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Tenny v. Loomis Armored US, LLC Appellant's Reply Brief Dckt. 48100

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STEVE R. TENNY,

Claimant/Respondent,

vs.

LOOMIS ARMORED US, LLC, Employer, and ACE AMERICAN INSURANCE CO., Surety,

Defendants/Appellants.

Supreme Court Case No.: 48100-2020

APPELLANTS' REPLY BRIEF

Appeal from Industrial Commission

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A. The Industrial Commission Erred as a Matter of Law Because It Failed to Follow the Appropriate Legal Standards for Deciding Causation.

1. The Industrial Commission erred by deciding the case based on a preponderance of the evidence rather than a reasonable degree of medical probability.

Respondent argues that the Industrial Commission did not err in deciding the issue of causation by a "preponderance of the evidence." Respondent's Brief at 3. However, he cites no law to establish that the legal standard for causation is preponderance of the evidence. Instead, he recognizes that the legal standard is "reasonable degree of medical probability." *Id.* (citing *Anderson v. Harper's Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006)).

There is a significant difference between preponderance of the evidence and reasonable degree of medical probability. The "preponderance of the evidence" standard does not require medical evidence. *Kelly v. Blue Ribbon Linen Supply, Inc.*, 159 Idaho 324, 327, 360 P.3d 333, 336 (2015) (not requiring medical evidence to establish by "a preponderance of the evidence that the accident in which [the claimant] was injured (1) arose out of and (2) in the course of his employment"). The "reasonable degree of medical probability" standard does require medical evidence. *Jones v. Emmett Manor*, 134 Idaho 160, 164, 997 P.2d 621, 625 (2000) (holding that the Industrial Commission may not decide causation "without medical evidence").

The medical evidence required to establish causation within a reasonable degree of medical probability is a medical opinion, by way of oral testimony or a written statement in medical records. *Id.*; *Anderson v. Harper's Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006). A claimant's testimony is not medical evidence and, thus, is not enough, standing alone, to establish causation. *Langley v. State of Idaho*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995)

(recognizing that an accident occurred based on the claimant's testimony but finding no medical opinion establishing that the accident caused injury); *Sykes v. C.P. Clare & Co.*, 100 Idaho 761, 764, 605 P.2d 939, 942 (1980) ("[Claimant's] testimony does not constitute medical testimony which is necessary to support his claim for compensation."). The claimant must present a credible medical opinion establishing a probability, not a possibility, of causation. *Langley*, 126 Idaho at 786, 890 P.2d at 737 (finding no evidence to support causation where doctors did not offer opinions to a reasonable degree of medical probability, but instead only concluded that the work environment may have irritated the claimants' asthma); *Roberts v. Kit Mfg. Co.*, 124 Idaho 946, 947-48, 866 P.2d 969, 970-71 (1993)) (recognizing that causation is not established where a doctor voices uncertainty about the cause of injury and affirming the Industrial Commission's decision to not give weight to the testimony of a doctor who voices uncertainty).

In this case, the Industrial Commission blatantly disregarded the proper standard for finding causation by looking at the evidence as a whole to find causation based on a preponderance of the evidence. Although the Industrial Commission is free to consider all of the evidence presented, as discussed below, the Industrial Commission must find causation to a reasonable degree of medical probability based on a medical expert opinion. Because the Industrial Commission found causation based on a preponderance of the evidence rather than within a reasonable degree of medical probability based on an expert opinion, the Industrial Commission erred.

2. A medical opinion, not the totality of the evidence, is required to establish causation.

To try and justify the Industrial Commission's decision, Respondent argues that the Industrial Commission should be free to look at the totality of the evidence, including a

claimant's testimony because a determination of causation will depend on the claimant's testimony. Respondent's Brief at 3-4. Once again, Respondent cites no law to support this argument. Instead, he supports his argument with (a) an argument that medical opinions are advisory only, and (b) an argument that requiring the Industrial Commission to rely on a medical expert opinion raises the legal standard for causation. None of these arguments has merit.

