ENOCH LOGAN,

Claimant,

vs.

ABF FREIGHT SYSTEM, INC.,

Employer,

and

ACE AMERICAN INS. CO.,

Insurance Carrier,

Defendants.

File No. 5047979
1/1/2016

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

A R B I T R A T I O N

D E C I S I O N

Head Note Nos.: 1100; 1802; 1803; 2700

STATEMENT OF THE CASE

Claimant, Enoch Logan, filed a petition in arbitration and seeks workers' compensation benefits from ABF Freight System, Inc., employer and Ace American Ins. Co., insurance carrier, defendants. This matter was heard by deputy workers' compensation commissioner, Joseph Walsh, on October 15, 2015, in Des Moines, Iowa. The record in the case consists of

claimant's exhibits 1 through 10 and employer exhibits A through P including sworn testimony of claimant.

ISSUES

The parties present the following issues for determination:

1. Whether the April 11, 2013 injury is a cause of permanent disability.

2. Whether claimant is entitled to temporary disability or healing period for the time June 18, 2013 through July 8, 2013.

3. Whether claimant is entitled to permanent partial disability and whether it is industrial disability.

4. Whether the rate of weekly benefits is $716.93 or $733.20.

5. Whether claimant is entitled to Iowa Code section 85.27 medical benefits.

a. Whether the treatment was reasonable and necessary and the fees are reasonable.

b. Whether the medical expenses are causally connected to the work injury.

c. Whether the expenses were authorized by employer.

d. Whether claimant is entitled to alternate medical care.

6. Whether claimant is entitled to Iowa Code section 85.39 independent medical evaluation benefits.

7. Whether the defendants are entitled to credit under Iowa Code section 85.38(2).

8. Whether costs are taxable.

FINDINGS OF FACT

The undersigned, having viewed the appearance, actions, and demeanor of the witness, considered all of the testimony and evidence in the record finds:

The claimant, at the time of injury on April 11, 2013, had just turned 65 years of age. Claimant is a 1967 high school graduate with a two year degree from Des Moines Area Community College in management. Claimant served two and one half honorable years in the US Army. Claimant has significant experience in the trucking business. Claimant has also worked in customer service for about five years and as a convenience store manager for

about three years. Claimant also spent a couple of years in construction and working for the metro solid waste facility.

Claimant worked for employer ABF as a "city driver". The position required loading and unloading using both hands, back, two wheel trailer and pallet jack. The work is fairly heavy. Claimant worked 40 to 55 hours per week. Exhibit N demonstrates that claimant routinely worked overtime in the year prior to injury. It is found that weekly hours fewer than 40 are not typical in claimant's work history with this employer. Hours under 30 must be excluded from his weekly rate calculation as not representative. Employer compensated claimant at $24.70 per hour with overtime at time and a half. The work claimant performed as a city driver was fairly heavy work when loading and unloading trucks. Prior to the injury, claimant performed a fair amount of overhead reaching and lifting. Claimant voluntarily retired in July 2014. He began drawing his pension. Claimant continues on part time to date of hearing at about 40 hours per month. Claimant cannot work more than 40 hours because of restrictions connected to his pension.

Claimant's past medical history is significant for shoulder pain and injuries. Claimant had a right shoulder rotator cuff repair due to a 1987 accident. Claimant lost a year of work for recovery. Claimant has also injured his shoulders due to a fall from a tree, carrying buckets of mud and slip on the ice. Claimant had a number of medical visits complaining of shoulder pain prior to the injury in question. Claimant was perfectly able to perform all aspects of his city driver job with employer prior to the injury.

On April 11, 2013, claimant sustained an injury which arose out of and in the course of his employment to his right shoulder when a very heavy door was caught by the wind. The door slammed into claimant's right shoulder with significant force thereby causing injury. Later, that same day, claimant attempted to use an 8-pound hammer at work which caused significant pain. The next day claimant sought out treatment for the right shoulder injury as the pain did not dissipate. Claimant initially received conservative care with 15 to 20 physical therapy visits. His treatment with Terrance Kurtz, M.D., was with full knowledge and implied approval of the employer. He was then referred for an orthopedic consultation.

