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COURT OF APPEALS
STATE OF COLORADO

State Judicial Building
2 East 14th Avenue, Suite 300
Denver, Colorado 80203

Industrial Claim Appeals Office
Date of Entry of Final Order: December 5, 2006
Honorable John D. Baird
Honorable Thomas Schrant

Office of Administrative Courts
Administrative Law Judge Jill Mattoon
W.C. No. 4-620-669

^ COURT USE ONLY ^

KATHLEEN SAVIDGE,

Petitioner,

v.

AIR WISCONSIN AIRLINES, INC., INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, AND THE INDUSTRIAL CLAIM APPEALS OFFICE OF THE STATE OF COLORADO,

Respondents.

Case Number:
06CA2650

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OPENING BRIEF

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STATUTES

MISCELLANEOUS AUTHORITY

For purpose of clarity, the parties will be referred to as they were referred to in the proceedings below. Petitioner Kathleen Savidge will be referred to as (claimant). Respondents Air Wisconsin Airlines, Inc. and Insurance Company of the State of Pennsylvania will be referred to collectively as (respondents) or separately as (respondent employer) and (respondent insurer). Respondent Industrial Claim Appeals Office (ICAO) will be referred to by name.

I. SUMMARY OF THE ISSUES

The issues raised in this appeal by the claimant are whether the Order of the Administrative Law Judge denying claimant's request for the assessment of penalties against respondents for their failure to pay admitted temporary total disability benefits is supported by the applicable law, whether

II. STATEMENT OF THE CASE AND FACTS

Claimant sustained a compensable injury to her right upper extremity on March 21, 2004 while performing the duties of her employment as a gate agent at Denver International Airport. Treatment was provided by Dr. John Sanidas who placed claimant at maximum medical improvement on July 15, 2004 and assigned a 5% impairment for claimant's right upper extremity.

The claimant underwent a DIME on the issues of maximum medical improvement and permanent impairment. In his report of December 2, 2004, the DIME physician, Dr. Wiley Jinkins, stated that claimant had attained maximum

medical improvement and suffered permanent impairment as determined by the authorized treating physician. Dr. Jinkins further stated that claimant might benefit from additional diagnostic testing and treatment.

On March 11, 2005, respondents filed a final admission of liability for permanent partial disability benefits based upon the 5% scheduled impairment rating offered by Dr. Jinkins. Claimant thereafter underwent additional curative treatment, including right upper extremity surgery with Dr. Patrick Devanney. On June 14, 2005, respondents filed a general admission of liability admitting for the *ongoing* payment of temporary total disability benefits commencing May 23, 2005.

While still recovering from her right arm surgery, claimant's primary treating physician, Dr. Sanidas, released claimant to modified duty employment. Work restrictions set out by Dr. Sanidas in his report of June 15, 2005 included no use of the right hand and no driving. As a result of Dr. Sanidas' June 15, 2005 modified duty work release, respondent employer sent claimant an offer of modified employment beginning June 24, 2005 at Denver International Airport. As is shown by the evidentiary record, respondents deliberately refused to assist claimant in any way in either identifying means to get to work or in providing transportation or transportation assistance so that claimant could return to modified work while honoring the significant restrictions imposed by Dr. Sanidas.

More specifically, the record shows that claimant lives in Colorado Springs and that claimant lived in Colorado Springs at the time of her industrial injury. Prior to sustaining her job-related injury, claimant commuted to work in Denver by driving her manual transmission car. It is not disputed that following her right arm surgery, and as a direct result of that surgery, claimant was not able to drive to work due to the restrictions imposed by her authorized treating physician. The record further shows that claimant made an affirmative, albeit unsuccessful, effort to arrange alternative transportation to and from her modified duty employment.

It is likewise without dispute that claimant notified Air Wisconsin Airlines that she needed assistance with transportation to and from Denver International Airport. The record shows that claimant requested assistance from her supervisor in getting to and from work and her supervisor contacted Jennifer Voight, the employer's workers' compensation specialist. Ms. Voight spoke with the insurance adjuster, Carol Keim, regarding respondents' obligation to provide claimant with assistance in getting to and from work in light of the restrictions imposed by Dr. Sanidas and a concerted decision was made that nothing would be done to assist claimant in any way with getting to and from work. Adjuster Keim testified at deposition that she believed respondents had no duty to assist claimant in identifying a means of getting to and from work (given claimant's restriction of no driving) based on the "going and coming rule".

