

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: November 9, 2018

CLAIM NO. 199332090

LARRY SCHNEIDER

PETITIONER

VS.           **APPEAL FROM HON. JOHN H. MCCRACKEN,  
ADMINISTRATIVE LAW JUDGE**

PROGRESS PAINT MANUFACTURING  
SPECIAL FUND  
and HON. JOHN H. MCCRACKEN,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

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

**STIVERS, Member.** Larry Schneider (“Schneider”) appeals from the June 29, 2018, Order of Hon. John H. McCracken, Administrative Law Judge (“ALJ”), sustaining the motions of the Special Fund and Progress Paint Manufacturing (“Progress”) to dismiss his motion to reopen seeking additional income benefits.

On appeal, Schneider challenges that portion of the ALJ’s Order sustaining the Special Fund’s motion to dismiss his motion to reopen as not being

timely filed. Relying upon Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008), Schneider asserts his motion was timely filed.

### **BACKGROUND**

The record reflects Schneider filed a Form 101 on October 30, 1996, alleging a June 4, 1993, injury to his right shoulder and neck. On April 10, 1997, Hon. Mark Webster, Administrative Law Judge approved the settlement agreement entered into between Schneider, Progress, and the Special Fund. The Form 110 Agreement as to Compensation lists the nature of the injury as “shoulder and disputed neck” and provides the following regarding the compensation Schneider received:

TTD as paid thru 4/23/95 followed by a 20% occupational disability split 75% DE & 2550 SF. To be paid weekly from 4/23/95 at \$52 a week and interest on past due, for 425 weeks. Employer paying their liability first for proportionate share followed by SF. DE will pay for epidurals and Plaintiff will give 60 day notice of any proposed neck surgery. Reasonable Medicals per 342.

On June 7, 2000, Schneider filed a motion to reopen asserting a worsening of condition. In an order dated July 11, 2000, Hon. Sheila Lowther, Chief Administrative Law Judge (“CALJ Lowther”), concluded Schneider had made a *prima facie* showing for reopening and ordered the claim transferred to an Administrative Law Judge for further adjudication. Following the introduction of the proof, Hon. Ronald E. Johnson, Administrative Law Judge (“ALJ Johnson”), entered a March 26, 2001, Opinion and Order finding Schneider had not demonstrated an increase in occupational disability. However, he found the neck injury, which was disputed in the original claim, was caused by the June 1993 work injury since Schneider had a “pre-existing dormant non-disabling condition that was brought into

active reality as a result of the work related injury.” ALJ Johnson found the neck injury “is apportioned 50/50 between the defendant-employer and the Special Fund.” There was no finding of apportionment for the shoulder injury, and ALJ Johnson ordered the motion to reopen dismissed with the finding that the neck injury was caused by the work-related injury and apportioned 50/50 between Progress and the Special Fund. Schneider filed a petition for reconsideration alleging several errors which resulted in ALJ Johnson entering a May 14, 2001, Order sustaining the petition for reconsideration. ALJ Johnson found Schneider had a 20% impairment at the time of the original settlement, one-fourth of which was attributable to the shoulder injury, with the balance due to the work-related neck injury. ALJ Johnson also found Schneider had a 30% occupational disability as a result of the work-related injury at the time of reopening. Consequently, he directed “the increase of 10% is apportioned 50/50 between [Progress] and the Special Fund.” The Opinion and Award was amended to reflect Progress shall pay for medical expenses relating to the neck and shoulder injuries pursuant to the statute. In addition to the amount set forth in the original agreement, Schneider was to recover from Progress and the Special Fund \$26.00 per week due to the additional 10% permanent occupational disability. Payments were to commence on the date of reopening, June 7, 2000, and paid by Progress for the number of weeks proportionate to its 50% liability, after which the Special Fund was to pay all income benefits directly to Schneider for the remainder of the compensable period. No appeal was taken from the May 14, 2001, Order.

On July 21, 2004, Schneider filed another motion to reopen asserting he was more disabled than he was at the time of settlement and had undergone surgery.