Claimant asked to treat with Scott Neff, D.O., because his 1987 rotator cuff surgery was performed by Dr. Neff with a good result. Again, employer did not object to treatment with Dr. Neff, and apparently paid most of the bills from that treatment until employer denied causation. Dr. Neff diagnosed claimant with a partial articular sided tear of the distal fibers of the supraspinatus. Dr. Neff repeatedly opined that the work injury caused the need for treatment. Dr. Neff recommended arthroscopic examination. Claimant was ordered by Dr. Neff to receive a cardiac assessment prior to surgery. The cardiac consultation occurred during a time when claimant was off work for this work injury. Claimant lost time for the cardiac evaluation and treatment June 18, 2013 through full duty release on July 5, 2013. (Exhibit D, page 7) These dates are in conflict with the hearing assignment order which indicates the lost time was through July 8, 2013. I find that the lost time for cardiac evaluation and treatment was precipitated by the treatment for the April 11, 2013, injury and as such causally connected to the treatment for this injury.

Upon return from cardiac evaluation, Dr. Neff changed his attitude concerning surgery for claimant's injured right shoulder. Claimant received an injection into the right shoulder which helped with pain and mobility. Dr. Neff ended the healing period August 18, 2013. Dr. Neff opined that claimant reached maximum medical improvement one year post injury, May 20, 2014. Dr. Neff released claimant to return to work full duty. Dr. Neff later opined that no restrictions were imposed as claimant's retirement was pending. (Ex. C, p. 27-30) Dr. Neff did state, as a general rule, that workers with shoulder problems should not do over the shoulder lifting. Dr. Neff also testified, "We don't have a normal shoulder and we have a 66 year old guy." (Ex. O, p. 37) Dr. Neff flip flopped on his opinion of causation of the shoulder problems after claimant had finished treatment. The flip flop occurred after the defendants retained legal counsel to inquire of his opinions and take a deposition. Dr. Neff then opined that claimant's problems were all pre-existing and unrelated to the door incident of April 11, 2013.

Claimant returned to work with no work restrictions. Claimant provided credible testimony that he could not do the lifting as before. Camaraderie abounded at the workplace, and claimant's co-workers chipped in where claimant was unable to perform the lifting. Claimant did most of the forklift work with co-workers doing the manual work. Claimant uses Tylenol on a daily basis for pain relief. Claimant continued working for employer through date of hearing at about 40 hours per month at the same hourly rate of pay.

Claimant sought an independent medical evaluation from John Kuhnlein, D.O., on August 3, 2015. Dr. Kuhnlein opined that claimant's injury was the cause of the right shoulder problems. He further opined that claimant sustained permanent partial impairment as a result of the April 11, 2013 injury of about 5 percent to the body as a whole. Dr. Kuhnlein also stated that he did not apportion the impairment between the old 1987 rotator cuff repair and would let the workers' compensation commissioner do that. It is found that claimant did sustain permanent partial impairment to the right shoulder caused by the April 11, 2013, injury based on the credible opinion of Dr. Kuhnlein. The impairment was based on measurements of the right arm. The left arm was not used as a comparison because of a sequela injury caused by overuse. Since claimant had full function of the right shoulder prior to the injury, it is found that all of the permanent partial impairment is causally connected to the work injury.

No impairment was rated to the left shoulder. No evidence produced indicates that claimant suffered no impairment to the left shoulder. Claimant has established causation to the injury and as such, the need for conservative medical treatment until the left shoulder returns to pre injury state.

Dr. Kuhnlein recommended work restrictions commensurate with the functional capacity evaluation, lifting 50 pounds from floor to waist, 50 pounds occasionally from waist to shoulder and 30 pounds occasionally over the shoulder. Weights held farther than an elbow from the body should be limited to 30 pounds occasionally. The report issued by Dr. Kuhnlein is very detailed. It refers to Dr. Neff's early opinions. It is well reasoned and credible in its findings. The opinion that the injury aggravated if not caused the shoulder

problems seems a common sense finding when the facts are viewed in the context of the record as a whole. The objective finding of a partial tear weighs toward a finding that the April 11, 2013 injury either caused the tear or caused it to become symptomatic. It is further found that the left shoulder symptoms are an aggravation of a preexisting condition caused by overuse and as such a sequela of the April 11, 2013 right shoulder injury.