Although it is true that the Industrial Commission is "not bound to accept the opinion of any particular medical doctor," this does not negate that it must accept the opinion of a medical doctor to find causation. *Clark v. Truss*, 142 Idaho 404, 408, 128 P.3d 941, 945 (2006) (affirming the Industrial Commission's finding that claimant did not have a pre-existing medical opinion because it did not find the one medical opinion providing this opinion to be credible); The Idaho Supreme Court has made it clear that the Industrial Commission "may not decide causation without opinion evidence from a medical expert." *Anderson v. Harper's Inc.*, 143 Idaho 193, 196, 141 P.3d 1062, 1065 (2006) (emphasis added); *see also Langley*, 126 Idaho at 785-86, 890 P.2d at 736-37; *Roberts v. Kit Mfg. Co.*, 124 Idaho 946, 947-48, 866 P.2d 969, 970-71 (1993). To allow the Industrial Commission to decide causation without a medical opinion would allow the Industrial Commission to play doctor as it has done in this case.

The requirement that the Industrial Commission rely upon a medical opinion does not mean that the Industrial Commission is precluded from considering other evidence. *See Estate of Aikele v. City of Blackfoot*, 160 Idaho 903, 911, 382 P.3d 352, 360 (2016). Other evidence may help the Industrial Commission determine the credibility of the testifying doctors and decide what weight to give various opinions. *Id.* Weighing medical expert opinions and determining which opinions are credible for the purpose of reaching a decision is the very task that the

Industrial Commission is charged with performing. *Id.* at 912, 382 P.3d at 361. Accordingly, "the Commission can certainly consider whether the expert's reasoning and methodology has been sufficiently disclosed and whether or not the opinion takes into consideration all relevant facts." *Id.* at 911, 382 P.3d at 360. The Industrial Commission oversteps its bounds when it decides to reach a decision based on its own medical findings rather than a medical expert opinion. *Corgatelli v. Steel W., Inc.*, 157 Idaho 287, 297, 335 P.3d 1150, 1160 (2014); *Mazzone v. Texas Roadhouse, Inc.*, 154 Idaho 750, 756 (2013). This is exactly what the Industrial Commission did in this case, it disregarded its task of weighing the expert opinions and instead formed its own opinion.

Respondent argues that requiring the Industrial Commission to rely on one medical opinion over another would raise the legal standard for causation from reasonable degree of medical probability to reasonable degree of medical certainty. Respondent's Brief at 5. However, this argument lacks both logic and legal support.

The logical fallacy of Respondent's argument is demonstrated by the holding in *Estate of Aikele*. In that case, the issue was whether the claimant's lung cancer was caused by occupational exposure such that it was an occupational disease. *Estate of Aikele*, 160 Idaho 903, 906-07, 382 P.3d 352, 355-56. There were three doctors who offered opinions. *Id.* Only one, Dr. Dickson, offered an opinion for the claimant. *Id.* at 907, 382 P.3d at 356. The Industrial Commission found the opinions of Dr. Zuckerman and Dr. Pfoertner more persuasive than opinion of Dr. Dickson and concluded that the claimant had not met his burden of proving an occupational disease within a reasonable degree of medical probability. *Id.* at 908, 911, 382 P.3d at 357, 360. The Idaho Supreme Court affirmed the decision, finding substantial evidence for

this conclusion where at most there was a possibility, not a probability that firefighting work caused lung cancer. *Id.* at 911-12, 382 P.3d at 360-61. The scientific study that Dr. Zuckerman relied upon showed that firefighters have no greater risk than the general population of getting lung cancer. *Id.* at 907, 382 P.3d at 356. Dr. Dickerson "did not provided specific evidence detailing what substances or in what amounts [the claimant] encountered during the 'hundreds of carcinogenic fires' he reference[d]." *Id.* at 913, 382 P.3d at 362. The fact that the Industrial Commission decided to follow the opinions of Dr. Zuckerman and Dr. Pfoertner did not change the claimant's burden of proof from reasonable degree of medical probability to medical certainty. *Id.* at 913-14, 382 P.3d at 362-63.