Thus, with full knowledge that the modified employment in Denver was not reasonably available to claimant absent transportation assistance, respondents decidedly refused to make any arrangements to transport claimant to work, or to assist claimant in making such arrangements, and then unilaterally terminated her temporary disability benefits with the filing of a general admission of liability on June 30, 2005. Ms. Voight has since acknowledged that without providing claimant with any assistance in getting to and from work, the employer's offer of modified duty employment was not objectively workable. Ms. Voight has admitted that the assistance requested by claimant should have been provided and that respondents' failure to provide that assistance was unreasonable. (2/15/06 Hearing Transcript pages 71-77; 91 & 92; 169 - 171)

Hearings were held before Administrative Law Judge Jill Mattoon on October 6, 2005, February 15, 2006, and April 3, 2006 pursuant to the claimant's application for hearing endorsing as issues ongoing temporary total disability benefits commencing June 23, 2005 and penalties for respondents' failure to pay temporary total disability benefits commencing June 23, 2005. Following the conclusion of the evidentiary proceedings and receipt of post-hearing position statements, the Administrative Law Judge issued Findings of Fact, Conclusions of Law and Order on May 17, 2006. As pertinent, the Administrative Law Judge found that:

- Claimant had been released by her authorized treating physician for modified duty with restrictions against using her right hand and from all driving;

- The employer offered claimant modified employment that was within her medical restrictions;

- Claimant declined the employer's offer of modified duty work *solely* because she was unable to arrange transportation to and from work; and,

- "Employer and Insurer were both aware that Claimant could not drive and had no way to get to work, but both declined to make arrangements to transport Claimant to work. Claimant was unable to get to work to perform the modified duty work. Claimant was unable to accept the modified job offer beginning on June 24, 2005, because her work restrictions prevented her from driving to work and no other practical method of travel was available. Claimant's refusal to accept the modified job was reasonable because of her inability to get to and from work due to her work-related injury."

These findings of fact are amply supported by the record and the Administrative Law Judge correctly concluded therefrom that the claimant is entitled to the payment of temporary total disability benefits beginning June 24, 2005 and continuing until terminated by law. In reaching this conclusion, the Administrative Law Judge specifically noted that section 8-42-105(3)(d) does not contemplate the termination of temporary disability benefits when "the employer offers modified employment that the claimant cannot as a practical matter accept." Rather, the modified employment "must be reasonably available to the claimant under an objective standard."

Having correctly determined, with record support, that claimant is entitled to ongoing temporary total disability benefits commencing June 24, 2005, and having

further reasoned, with lawful support, that the statute does not contemplate the termination of temporary disability benefits when the employer offers modified employment that the claimant cannot as a practical matter accept, Judge Mattoon then reached the factually and legally insupportable conclusion that respondents' unilateral termination of temporary total disability benefits was not a violation of statute or rule that exposed respondents to the assessment of penalties under section 8-43-304(1).

The Industrial Claim Appeals Panel affirmed the Order of the Administrative Law Judge and this matter is now before the Court.

III. SUMMARY OF THE ARGUMENT

Once an admission of liability is filed for temporary disability benefits, the Workers' Compensation Act does not allow the respondent to unilaterally terminate those benefits except as provided by Part IX of the Rules of Procedure. Additionally, unless admitted benefits are unilaterally terminated in accordance with Rule IX, *payments shall continue according to admitted liability* until the duty to pay is terminated pursuant to an order of an Administrative Law Judge following a hearing. Temporary disability benefits cannot be terminated except in accordance with Rule IX or pursuant to an order of the Division following a hearing because once liability for temporary disability is determined by admission or order, the burden shifts to the respondents to show grounds for termination.