On August 30, 2004, CALJ Lowther, entered an Order concluding Schneider had made a *prima facie* showing for reopening and directing the claim to be assigned to an Administrative Law Judge for further adjudication. Both the Special Fund and Progress were served with an Order sustaining the motion to reopen.<sup>1</sup>

Progress appealed from the orders sustaining the motions to reopen to the Board. In a January 14, 2005, Opinion, this Board ordered the appeal dismissed as an appeal from an interlocutory order and remanded the claim to an Administrative Law Judge.

The claim was assigned to Hon. Lawrence F. Smith, Administrative Law Judge (“ALJ Smith”) who, in a December 16, 2005, Opinion, Order, and Award, found Schneider was entitled to temporary total disability (“TTD”) benefits of \$260.00 per week to be paid from July 21, 2004, to July 26, 2004.

Schneider filed a Notice of Appeal on January 17, 2006, and on February 16, 2006, he filed a brief. On February 27, 2006, Schneider filed another motion to reopen with various attachments alleging, “there has been a change of condition that relates to the modifiers in KRS 342.7301(c).”

On March 31, 2006, Schneider filed a motion to hold the appeal in abeyance pending an appellate decision in Bartee v. University Medical Center, 2006-CA-000401, concerning the issue of when he is first entitled to TTD benefits. Schneider contended he was entitled to TTD benefits prior to the time he filed his motion to

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<sup>1</sup> An August 30, 2004, Order sustaining the Motion to Reopen was only served on Progress. A September 15, 2004, Order which reads the same as the earlier order was served on Progress and the Special Fund.

reopen. On April 19, 2006, this Board entered an Order holding the appeal in abeyance pending a final appellate decision on this issue.

On December 9, 2006, Schneider filed a Motion to Remand for Approval of Settlement indicating the parties had reached an agreement with respect to the issues presented. On January 3, 2008, this Board entered an Order removing the claim from abeyance and remanding the claim to the Administrative Law Judge for consideration of the proposed settlement agreement.

On January 11, 2008, the proposed settlement agreement was approved by an Administrative Law Judge.<sup>2</sup> The agreement pertained to two different claims, but relevant to the subject claim the agreement states Schneider did not waive his entitlement to past or future medical benefits. However, he waived his right to vocational rehabilitation and right to reopen. The relevant language reads as follows:

This is a compromise settlement of these disputed claims. The Plaintiff has filed Motions to Reopen in both claims, alleging entitlement to additional temporary total disability benefits and/or additional permanent partial disability benefits. The Defendant specifically denies that the Plaintiff has proven entitlement to any additional income benefits of any sort. As a compromise, the Defendant agrees to pay, and the Plaintiff agrees to accept, a lump sum of \$16,500.00 on the terms and conditions set out below.

The parties agree that this lump sum settlement of \$16,500.00 includes payments of \$12,000.00 for any additional income benefits for either claims, including additional temporary total disability benefits, additional permanent partial disability benefits, or permanent total disability benefits, including interest, an additional \$1,500.00 for waiver of the Plaintiff's right to vocational rehabilitation benefits, and an additional \$3,000.00 for waiver of the Plaintiff's right to reopen these claims for any additional income benefits or vocational

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<sup>2</sup> The Administrative Law Judge's signature is illegible.

rehabilitation benefits in the future. The Plaintiff further agrees to dismiss his pending Motions to Reopen, in both claims and his pending appeal to the Kentucky Workers' Compensation Board in Claim No. 93-32090.

On January 22, 2008, Progress filed a motion to dismiss the appeal stating the matter had been settled and a settlement agreement had been approved. In a June 17, 2010, Order this Board sustained the motion and dismissed the appeal.

On November 2, 2015, Schneider filed a motion to reopen with several attached documents alleging he required epidural steroid injections or in the alternative that he be allowed to proceed with "a posterior approach for a discectomy and fusion from C4-7" which had been denied by utilization review. Schneider did not serve this motion upon the Special Fund.

On December 3, 2015, Progress filed a response to the motion to reopen. Significantly, Progress did not raise the terms of the January 11, 2008, settlement agreement as a bar to the motion to reopen.