The Idaho Supreme Court case that Respondent cites in support of his argument simply establishes that a claimant must prove causation with evidence of medical probability, not medical certainty. *Bowman v. Twin Falls Const. Co.*, 99 Idaho 312, 318, 581 P.2d 770, 776 (1978), *overruled on other grounds by DeMain v. Bruce McLaughlin Logging*, 132 Idaho 782, 785, 979 P.2d 655, 658 (1999). There is no holding in *Bowman*, let alone suggestion, that if the Industrial Commission were to rely on one medical opinion over another that this would somehow improperly raise the standard to medical certainty. *See id.* (remanding for the Industrial Commission to determine the proportion of total disability to employment as opposed to other causes).

In an attempt to establish that the standard would change if the Industrial Commission were forced to rely on a medical opinion, Respondent cites the AMA Guides to the Evaluation of Permanent Impairment (6th ed. 2008) ("AMA Guides") for the proposition that physicians have a different understanding of what is meant by medical probability. According to the AMA Guides,

physicians purportedly understand "medical probability" to mean having a 95% likelihood. However, Respondent offers no evidence that physicians practicing in Idaho between 2016 and the present understand probability in this way. Nor does he present any evidence that the medical experts in this case understand medical probability as meaning more than a 95% likelihood. To the extent that the doctors in this case are familiar with the AMA Guides, which they are since they provide impairment ratings based on the AMA Guides, then they understand that in the legal context (i.e., for workers' compensation claims), probability means more than 50%.[1]

Significantly, the common usage of the term "probability" aligns with the Idaho Supreme Court's definition of this term. Since 1973, the Idaho Supreme Court has defined "probability" for the purpose of workers' compensation cases as meaning "when there is more evidence in favor than against." *Dean v. Dravo Corp.*, 95 Idaho 558, 562, 511 P.2d 1334, 1338 (1973), *abrogated on other grounds by Jones*, 134 Idaho 160, 997 P.2d 621. Pursuant to Dictionary.com, "probable" means: (a) "likely to occur or prove true," (b) "having more evidence for than against, or evidence that inclines the mind to belief but leaves some room for doubt," and (c) "affording ground for belief." There is no evidence in the record that any of the physicians in this case, including Dr. Thompson and Dr. Frizzell, have a different understanding of the term "probable" than its common usage.

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[1] Dr. Hajjar and Dr. Gussner both utilize the AMA Guides as demonstrated by other Industrial Commission decisions. *See, e.g.*, *Wacaster v. Arlo Lott Trucking, Inc. et al.*, No. IC 2007-028189, 2010 WL 3947990, at *8 (Idaho Ind. Com. Sept. 14, 2010) (noting that Dr. Hajjar used the AMA Guides, 6th ed., to offer an opinion on impairment); *Cuevas v. Nederend Dairy, et al.*, No. IC 2007-035349, 2010 WL 1832573, at *15 (Idaho Ind. Com. Feb. 12, 2010) (concluding that Dr. Gussner "correctly applied the methodology set out in the *AMA Guides*," 6th ed.). Dr. Cox used the 6th edition of the AMA Guides in this case to give Respondent an impairment rating. Ex. 32 at 2006.

Nevertheless, assuming *arguendo* that Dr. Hajjar, Dr. Gussner, Dr. Cox, Dr. Schwartsman, and Dr. Krafft understood medical probability to be more than 95% likely, this only strengthens Appellants' position. These doctors offered opinions to a reasonable degree of medical probability that the injection did not cause Respondent's groin pain. In other words, they either think that it is more than 50% likely or more than 95% likely that the injection is not the cause of the groin pain.

The issue on appeal is not whether a higher standard ought to be employed. (Nor do Appellants ask this Court or the Industrial Commission to impose a higher standard of proof on Respondent.) The issue is whether the Industrial Commission failed to follow the appropriate standard of finding causation to a reasonable degree of medical probability. As the Industrial Commission clearly stated in its decision, it chose not to give weight to any one medical opinion. Instead, it played doctor by cherry picking statements from various doctors to support its opinion that there is medical causation. *See* Appellants' Brief at 24-27. Not only do these cherry-picked statements not constitute a medical opinion of causation within a reasonable degree of medical probability, they establish at most a possibility, not a medical probability, that the right-sided injection at L3-4 caused left-sided groin pain. *Id.* at 12-15, 24-27. By failing to determine which medical opinion was credible and should be given weight, the Industrial Commission failed to follow the appropriate standard for deciding causation.