Rather than filing a petition to terminate temporary disability benefits and having the issue of claimant's entitlement to temporary disability benefits determined by an Administrative Law Judge following an expedited hearing (while continuing to pay benefits consistent with their admission of liability), respondents unilaterally and illegally terminated claimant's temporary disability benefits and forced claimant to spend the following year litigating the issue, all the while knowing that no grounds existed for the termination of benefits.

Respondents unreasonably failed to comply with the requirements of the regulation governing termination of temporary disability benefits without a hearing and violated the statute prohibiting the withdrawal of an admission of liability. Respondents' failure to comply with a lawfully enjoined duty and concomitant violation of statute mandated the assessment of penalties and the Administrative Law Judge erred as a matter of law in holding otherwise.

IV. ARGUMENT

Claimant is mindful of the Court's policy prohibiting citation to unpublished opinions in briefs filed before the Court. Claimant's discussion of decisions issued by the Industrial Claim Appeals Panel is for purpose of showing the Panel's departure from its holding in earlier cases addressing like issues. A copy of each ICAP decision referenced herein is attached for the convenience of the Court.

Claimant submits that the Administrative Law Judge erred in failing to impose penalties under section 8-43-304(1) for the respondents' failure to comply with Rule IX(C)(1) and violation of section 8-43-203(2)(d).

In denying claimant's request for the imposition of penalties against respondents for their failure to pay admitted temporary total disability benefits, the Administrative Law Judge concluded as follows:

> The issue of whether or not Claimant is able to accept the offer of modified employment as a practical matter is a question of fact for determination by the ALJ. The statute does not require Insurer to make that fact determination prior to terminating TTD benefits pursuant to Section 8-42-105(3)(d), C.R.S. Claimant properly challenged at hearing the termination of TTD benefits based on her argument that she could not as a practical matter accept the offer of modified employment.
>
> Insurer did not violate the statute by unilaterally terminating Claimant's TTD benefits when she failed to begin modified duty after being given a medical release to return to modified duty, even though Claimant later successfully demonstrated at hearing that she was unable to accept the modified job offer as a practical matter due to transportation difficulties. The fact that Claimant was successful at hearing does not lead to the conclusion that Insurer violated the statute.

The Administrative Law Judge's conclusion that an insurer can properly effect a unilateral termination of temporary disability benefits without first determining whether the proffered modified employment is reasonably available to the claimant demonstrates a misunderstanding of the regulation governing the termination of temporary disability benefits. The Administrative Law Judge's conclusion that this insurer properly effected a unilateral termination of admitted temporary total

disability benefits with full knowledge that the proffered employment was not reasonably available to the claimant manifests a palpable misapplication of the law. It is submitted that for these reasons, and based on the argument that follows, the Order of the Administrative Law Judge must be set aside insofar as it denied claimant's request for penalties based on respondents' improper termination of temporary total disability benefits.

Claimant would submit as an initial matter that the Order of the Administrative Law Judge improperly required that claimant *re*-establish her entitlement to *admitted* temporary total disability benefits without regard to respondents' knowing failure to show grounds for the termination of those benefits in the first instance. The pertinent law provides as follows:

Temporary disability benefits are payable if the industrial injury causes a disability and if as a result of the disability the claimant suffers a temporary wage loss. Section 8-42-103(1), C.R.S. 2003. The claimant bears the initial burden to prove the entitlement to temporary disability benefits. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997). However, section 8-42-105(3), C.R.S. 2003, provides that once the claimant has established an entitlement to temporary disability benefits, benefits "shall continue" until the first occurrence of one of the events listed in subsections (a) through (d)(I). In other words, once the claimant establishes that the industrial injury has caused a compensable wage loss, the

burden shifts to the employer to establish grounds for the termination of benefits. See *Atlantic & Pacific Insurance Co. v. Barnes*, 666 P.2d 163 (Colo. App. 1983)(party seeking to change status quo bears burden of proof).

When respondent insurer filed its June 14, 2005 admission for temporary disability benefits, it admitted the claimant sustained her burden to prove her entitlement to temporary disability benefits. Accordingly, respondent insurer was required to pay continuing temporary disability benefits until terminated in accordance with §8-42-105(3). Insofar as pertinent, subsection 8-42-105(3)(d)(I) provides that temporary total disability benefits may be terminated when the employee is released to return to modified employment and the employer makes a written offer for such, but the employee fails to begin such employment.