On January 19, 2016, Schneider filed a medical fee dispute indicating the subject of the dispute was treatment denied by utilization review. On February 1, 2016, Hon. Jane Rice Williams, Administrative Law Judge ("ALJ Williams") entered an Order finding Schneider had made a *prima facie* showing for reopening, sustaining the motion to reopen, and joining the medical provider, Dr. George Raque. On February 15, 2016, ALJ Williams entered a "Scheduling Order Following Initial Conference On Medical Dispute Reopening" which reflects "cervical surgery" was the challenged or unpaid procedure at issue and the basis of the challenge was the reasonableness/necessity. ALJ Williams set a proof schedule and a Benefit Review Conference.

On February 22, 2016, Progress filed a motion to dismiss the pending medical fee dispute as moot representing that after the BRC a determination was made that the surgery which had been suggested would be authorized. Progress also represented it would pay TTD benefits from the date of surgery until the date Schneider attained maximum medical improvement (“MMI”) or released to return to a job for which he was qualified. Progress asserted this agreement rendered Schneider’s motion to reopen and medical fee dispute moot and requested dismissal. On March 8, 2016, ALJ Williams entered an Order sustaining Progress’ motion and dismissed the medical fee dispute.

On June 8, 2017, Schneider filed the subject motion to reopen asserting his treating physician believes he is in need of “right reverse total shoulder surgery” which was scheduled and had been approved by the carrier. However, Schneider was requesting “TTD at least for the period from the date of the surgery until he reaches maximum medical improvement and/or additional permanent partial impairment or permanent total disability/occupational disability.”

On August 1, 2017, Hon. Douglas W. Gott, Chief Administrative Law Judge (“CALJ Gott”), entered an Order finding Schneider had made a *prima facie* showing for reopening and sustaining the motion. However, because Progress was voluntarily paying TTD benefits due to the surgery performed by Dr. Kris Abeln, CALJ Gott temporarily assigned the claim to himself and placed it in abeyance.

No action was taken until CALJ Gott entered a March 9, 2018, Order directing the parties to file status reports within twenty days and include recommendations for scheduling further proceedings.

On April 10, 2018, Schneider filed the medical record of Dr. Raque and a separate status report requesting CALJ Gott schedule a telephonic status conference for the purpose of determining a proof schedule. Schneider represented the issue of TTD benefits was resolved, but his motion to reopen requested additional permanent partial disability (“PPD”) benefits or permanent total disability (“PTD”) benefits. Progress also filed a status report.

In an Order dated May 7, 2018, CALJ Gott noted TTD benefits were terminated when Schneider reached MMI following surgery. Further, the parties agreed to a proof schedule as to remaining issues. Upon oral motion from the parties, the Special Fund was joined as a party to this reopening. The claim was transferred and reassigned to the ALJ.

On May 14, 2018, Progress filed a motion to dismiss asserting that when Schneider filed the current motion its counsel was unaware of the terms of the January 11, 2008, settlement agreement which reflects Schneider had waived his right to reopen this claim for additional income benefits of any type. Progress argued Schneider has waived his right to reopen the claim against it and the motion to reopen against it should be dismissed. Progress took no position regarding the motion to reopen pertaining to the Special Fund.

Thereafter, the Special Fund entered an appearance and filed a motion to dismiss. The Special Fund indicated a review of the record as set forth in its motion to dismiss reflects it had not been ordered to pay any benefits to Schneider since ALJ Johnson’s May 14, 2001, decision. It asserted that, even then the additional benefits ordered were only ordered to be paid during the compensable period which ended on

June 3, 2003. It noted ALJ Smith awarded TTD benefits when the case was reopened in 2004. Further, when the claim was reopened in 2006 and 2015, no additional PPD benefits were sought from the Special Fund nor were benefits from the Special Fund awarded. Relying upon KRS 342.125(4), the Special Fund argued Schneider was now prohibited from filing a motion to reopen and the motion to reopen seeking additional income benefits against it should also be dismissed.