B. The Record Is Void of Substantial and Competent Evidence to Support the Industrial Commission's Finding of Causation.

Respondent argues that there is substantial and competent evidence to support a finding of causation based on opinions and observations of four treating physicians as found in medical records. Respondent's Brief at 7. In making this argument, Respondent misconstrues what the

medical records actually show—a lack of objective evidence of nerve damage—and what the treating physicians wrote in their reports regarding Respondent's groin pain. Respondent also argues that objective evidence should not be required to establish causation because it would raise the standard of proof for causation. However, requiring medical opinions to be supported by objective evidence is consistent with requiring something more than a possibility.

Respondent first reported his groin pain to Dr. Hajjar, a neurosurgeon. Ex. 25 at 1606-07. In February 2015, Dr. Hajjar felt that Respondent's "burning pain in the upper [left] thigh and hip" was "*probably* consistent with an L3 issue" but recommended additional testing. *Id.* at 1605 (emphasis added). By June 2015, after performing surgery at the L3-4 level and obtaining two negative nerve conduction studies, Dr. Hajjar concluded that Respondent's groin pain was not nerve related. *Id.* at 1623. Importantly, he reached this decision long before the 2017 MRI that showed iliopsoas bursitis, contrary to the assertions of Respondent and the Industrial Commission. *Compare id.* at 1623 *with* Respondent's Brief at 9 (citing R. 110 at ¶ 65). At no point during his treatment of Respondent did Dr. Hajjar offer an opinion that the left-sided groin pain was caused by the right-sided injection at L3-4. *See generally* Ex. 25. Based on Dr. Krafft's examination, he felt that Respondent's pain was muscle related. *Id.* at 1623-24, 1628, 1630-31. When Dr. Hajjar was provided an opportunity to review additional medical records a couple of years later in 2017, Dr. Hajjar concluded that the most likely cause of the groin pain was iliopsoas bursitis. *Id.* at 1632-33.

Next, Respondent reported his groin pain to Dr. Schwartsman, an orthopedic surgeon who performed Respondent's left-hip replacement a year before the underlying industrial accident in this case. Ex. 22 at 666, 669. Dr. Schwartsman initially felt that Respondent had

left-sided radiculopathy down L3-4. *Id.* at 669-70. Several months later, after Respondent's back surgery, Dr. Schwartsman concluded that the source of the pain was not Respondent's hip and was likely "L3-4 nerve root irritation" on the left side. *Id.* at 671. Notably, Dr. Schwartsman did not offer an opinion that the source of the pain was from a right-sided injection, which as Dr. Gussner pointed out, was not close to the L3-4 nerve roots. *See id.*; Gussner Tr. 22:1-6. Also, Dr. Schwartsman, who is not a back doctor, mistakenly thought that Respondent's decompression was only on the right. In reality, the L3-4 decompression was on the right *and* the left. Ex. 25 at 1611. When Dr. Schwartsman was later provided with additional medical records for Mr. Tenny, he changed his opinion and concluded that the most likely cause of Respondent's pain was iliopsoas bursitis. Ex. 22 at 676-77.

At the recommendation of Dr. Schwartsman, Respondent went to Dr. Frizzell, a neurosurgeon, in October 2015. Ex. 22 at 671; Ex. 29 at 1738. Dr. Frizzell concluded that Respondent's pain may be due to peripheral nerves. Ex. 29 at 1738. He did not offer an opinion on the cause of the possible nerve pain at that time. *See id.* Rather, it was not until almost three years later, in September 2018, that he offered an opinion on causation. Ex. 29 at 1748. He wrote that the left-sided lower extremity pain was caused by the "January 2015 epidural injection at L3-L4 on the left side." *Id.* (emphasis added). However, Respondent's injection on January 8, 2015, was on the right side, not the left! Ex. 35 2042, 2056-58. On cross-examination, Dr. Frizzell admitted that the only basis for his opinion was the temporal onset of pain. Frizzell Tr. 33:23 – 34:5. He was unable to identify objective evidence to support his opinion. *Id.* 23:13-21, 33:5-8.