Dr. Neff's reversed his causation opinion after treatment was completed. He was on board with causation to the injury until the employer retained counsel. It is difficult to reconcile the causation opinions rendered during treatment with the final opinion at deposition. The causation opinions issued by Dr. Neff during treatment seem more credible than opinions after treatment had ended. The opinions are close in time to the event and at a time when payment was in question for said treatment. Where conflicts exist in medical opinions, those of Dr. Kuhnlein are found more credible as based on objective findings and records accumulated close in time to the events. When viewed globally, Dr. Kuhnlein gave opinions that are reasonable. It is noted that claimant had preexisting weak shoulders. It is common sense that claimant's shoulders were more susceptible to injury. The preexisting issues make it far more likely that claimant sustained injury on April 11, 2013.

Claimant lost confidence in Dr. Neff after his reversal on medical causation. Claimant was also very confused with Dr. Neff's change in attitude over surgery after the cardiac consultation. Dr. Neff failed to communicate to claimant why he changed his surgery opinion. Claimant desires a transfer of care and treatment to either Dr. Kyle Galles or Dr. James Nepola.

Claimant underwent a functional capacity evaluation on July 23, 2014. Claimant was found to be in the medium physical demand category for work. The evaluation was not ordered by any treating doctor. A cost for creating the report as opposed to the examination was not presented. The functional capacity evaluation cost $960.00.

It is found that claimant has work restrictions caused by the April 11, 2013, injury limiting him to the medium physical demand work. The causally connected restrictions limit work above shoulders to occasional lifting no greater than 30 pounds. Claimant is also limited to occasional lifting of 50 pounds from waist to shoulders. Claimant can lift 50 pounds from floor to waist.

It is found that claimant has not suffered an actual loss in hourly wage as a result of this work injury. Employer has continued to offer employment at the same hourly wage.

Claimant incurred mileage expense for travel to and from reasonable and necessary medical treatment causally connected to the work injury. The travel expenses are set forth in Exhibit 9 and total $830.54.

Claimant incurred medical expenses as set forth in Exhibit 8. The parties failed to determine which medical expenses were paid and which remain unpaid. It is found based on early opinions of Dr. Neff and the independent opinion of Dr. Kuhnlein that the Exhibit 8

medical expenses are causally related to the April 11, 2013 injury. It is found that the expenses are reasonable and necessary treatment and fair and reasonable charges. There is a lack of evidence showing the reasonableness of the expenses. The offer of treatment by the treating doctors and making charges based on that treatment lead to a finding of reasonable charges and necessary treatment.

Dr. Neff declined to give claimant an impairment to the shoulder on February 1, 2015. He also said no restriction was appropriate. In turn, claimant obtained an independent rating from Dr. Kuhnlein at a cost of $3,523.00.

REASONING AND CONCLUSIONS OF LAW

The first issue is whether the April 11, 2013 injury is a cause of permanent disability.

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa 1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

Having found, based on the opinion of Dr. Kuhnlein, that the left shoulder injury resulted in permanent partial impairment and work restrictions, it is held that the injury caused permanent disability.

The next issue is whether claimant is entitled to temporary disability or healing period for the time June 18, 2013 through July 8, 2013.

Healing period compensation describes temporary workers ' compensation weekly benefits that precede an allowance of permanent partial disability benefits . Ellingson v. Fleetguard , Inc. , 599 N.W.2d 440 (Iowa 1999) . Section 85.34 (1) provides that healing period benefits

are payable to an injured worker who has suffered permanent partial disability until the first to occur of three events . These are: (1) the worker has returned to work ; (2) the worker medically is capable of returning to substantially similar employment ; or (3) the worker has achieved maximum medical recovery . Maximum medical recovery is achieved when healing is complete and the extent of permanent disability can be determined. Armstrong Tire & Rubber Co. v. Kubli, Iowa App., 312 N.W.2d 60 (Iowa 1981). Neither maintenance medical care nor an employee's continuing to have pain or other symptoms necessarily prolongs the healing period .