On June 29, 2018, the ALJ entered the following order dismissing both parties:

Defendants, Special Fund, and Defendant Progress Paint MFD., filed motions to dismiss Plaintiff's motion to reopen. The Special Fund states that Plaintiff's claims were resolved by settlement agreement dated April 10, 1997. The Special Fund was responsible for 25% of the settlement income benefits commencing on April 23, 1995 for a period of 425 weeks. The Special Fund asserts that the "compensable period" ended June 3, 2003. On July 23, 2004, Plaintiff filed a motion to reopen alleging a greater disability. ALJ Smith awarded Plaintiff TTD from July 21, 2004 to July 26, 2004. No benefits were awarded against the Special Fund. This decision was appealed to the Workers' Compensation Board. The appeal to the Board was dismissed June 22, 2010. On March 2, 2006, Plaintiff filed another Motion to Re-open for a knee injury and sought to increase the multiplier. On January 15, 2008, the ALJ approved an agreement resolving the 2006 motion to reopen from claim number 1998-01374 and 1993-32090. This agreement reflects that \$3,000.00 was paid to Plaintiff to waive her right to reopen her claims for any additional income benefits. The agreement also reflects that \$12,000.00 was paid to Plaintiff for any additional temporary total disability benefits, permanent partial disability benefits, or permanent total disability benefits for both of these claims. This agreement was filed by Defendant Progress Paint MFD in their motion to dismiss.

No other action was taken by Plaintiff on her claim from June 22, 2010 until she filed her motion to reopen on

November 2, 2015. This represents more than a four year gap between any order in the case and her motion to reopen. This motion was resolved by order dismissing the motion to reopen entered March 8, 2016. The current motion to reopen was filed on June 8, 2017. Initially, only the employer was named in this motion to reopen. The Special Fund was joined as a party by order entered May 7, 2018. The Special Fund moves to be dismissed as a party to this claim.

Defendant/Employer has moved to dismiss the motion to reopen due to the January 15, 2008 settlement agreement. They allege Plaintiff waived all of his rights to additional TTD, PTD, and PPD.

Plaintiff's motion to reopen is limited to a request for TTD, PTD and PPD.

Plaintiff's initial award period was for 425 weeks from April 23, 1995, the date TTD ended from the initial 1993 injury. That period of compensability [sic] for this injury ended on June 3, 2003. All of Plaintiff's motions to reopen filed through March 2, 2006, were filed within four years of either the original award, or order granting or denying benefits. KRS 342.125(3). The 2006 motion to reopen was dismissed by the Workers' Compensation Board on June 22, 2010. The next motion to reopen was filed November 2, 2015, more than fours [sic] after the dismissal of the 2006 motion to reopen. Additionally, the Special Fund has not been ordered to pay any benefits to the decision of ALJ Johnson dated May 14, 2001. KRS 342.125(3) prohibits a Plaintiff from filing a motion more than four years following the date of the original award or order granting or denying benefits. In this case, there is a gap of longer than four years following the dismissal of the 2006 motion to reopen. For this reason alone, the motion to reopen for TTD, PTD and PPD must be dismissed.

With regards to the Special Fund, the period of compensability for which the Special Fund could be liable ended on June 3, 2003. The ALJ finds that the Special Fund could not be liable for income benefits on this claim beyond that date. Of interest, is the absence of the Special Fund as a party to the 2008 Form 110 settment [sic] agreement. If any of the parties thought that the Special Fund had additional liability, it appears as though the

Special Fund would have been included in the 2008 settlement.

In the 2008 Form 110, Plaintiff waived any additional TTD, PTD or PPD income benefits arising out of this claim. Plaintiff additionally waived her right to reopen to claim any additional TTD, PTD or PPD benefits in this settlement agreement. The Defendant/Employer was a party to this agreement. The ALJ finds that Plaintiff waived her right to seek additional TTD, PTD or PPD benefits.

For the reasons stated above, the ALJ sustains both the Special Fund and Defendant/Employer's motions to dismiss Plaintiff's motion to reopen [sic]. Plaintiff's motion to reopen for TTD, PTD and PPD income benefits is overruled and dismissed.