Respondent then went to Dr. Thompson, an anesthesiologist specializing in pain management. Thompson Tr. 5:10-12, 18-21. Dr. Thompson boasts that she "can, generally, without objective testing data, know exactly what's wrong," based on her experience. Thompson Tr. 23:9-13. She admittedly does not give a lot of weight to test results and did not give any weight to the fact that Respondent had negative nerve conduction studies. *Id.* 12:17-25, 28:23 – 29:13. She claims she can know the source of pain by Respondent's description, despite the fact that pain reports are highly subjective. *Id.* 28:23 – 29:13; Gussner Tr. 37:9-15. She further claims that she can know that Respondent's symptoms were caused by nerve pain based on his reaction to opioid pain medication. Thompson Tr. 14:24 – 15:5. However, Dr. Thompson admittedly uses opioid pain medication to treat other types of pain. *Id.* 19:3-8. Also, she ignored Respondent's use of marijuana for two years and does not know whether the marijuana could have negatively impacted his pain complaints because, notwithstanding the fact that prescribing opiates is a large part of her practice, she is not reading medical literature regarding marijuana and its interplay with opiate medication. *See* Appellants' Brief at 21; Thompson Tr. 39:23 – 40:3. Dr. Thompson ultimately concluded that Respondent has nerve pain from his injection, but she failed to identify any objective evidence to support this opinion. 28:20 – 29:9. She is really relying on nothing more than the reported temporal onset of pain.

Nothing in the medical records or physician testimony shows an objective basis for a finding that the right-sided injection caused the left-sided groin pain. Rather, the records show objective evidence to the contrary: an injection at the L3-4 level that was not near a nerve root, three negative nerve conduction studies, spot pain in the groin as opposed to pain distributed over a region, no improvement in the groin pain following a decompression surgery, no sign of

muscle weakness or muscle loss after three years, reported symptoms outside of a nerve distribution, and an alternate diagnosis attributed to the pain. Ex. 27 at 1641-51; Ex. 32 at 2015; Ex. 34 at 2034-35; Ex. 35 at 2056-58; Gussner Tr. 21:1 - 22:6, 26:5-21; Hajjar Tr. 15:20–16:7, 20:3-17; Cox. Tr. 10:8-11, 11:4-5. Further, physiologically speaking it "would be hard to hurt the left side from a right sided injection if you tried to." Hajjar Tr. at 22:20-21.

To require some objective evidence to support a finding of causation is not requiring medical certainty. Rather, it is requiring something more than a possibility. An alleged temporal onset of pain gives rise to a possibility, not a medical probability. Something more than a possibility is required. That something more is lacking in this case. Although Respondent offered the opinions of Dr. Thompson and Dr. Frizzell to support his claim, those opinions are nothing more than unsubstantiated conjecture. They are not substantial and competent evidence to support a finding that the right-sided injection caused the left-sided groin pain.

The lack of objective evidence to support Dr. Thompson and Dr. Frizzell's opinions explains why the Industrial Commission pulled discrete statements by other medical providers in an attempt to support the ultimate finding of causation. The Industrial Commission needed something to support its opinion, and it took great liberty in utilizing isolated statements by Dr. Hajjar and Dr. Gussner even though the actual opinions by those providers is that the right-sided injection did not cause the left-sided groin pain. Those isolated opinions, which explain a possibility, not a probability, do not constitute substantial and competent evidence to support a finding of causation.

C. The Industrial Commission Did Not Err in Finding that Dr. Thompson Did Not Review Medical Records Prior to Forming Her Opinion.

Respondent takes issue with the Industrial Commission's finding that Dr. Thompson did not review medical documentation prior to reaching her conclusion that "something happened" during the injection. Respondent's Brief at 11 (citing R. 108 ¶ 58). Respondent does not state why he raised this issue. If Respondent wants the Court to reverse the Industrial Commission's finding on that issue, Respondent is seeking affirmative relief, which would require a cross-appeal. I.A.R. 15(a). However, Respondent did not file a cross-appeal, thereby failing to properly raise the issue for the Court to consider. Alternatively, if Respondent is not seeking affirmative relief, then the Court can simply ignore the issue because Respondent is not asking for relief.