Having found that the cardiac evaluation and care was a direct result of treatment necessitated by the shoulder, it follows that the lost time is compensable as healing period. The time period of June 18, 2013 through July 6, 2013 is clearly compensable. This is not an order for double payment. The employer receives credit for prior payments made. Claimant is entitled to healing period for the time period April 15, 2013 through August 19, 2013. It appears the correct order for additional healing period is June 19, 2013 through July 7, 2013. (Ex. L, p. 10)

The third issue concerns the nature and extent of permanent partial disability and whether it is industrial disability.

When disability is found in the shoulder, a body as a whole situation may exist. Alm v. Morris Barick Cattle Co., 240 Iowa 1174, 38 N.W.2d 161 (1949). In Nazarenus v. Oscar Mayer & Co., II Iowa Industrial Commissioner Report 281 (App. 1982), a torn rotator cuff was found to cause disability to the body as a whole.

The permanent disability is industrial disability based on impairment caused by a partially torn rotator cuff and shoulder strain. Whether the injury caused or aggravated the rotator cuff tear is not material. The resultant disability is the proximate result of rotator cuff pain and loss of range of motion. The industrial disability is limited to the right shoulder. No industrial disability is rated for the left shoulder sequela. The medical evidence demonstrates injury and impairment beyond the head of the right humerus at the site of the rotator cuff. This is a body as a whole injury and disability must be evaluated industrially.

Since claimant has an impairment to the body as a whole, an industrial disability has been sustained. Industrial disability was defined in Diederich v. Tri-City R. Co., 219 Iowa 587, 258 N.W. 899 (1935) as follows: "It is therefore plain that the legislature intended the term 'disability' to mean 'industrial disability' or loss of earning capacity and not a mere 'functional disability' to be computed in the terms of percentages of the total physical and mental ability of a normal man."

Functional impairment is an element to be considered in determining industrial disability which is the reduction of earning capacity, but consideration must also be given to the injured employee's age, education, qualifications, experience, motivation, loss of earnings, severity and situs of the injury, work restrictions, inability to engage in employment for which the employee is fitted and the employer's offer of work or failure to so offer.

McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Olson v. Goodyear Service Stores, 255 Iowa 1112, 125 N.W.2d 251 (1963); Barton v. Nevada Poultry Co., 253 Iowa 285, 110 N.W.2d 660 (1961).

Compensation for permanent partial disability shall begin at the termination of the healing period. Compensation shall be paid in relation to 500 weeks as the disability bears to the body as a whole. Section 85.34.

The claimant's age of 65, at the time of injury, weighs toward a higher industrial disability. The age combined with work restrictions will adversely impact claimant's ability to access jobs for which he has prior training and experience. The majority of claimant's jobs have been trucking which often require loading and unloading, much of which is heavy physical work. The impact on claimant is far more than a younger worker, similarly situated. The work restrictions, limiting claimant to medium demand work category, also limit claimant's ability to access the job market. The restrictions and moderate impairment lead to a conclusion that claimant has lost an ability to make a living in jobs for which he has prior training and experience. It adversely impacts claimant far more due to age. The employer's retention of claimant at the same hourly wage and job detract from a significant industrial disability. Claimant did return to the same job at the same hourly rate of pay. This demonstrates that claimant has not lost an actual ability to earn the same hourly wage enjoyed at the time of injury. The fact that claimant receives accommodation from co-workers also bolsters a finding of industrial disability. Unfortunately, most jobs do not have coworkers willing to chip in and help. The prior work experience primarily as a trucker combined with the work restriction lead to the undeniable conclusion that the injury of April 11, 2013 caused 15 percent industrial disability. It is held that claimant incurred 15 percent industrial disability as a result of the April 11 injury and resulting disability. The parties stipulated a commencement date of May 20, 2014, the date of maximum medical improvement. This stipulation is accepted.

The fourth issue is whether the rate of weekly benefits is $716.93 or $733.20.

