the ALJ did not cite to Robertson v. United Parcel Service, supra, in her decision, she engaged the appropriate analysis. On remand she is requested to clearly state she found Hibbs sustained a temporary injury which occurred on April 5, 2013. As part

of her analysis, the ALJ must also determine whether Hibbs is entitled to future medical benefits pursuant to FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007).

Finally, this Board is permitted to *sua sponte* address issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). Here, the ALJ merely stated Hibbs was entitled to TTD benefits as paid without performing an appropriate analysis.

The parties stipulated TTD benefits were paid from June 25, 2013 through July 31, 2013 at the rate of \$207.58 per week. It is further noted the parties stipulated Hibbs' average weekly wage was \$369.25 per week. Based upon this stipulated wage, Hibbs was entitled to TTD benefits at \$246.16 per week. This results in an underpayment of TTD benefits for the weeks Hibbs was actually paid. On remand, the ALJ must, based upon the stipulated wage, find Hibbs was entitled to TTD benefits at the rate of \$246.16 per week.

Hibbs testified she was off work for one week, then hired by Geek Squad on limited duty, and eventually terminated. The time period of June 25, 2013 through July 31, 2013 does not comport with Hibbs' testimony regarding when she worked subsequent to the incident. As both this Board and Kentucky Court of Appeals noted previously,

"temporary total disability is defined as the condition of an employee who has not reached MMI from an injury and has not reached a level of improvement permitting a return to employment". KRS 342.0011(11)(a). This definition has been determined by our courts to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202, 205 (Ky. App. 1993), wherein the Court of Appeals stated generally:

TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

Both prongs of the test in W.L. Harper Const. Co., Inc. v. Baker, supra, must be satisfied before TTD benefits may be awarded. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Court further explained, "[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is **customary or that he was performing at the time of his injury.**" In other words, where a claimant has not reached MMI, TTD benefits are payable until such

time as the claimant's level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event. (Emphasis added).

In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his **customary** work or the work he was performing at the time of the injury. (Emphasis added). The Court stated as follows:

In order to be entitled to temporary total disability benefits, the claimant must not have reached maximum medical improvement **and** not have improved enough to return to work.

. . . .

The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured. (Emphasis added) Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), the Supreme Court elaborated as follows:

As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment.

. . . .

Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

Here, the ALJ failed to conduct an appropriate analysis regarding the time period to which Hibbs may be entitled to TTD benefits. Hibbs' testified she did not return to work for York. She began working for Geek Squad on light or limited duty. There is no evidence she ever returned to the customary job she performed for York.

We note the following decisions from the Kentucky Court of Appeals which are applicable to this claim. Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009); and Central Kentucky Steel v. Wise, supra. We also

note three recent decisions of the Kentucky Court of Appeals, Sonia S. Mull v. Zappos.Com, Inc., 2013-CA-001320-WC (rendered July 11, 2014); Delena Tipton v. Trane Commercial Systems, 2014-CA-00626 (rendered August 22, 2014); and Nesco Resource v. Michael Arnold, 2013-CA-001098 (rendered March 13, 2015), all designated to not be published, which are not cited as authority, but are referenced for guidance). In each of these cases, the injured workers were awarded TTD benefits during a time period when they were on light duty, and could perform some, but not all of their customary pre-injury job duties. As noted most recently in Nesco Resource, supra, the Court of Appeals clearly stated if an injured worker demonstrates the inability to return to his or her customary pre-injury work, (which includes all job duties), and has not reached MMI, he or she is entitled to TTD benefits pursuant to the Kentucky Worker's Compensation Act. On remand, the ALJ must, based upon the evidence, determine the time period Hibbs was unable to perform her customary pre-injury work, and enter an award of TTD benefits to which she may be entitled.

This Board may not and does not direct any particular result because we are not permitted to engage in fact-finding. See KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

Accordingly, the November 24, 2014 Opinion and Order Dismissing and the January 7, 2015 Order on Reconsideration rendered by Hon. Jane Rice Williams, Administrative Law Judge, are hereby **AFFIRMED IN PART, VACATED AND REMANDED** for a determination in accordance with the directions outlined above.

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, CONCURS IN PART, DISSENTS IN PART, AND FILES A SEPARTE OPINION.