Commencing with *Ragan v. Temp Force*, 1996 WL 423018 (ICAO) (June 7, 1996), the Industrial Claim Appeals Panel has issued a series of decisions in which it was held that section 8-42-105(3)(d) does not contemplate nor authorize the termination of temporary disability benefits when an employer offers modified employment that the claimant cannot, as a practical matter, accept. *Kabis v. Marriott School Services*, 1998 WL 655800 (ICAO) (August 24, 1998); *Simington v. Assured Transportation & Delivery*, 1998 WL 185094 (ICAO)(March 19, 1998); *Belanger v. Keystone Resorts, Inc.*, 1997 WL 731378 (ICAO) (October 9, 1997). The *Ragan* Panel explained the rationale underlying this conclusion:

> Section 8-42-105(3)(d) creates no explicit prescriptions or restrictions on the type of 'modified employment' which may be offered, other than the employment be approved by the attending physician. However, we agree with the ALJ that the General Assembly could not have intended section 8-42-105(3)(d) to authorize termination of temporary disability benefits when respondents offer employment which the claimant cannot, as a practical matter, accept.
>
> Although the apparent legislative objective of §8-42-105(3)(d) is to terminate temporary disability benefits when claimants choose not to accept employment within restrictions established by their treating physician, it would be absurd to suggest that the statute was designed to penalize claimants who, for reasons beyond their control, are unable to accept the proffered employment.

The law therefore provides that where the claimant is restricted to modified duty work, and the employer seeks to limit its liability for temporary disability benefits through an offer of modified employment, the modified employment must be reasonably available to the claimant.

On June 14, 2005, respondents filed a general admission of liability for the ongoing payment of temporary total disability benefits. Once this admission was filed, the respondents did not have a statutory right to terminate benefits without a hearing. See *Vargo v. Industrial Commission*, 626 P.2d 1164 (Colo. App. 1981); *A & R Concrete Construction v. Lightner*, 759 P.2d 831 (Colo. App. 1988) (unilateral termination of benefits by filing an admission of liability is a privilege accorded by the rules of procedure, not a statutory right). Respondents admitted liability for temporary total disability benefits and they were obliged to continue payments until legally excused from the obligation to do so. §8-43-203(2)(d),

C.R.S. 2003 (if any liability is admitted, payments shall continue according to admitted liability); *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990). Insofar as the respondents wished to avail themselves of the rule of procedure permitting unilateral termination of benefits without a hearing, respondents were obligated to meet the requirements for unilateral termination under Rule IX(C)(1).[1] The requirements of Rule IX(C)(1) are designed to ensure that respondents seeking unilateral termination of benefits can make a showing that it is highly probable that they will meet their burden of proof if the validity of the termination is contested and tried on the merits. *Strombitski v. Man Made Pizza*, 2003 WL 22997989 (ICAO) (December 1, 2003); *Jyrkinen v. Peakload, Inc.*, 1994 WL 361961 (ICAO) (June 15, 1994); *Stewart v. Dillon Companies, Inc.*, 1996 WL 732121 (ICAO) (November 20, 1996). If the respondents are unable to meet the requirements for unilateral termination under Rule IX(C)(1), the respondents must file a petition to terminate and continue to pay temporary disability benefits until a hearing is held to determine whether there is sufficient evidence to permit the termination of benefits under the statute. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). In that way, the claimant is not deprived of periodic indemnity benefits in the event the respondents are unable to prove grounds for the termination of benefits.

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[1] Now renumbered with changes not applicable here at Rule 6-1(A).