On appeal, Schneider notes the ALJ found the Special Fund's liability ended on June 3, 2003, and it could not be liable for any income benefits in this claim beyond that date. Schneider contends that finding by the ALJ is incorrect as the Special Fund could be liable for its portion of any PTD benefits awarded. Schneider asserts the ALJ incorrectly noted the Special Fund was not a party to the Form 110 settlement agreement approved in 2008, and if the Special Fund had additional liability, it would have been included in the 2008 settlement. Schneider argues the Special Fund was not a party to the motion to reopen because Schneider had only sought TTD benefits and medical benefits. Schneider agreed the waiver set forth in the settlement agreement of 2008 extinguished his rights to additional income benefits against Progress, but did not bar his claim against the Special Fund for PTD benefits. Relying upon Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008), Schneider argues his motion to reopen was clearly filed within the four year statute of limitations contained in KRS 342.125(3) "as the Motion to Reopen was filed within four years from the November 2, 2015 Motion to Reopen which resulted in additional income benefits." Schneider

requests that portion of the ALJ's decision dismissing the Special Fund be vacated and the claim remanded to the ALJ for additional proceedings and a decision on the issue of whether he is permanently totally disabled as a result of the work injury.

Schneider filed a reply brief responding to the Special Fund's assertion that the newly enacted version of KRS 342.125(3) effective July 14, 2018, controls as it directs that all claims respective of when they occurred or when the award was entered or the settlement approved are subject to the four year time limit contained therein. Schneider contends the language regarding retroactivity was not included in the final version of the statute and therefore the amended statute does not apply retroactively to limit the claimant's right to reopen. Schneider also filed a notice of constitutional challenge served upon the Kentucky Attorney General in which he asserts a challenge to the constitutionality of KRS 342.125(8) as amended on July 14, 2018.

We decline to address the applicability of the newly enacted version of KRS 342.125(3) in light of the recent Court of Appeals holding in Holcim v. Swinford, 2018-CA-000414-WC, rendered September 7, 2018, To Be Published, which is not final. Further, this Board has no authority to address a constitutional challenge to a statute. Blue Diamond Coal Co. v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945). Thus, for reasons other than those espoused by the ALJ, we affirm.

KRS 342.125(3) reads in relevant part as follows:

Except for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730(1)(c)2., or for reducing a permanent total disability award when an employee returns to work, or seeking temporary total disability benefits during the period of an award, no claim

shall be reopened more than four (4) years following the date of the original award or original order granting or denying benefits, when such an award or order becomes final and nonappealable, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party. Orders granting or denying benefits that are entered subsequent to an original final award or order granting or denying benefits shall not be considered to be an original order granting or denying benefits under this subsection and shall not extend the time to reopen a claim beyond four (4) years following the date of the final, nonappealable original award or original order.

In Hall v. Hospitality Resources, Inc., *supra*, the Kentucky Supreme Court interpreted the language “no claim shall be reopened more than four (4) years following the date of the original award or granting or denying benefits” to mean:

That the reference to the “original award or order granting or denying benefits” was intended to encompass orders granting benefits other than the “original award,” is established by several additional uses in the same statute. For example, KRS 342.125(1) allows an ALJ to “reopen and review any award *or order*” on stated grounds. (emphasis added). It is uncontestable that the reference to “order” in KRS 342.125(1) encompasses an order different than the original award, otherwise there could be no reopenings of awards changed subsequent to the original award, increasing or decreasing benefits, as all must concede is the practice. For example, KRS 342.125(*l*) (d) specifically allows a “reopening and review” upon a “[c]hange of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award *or order*.” (emphasis added). If the word “order” was interpreted to refer only to the original award, a “review and reopening” of a subsequently increased or decreased award or order could simply not occur. And, KRS 342.125(4) acknowledges that the “[r]eopening shall not affect the *previous order* or award as to any sums already paid thereunder.” (emphasis added). Meaning simply that the *new* award or order will operate prospective only for the remaining term of the award.