STIVERS, MEMBER. I disagree with the majority's holding regarding the standard for determining entitlement to TTD benefits. The standard the majority espouses is as follows:

We note the following decisions from the Kentucky Court of Appeals, both published and unpublished, which are applicable to this claim. Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009); and Central Kentucky Steel v. Wise, supra, as well as a trio of recent decisions of the Kentucky Court of Appeals, Sonia S. Mull v. Zappos.Com, Inc., 2013-CA-001320-WC (rendered July 11, 2014); Delena Tipton v. Trane Commercial Systems, 2014-CA-00626 (rendered August 22, 2014); and Nesco Resource v. Michael Arnold, 2013-CA-001098 (rendered March 13, 2015), all designated to not be published, which are not cited as authority, but are referenced for guidance. In each of these cases, the injured workers were awarded TTD benefits during a time period when they were on light duty, and

could perform some, but not all of their pre-injury job duties. As noted most recently in the Nesco case, the Court of Appeals clearly stated if an injured worker demonstrates the inability to return to his or her customary pre-injury work, (which includes all job duties), and has not reached MMI, he or she is entitled to TTD benefits pursuant to the Kentucky Worker's Compensation Act.

I respectfully submit entitlement to TTD benefits is controlled by KRS 342.0011(11)(a) and the Supreme Court's holding in Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000). KRS 342.0011(11)(a) defines temporary total disability as follows:

'Temporary total disability' means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

Clearly, the statute only requires a return to employment. It does not require a return to the previous job with the ability to perform all job duties associated with the previous job. However, the statutory definition is to be tempered by the Supreme Court's holding in Central Kentucky Steel v. Wise, supra. There, the Supreme Court further expanded the definition stating:

It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is **customary or that**

he was performing at the time of his injury. (emphasis added)

Id. at 659.

The Supreme Court stated a return to employment means a return to work that is customary or that the employee was performing at the time of the injury. The Supreme Court did not state the employee is entitled to TTD benefits when he or she is not at MMI and is not capable of returning to the work he or she was performing at the time of the injury. The second prong is whether the employee is capable of returning to customary work or work he or she was performing at the time of his injury.

In Bowerman v. Black Equipment Co., 297 S.W.3d 858, 874 (Ky. App. 2009), the Court of Appeals stated:

Thus, as defined by the statute, there are two requirements for an award of TTD benefits: first, the worker must not have reached MMI; and, second, the worker must not have reached a level of improvement that would permit him to return to the type of work he was performing when injured or to other customary work. Absent either requirement, a worker is not entitled to TTD benefits. Furthermore, pursuant to the construction assigned under *Wise*, KRS 342.0011(11)(a) takes into account two distinct realities: first, even if a worker has not reached MMI, temporary disability can no longer be characterized as total if the worker is able to return to the type of work performed when injured **or to other customary** work; and, second, where a

worker has not reached MMI, a release to perform minimal work does not constitute "a level of improvement that would permit a return to employment" for purposes of KRS 342.0011(11(a)). (emphasis added).

Bowerman, supra, reinforces the holding of Central Kentucky Steel v. Wise, supra, that in order to qualify for TTD benefits the worker must not have reached MMI and a level of improvement that would permit him to return to the type of work he was performing when injured or to other customary work. See also Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky. App. 2004) wherein the Court of Appeals stated:

In *Central Kentucky Steel v. Wise*, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

The majority's holding that "if an injured worker demonstrates the inability to return to his or her customary pre-injury work (which includes all job duties) and has not reached MMI, he or she is entitled to TTD benefits" pursuant to the Act applies an incorrect standard.

More importantly, the three unpublished decisions of the Court of Appeals cited by the majority cannot be

relied upon as authority. In addition, two of the three unpublished opinions are currently on appeal to the Kentucky Supreme Court. Therefore, Central Kentucky Steel v. Wise, supra, is still binding precedent. Significantly, the Court of Appeals' holding in Bowerman, supra, concerning the applicable standard for determining entitlement to TTD benefits adopts the standard contained in Central Kentucky Steel v. Wise, supra.

Based on the standard imposed by the Court of Appeals in the three unpublished opinions, the majority is changing the standard for determining entitlement to TTD benefits set down in Central Kentucky Steel v. Wise, supra and Bowerman, supra. This is particularly unsettling since the Court of Appeals did not see fit to publish any of the three cases relied upon by the majority, and two of the three cases are on appeal to the Kentucky Supreme Court. Until the Kentucky Supreme Court directs otherwise we are bound by the standard set forth in Central Kentucky Steel v. Wise, supra.

The claim should be remanded to the ALJ with instructions to determine entitlement to TTD benefits based on the standard set forth in Central Kentucky Steel v. Wise, supra, and Bowerman, supra.

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