The Administrative Law Judge's finding that these respondents terminated temporary disability benefits in compliance with section 8-42-105(3)(d) finds no support in the record or the law. As indicated above, in order to avoid an absurd result, §8-42-105(3)(d) has consistently been interpreted as precluding an insurer from terminating temporary disability benefits based on an offer of modified employment that the claimant cannot, as a practical matter, accept. Thus, in order to comply with the requirements of Rule IX(C)(1), respondents' June 30, 2005 admission of liability had to be supported by evidence demonstrating a high degree of probability that the modified employment was reasonably available to claimant. This of course was not the case as has been admitted by the respondents and found by the Administrative Law Judge. Respondents' offer of modified employment was undisputedly insufficient to support the termination of benefits under Rule IX.

Where the decision of the Administrative Law Judge is based upon an improper application of the law, a reviewing court may set aside the award. *Coates, Reid & Waldron v. Vigil,* 856 P.2d 850, 856 (Colo. 1993). As noted previously, the Administrative Law Judge reached the following conclusions[2] with regard to claimant's request that a §8-43-304(1) penalty be assessed against respondents for their failure to comply with Rule IX(C)(1) and concomitant violation of section 8-43-203(2)(d).

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[2] The language of the ALJ, quoted from her Order, is italicized.

"The issue of whether or not Claimant is able to accept the offer of modified employment as a practical matter is a question of fact for determination by the ALJ. The statute does not require Insurer to make that fact determination prior to terminating TTD benefits pursuant to Section 8-42-105(3)(d), C.R.S."

The Administrative Law Judge's conclusion that an insurer can properly effect a unilateral termination of temporary disability benefits without first determining whether the proffered modified employment is reasonably available to the claimant demonstrates a misunderstanding of the regulation governing the termination of temporary disability benefits without a hearing.

If, as suggested by the Administrative Law Judge, §8-42-105(3)(d) does not require that the employer offer reasonably available modified employment in the first instance, such proposition would at least meet with the protections of due process. The respondents cannot terminate temporary disability benefits pursuant to §8-42-105(3)(d) without a hearing.

Rule IX(C)(1) is an exception to the statutory requirement that benefits must be paid in accordance with admitted liability. Contrary to the conclusion of the Administrative Law Judge, the requirements of Rule IX(C)(1) are designed to ensure that respondents seeking unilateral termination of benefits can make an evidentiary showing which demonstrates a high degree of probability that they will succeed when the issue is tried on the merits.

"Claimant properly challenged at hearing the termination of TTD benefits based on her argument that she could not as a practical matter accept the offer of modified employment."

The conclusion of the Administrative Law Judge represents a misapplication of the burden of proof.

As argued more fully above, when the insurer filed its admission of liability for ongoing temporary disability benefits, it admitted that claimant sustained her burden of proving her entitlement to temporary disability benefits. Requiring claimant to re-establish her entitlement to admitted temporary total disability benefits without regard to respondents' knowing failure to show grounds for the termination of those benefits in the first instance constitutes reversible legal error.

"Insurer did not violate the statute by unilaterally terminating Claimant's TTD benefits when she failed to begin modified duty after being given a medical release to return to modified duty, even though Claimant later successfully demonstrated at hearing that she was unable to accept the modified job offer as a practical matter due to transportation difficulties."

The Administrative Law Judge's conclusion represents both a misapplication of the law and a misunderstanding of the basis of claimant's penalty claim.

The Administrative Law Judge's determination in this regard evidences her failure to distinguish between a termination of benefits by petition or application under the statute and a unilateral termination of benefits under the regulations by admission. The Administrative Law Judge's conclusion was not directed at the issue of claimant's entitlement to temporary total disability benefits. Rather, it addressed the issue of respondents' unilateral termination of temporary benefits and therefore, the pertinent authority was Rule IX(C)(1).

Since the respondents undisputedly failed to satisfy the requirement for unilateral termination imposed by Rule IX(C)(1), the insurer was obligated to continue payment of temporary total disability benefits in accordance with its admission of liability. *Vargo v. Industrial Commission*, 626 P.2d 1164 (Colo. App. 1981) Respondents' failure to comply with the necessary requisites of Rule IX(C)(1) resulted in an illegal termination of admitted benefits in violation of section 8-43-203(2)(d), and it was this failure to perform a duty lawfully enjoined, and concomitant violation of a statutory provision, that formed the basis of claimant's penalty claim against these respondents. Section 8-43-203(2)(d), C.R.S. 2003 (hearings may be set to determine any matter, but, if any liability is admitted, payments shall continue according to admitted liability).