Given our further analysis, the conclusion that an “order granting or denying benefits” was tended to encompass an order granting benefits *different* than an original award or settlement is compelling. Thus, the reference in KRS 342.125(3) to the “the original award or order granting or denying benefits,” must necessarily refer not only to the original award, but to any *subsequent* order granting or denying benefits. Any contrary interpretation leads to absurd results, as well as a violation of the clear spirit of the Kentucky Workers' Compensation Act. *Plummer v. Sharondale Coal Corp.*, 834 S.W.2d 708, 711 (Ky. App. 1992) (“We refuse to afford an interpretation to the statute that would create irrational distinctions yielding absurd results that would serve to undermine the purpose of the Workers' Compensation Act.”). “We have often said that statutes will not be given [such a] reading where to do so would lead to an absurd or unreasonable conclusion.” *Wesley v. Board of Ed. of Nicholas County*, 403 S.W.2d 28, 30 (Ky. 1966); *see also Commonwealth of Ky., Dept. of Highways v. Wilkins*, 320 S.W.2d 125, 126 (Ky. 1959).

The Appellant's motion, therefore, was clearly filed within the four year period of the statute of limitations contained in KRS 342.125(3), as the motion to reopen filed on November 7, 2003, was within four years from the February 14, 2001, order *granting benefits*. [footnote omitted] An order denying a motion to reopen under the *prima facie* principles of *Hodges* and *Stambaugh*, on the other hand, would not constitute an *order granting or denying benefits*, as a denial of a motion to reopen for failure to make a *prima facie* showing does not deal with benefits, but rather whether or not there are grounds to reopen and take proof akin to a motion to re-docket. *Cf., Hodges*, 182 S.W.3d at 500; *see also Stambaugh*, 488 S.W.2d at 681.

Id. at 784-785.

Pursuant to Hall v. Hospitality Resources, Inc., *supra*, Schneider must have filed his motion to reopen within four years of a subsequent order granting or denying benefits. The January 11, 2008, Order is the last such order granting or denying benefits. We will not address the fact the agreement did not grant additional

benefits against the Special Fund, as the analysis does not require us to address that issue. For our purposes, the key document in resolving the issue before us is the settlement agreement approved by the ALJ on January 11, 2008, granting Schneider additional income benefits. Even though Schneider filed a motion to reopen on November 2, 2015, the medical fee dispute was ultimately dismissed because Progress voluntarily paid for Schneider's surgery, and agreed to pay an additional amount of TTD benefits from the date of the surgery until the date he reached MMI or was released to return to a job. ALJ Williams' March 8, 2016, Order did not deny or grant additional benefits. The November 2, 2015, motion to reopen and the subsequent dismissal of the motion to reopen have no bearing on the limitation period. Consequently, the January 8, 2017, motion to reopen was not timely filed, and the ALJ did not err in dismissing the motion to reopen. Schneider's motion to reopen must have been filed within four years of the January 11, 2008, Order.

In Hall v. Hospitality Resources, Inc., *supra*, the Supreme Court specifically addressed this issue citing to its decision in Kendrick v. Toyota, 145 S.W.3d 422, 425 (Ky. App. 2004) stating:

*Kendrick*, however, dealt only with the question of whether the *voluntary payment* of post-award TTD benefits by the employer *without a motion and order granting such benefits*, extended the four year statute of limitations under KRS 342.125(3). The Court, holding the filing of the motion to reopen untimely, held the “[v]oluntary payment of TTD benefits post-award is not an exception contained within the statute.” *Id.* A point with which we do not disagree, since there was no order requiring payment of income benefits.

Id. at 783.

As held in Kendrick v. Toyota, *supra*, since ALJ Williams' order dismissed the medical dispute without requiring the payment of income benefits, the four-year period set forth in KRS 342.125(2) was not extended by virtue of the March 8, 2016, Order. Because the motion to reopen filed June 8, 2017, was filed more than four years after the January 11, 2008, Order approving the settlement agreement, Schneider's motion was not timely filed. Consequently, the ALJ did not err in sustaining the Special Fund's motion to dismiss Schneider's motion to reopen seeking additional income benefits from the Special Fund.

Accordingly, the June 29, 2018, Order sustaining Special Fund's motion to dismiss Schneider's motion to reopen against Special Fund is **AFFIRMED**.

ALL CONCUR.

**DISTRIBUTION:**

**METHOD**

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