Assuming *arguendo* that this issue is properly before the Court, the Industrial Commission's finding as to what Dr. Thompson reviewed is supported by the record and illustrates why Dr. Thompson's opinion is not credible or worthy of any weight. When Dr. Thompson first started treating Respondent at the end of 2015, she quickly concluded that Respondent's symptoms were nerve related despite "no clear underlying objective testing to support the diagnosis." Ex. 30 at 1768. She also believed Respondent's representation that the groin pain started at the time of the injection. *Id.* at 1754, 1779. Her medical records and testimony do not provide evidence that she reviewed medical records from other treating providers such as Dr. Hajjar, Dr. Krafft, or Dr. Gussner prior to reaching her conclusion that Respondent had nerve pain from the injection. *See id.* at 1754-79. During her deposition, she was not able to affirmatively state that she had received or reviewed those medical records.

Thompson Tr. 26:13 – 27:23. She acknowledged that she had not seen Respondent's Diagnostic Block Sheet in 2016. Thompson Tr. 27:16-23.

Even if Dr. Thompson had reviewed medical documentation prior to reaching her opinion in December 2015 that Respondent had nerve damage, this does not change the fact that her opinion is not supported by objective evidence. In other words, a different finding by the Industrial Commission as to what information Dr. Thompson considered would not remedy the problem with her opinion—that it is based solely on the temporal onset of pain. There is no anatomical or physiological findings in the medical records that Dr. Thompson could have reviewed that supports a conclusion of left-sided groin pain as a result of a right-sided injection. Consequently, Dr. Thompson's opinion does not constitute substantial and competent evidence to support the Industrial Commission's decision regardless of whether she reviewed medical documentation.

D. Respondent Is Not Entitled to an Award of Attorney Fees.

Respondent argues that he is entitled to an award of attorney fees because Appellants do not have a reasonable basis for the appeal. Respondent's Brief at 11. According to Respondent, the appeal is without reasonable basis because Appellants are allegedly asking the Court to do nothing other than reweigh the evidence. This argument is without merit.

In order for this Court to award attorney fees, it must find that Appellants contested Respondent's claim for compensation without reasonable ground. IDAHO CODE § 72-804. Where there is reasonable ground for an appeal, Respondent is not entitled to an award of attorney fees. *Seamans v. Maaco Auto Painting & Bodyworks*, 128 Idaho 747, 754, 918 P.2d 1192, 1199 (1996) (declining to award attorney fees). Reasonable grounds for an appeal exist

when the Industrial Commission fails to follow the proper legal standard for reaching a decision. *Aguilar v. Indus. Special Indem. Fund*, 164 Idaho 893, 899, 436 P.3d 1242, 1248 (2019).

In this case, reasonable grounds exist for the appeal because the Industrial Commission reached a finding of causation using the wrong legal standard—using preponderance of the evidence rather than reasonable degree of medical probability based on a medical opinion. Also, the Industrial Commission admittedly chose not to decide what weight to give the expert opinions, and thereby failed to perform the task assigned to it. Considering the Industrial Commission did not even weigh the medical expert opinions as required, there is not a finding based on the appropriate legal standard for the Court to reweigh. As to the evidence upon which the Industrial Commission based its decision, it is not substantial and competent evidence to support the decision, thereby resulting in an err upon which the decision must be reversed.

For these reasons, Respondent's request for attorney fees should be denied.

II. CONCLUSION

Because there is a lack of substantial and competent evidence to support the Industrial Commission's decision, Appellants request the Court reverse the decision of the Industrial Commission. In the alternative, Appellants request the Court vacate the decision and remand for a decision that follows appropriate legal standards.

DATED THIS 5th day of February, 2021.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February, 2021, I caused to be served a true copy of the foregoing APPELLANTS' REPLY BRIEF by the method indicated below, and addressed to each of the following:

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