Administrative Law Judges do not have discretion to deny a penalty if a punishable violation has occurred. E.g. *Hillebrand Construction Co. v. Worf,* 780 P.2d 24 (Colo. App. 1989) (word shall connotes a mandatory requirement). Thus, under §8-53-102(2), C.R.S. (1986 Repl. Vol. 3B) [predecessor to the amended statute now codified at §8-43-203(2)], it was held that use of the word "shall" created a mandatory penalty for failure timely to admit or deny liability. *Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Here, §8-43-304(1) states that a violator "shall" be punished by imposition of a penalty. The plain meaning of this statute requires an Administrative Law Judge to impose a penalty when an

insurer fails or refuses to perform a lawfully enjoined duty if the insurer's conduct was unreasonable from an objective standpoint. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). In view of respondents' admission that they were fully aware that the modified employment in Denver was not reasonably available to claimant absent the transportation assistance that was decidedly refused by respondents, in combination with the Administrative Law Judge's finding that respondents were fully aware that claimant could not drive and had no way to get to work when they offered claimant modified employment in Denver, a determination that respondent insurer's conduct was unreasonable can be made as a matter of law. Thus, respondents' violation of statute and rule mandates the imposition of penalties under section 8-43-304(1).

"The fact that Claimant was successful at hearing does not lead to the conclusion that Insurer violated the statute."

This conclusion does not serve to support or refute the claimant's assertion that the Order of the Administrative Law Judge is factually and legally insupportable. It does however hallmark the enormity of the respondents' conduct in decidedly refusing to assist claimant in any way in getting to and from modified duty employment and then terminating her temporary disability benefits with full knowledge that modified employment was not reasonably available to claimant. The findings and conclusions of the Administrative Law Judge show that, contrary to law, reason, principle, the Act's basic goals of speedy and reliable compensation

of injured workers, and its design to reduce costs and avoid litigation, Kathleen Savidge was forced to take this matter to hearing to establish what the parties already knew.

As for its part, the Industrial Claim Appeals Panel erred:

The issue placed before the ICAP for its review was ????

The distinction between this case and the Bronco Billy case is manifest.

V. CONCLUSION

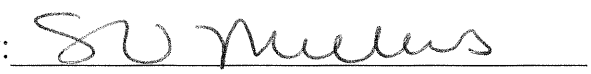
Respondents deliberately refused to assist claimant in any way in either identifying means to get to work or in providing transportation or transportation assistance so that claimant could return to modified work while honoring the significant restrictions imposed by Dr. Sanidas. Contrary to law, these respondents took the position that they had no obligation to act reasonably in assisting claimant in identifying a means of transportation to get to and from work when claimant was released by her treating physician for modified duty. In reliance upon this legally unsupportable conclusion, respondents unilaterally terminated claimant's temporary disability benefits. Offers of modified duty employment are supposed to enable work-injured claimants to resume work activity in an accommodated and reasonable manner. The modified job offer process in this case was employed by respondents' adjuster in a manner that was not geared to actually assisting claimant

in returning to work. Rather, it was used as an adjusting tool to wrongfully terminate claimant's temporary disability benefits.

Administrative Law Judge Mattoon's Order must be set aside insofar as she concluded the respondents did not violate statute or rule when they filed the June 30, 2005 admission of liability unilaterally terminating the claimant's temporary total disability benefits effective June 24, 2005. This matter should be remanded for entry of an Order determining the amount of penalties to be imposed.

Respectfully submitted this 14th day of May, 2007.

Steven U. Mullens, P.C.

By: 

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CERTIFICATE OF SERVICE/MAILING

I hereby certify that on this 14th day of May, 2007, the original and five (5) copies of the foregoing OPENING BRIEF were sent by same-day carrier to the Clerk of the Colorado Court of Appeals, 2 East 14th Avenue, Denver, CO 80203 and that a true and correct copy of the foregoing was placed in the U.S. Mail, postage prepaid and properly addressed to the parties listed below:

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