Section 85.36 states the basis of compensation is the weekly earnings of the employee at the time of the injury. The section defines weekly earnings as the gross salary, wages, or earnings to which an employee would have been entitled had the employee worked the customary hours for the full pay period in which injured as the employer regularly required for the work or employment. The various subsections of section 85.36 set forth methods of computing weekly earnings depending upon the type of earnings and employment.

If the employee is paid on a daily or hourly basis or by output, weekly earnings are computed by dividing by 13 the earnings over the 13-week period immediately preceding the injury. Any week that does not fairly reflect the employee's customary earnings that fairly represent the employee's customary earnings, however. Section 85.36(6).

Having found that claimant's work history is composed primarily of work over 40 hours and significant overtime it follows that the low weeks under 30 hours should be excluded. It

is held that the week of February 9, 2013 is excluded as not representative, which results in a weekly rate of $733.20.

The fifth issue involves benefits pursuant to Iowa Code section 85.27.

The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Defendants have lodged a number of objections to claimant's medical expenses.

a. Whether the treatment was reasonable and necessary and the fees are reasonable. Having found the treatment as reasonable and necessary and fees reasonable it follows that the medical expenses in Exhibit 8 are the responsibility of the employer. It is held that unpaid expenses in Exhibit 8 shall be paid by employer as the treatment was reasonable and necessary and the fees fair and reasonable. Claimant incurred mileage expense for travel to and from reasonable and necessary medical treatment causally connected to the work injury. The travel expenses are set forth in Exhibit 9 are compensable and shall be ordered paid by employer in the amount of $830.54.

b. Whether the medical expenses are causally connected to the work injury. Having found that the treatment was causally connected based on the opinion of Dr. Kuhnlein and the contemporaneous opinions of Dr. Neff when treating, it follows that causation has been established. The Exhibit 8 medical expenses are held as causally connected to the work injury.

c. Whether the expenses were authorized by employer. The initial treatment by Drs. Kurtz and Neff was paid for by the employer. The treatment with Drs. Kurtz and Neff was with full knowledge of employer and as such authorization is implied by employer's inaction. The authorization defense is not viable for treatment after employer denied medical care. The medical expenses presented in Exhibit 8 are not barred by the authorizing defense.

d. Whether claimant is entitled to alternate medical care. It is held that claimant has established entitlement to alternate medical care for both the left and right shoulders. The physician patient relationship with Dr. Neff has eroded because of the flip flop of Dr. Neff on the causation issue. It is accepted as correct that claimant does not trust Dr. Neff after being led down the path of causation during treatment and then an abrupt about face after treatment ended. It is also concerning that Dr. Neff changed his attitude on surgery after the cardiac evaluation. It is held that claimant is entitled to a transfer of treatment to either Dr. Kyle Galles or Dr. James Nepola. Employer shall choose one provider for treatment after consultation with the providers on whether they will accept the claimant as a patient.

The sixth issue is whether claimant is entitled to Iowa Code section 85.39 independent medical evaluation.

Section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

Defendants are responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). Claimant need not ultimately prove the injury arose out of and in the course of employment to qualify for reimbursement under section 85.39. See Dodd v. Fleetguard, Inc., 759 N.W.2d 133, 140 (Iowa App. 2008).

The employer's authorized doctor stated that claimant had no permanent impairment and no work restrictions prior to claimant seeking an independent medical evaluation with Dr. Kuhnlein. This triggers claimant's entitlement to a section 85.39 evaluation. Claimant has established entitlement to reimbursement for the Dr. Kuhnlein examination in the amount of $3,523.00.

Issue seven is whether the defendants are entitled to credit under Iowa Code section 85.38(2). Indeed, they are entitled to credit for benefits previously paid concerning all issues in dispute. Since the parties are unable to verify what has and has not been paid, the amounts and credit entitlement are left to the parties to resolve.

The final issue concerns taxation of costs set forth in Exhibit 10.

The final issue is costs. Claimant seeks costs set forth in Exhibit 10. Costs are discretionary. "All costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Iowa Code section 86.40 (2013); see also, 876 IAC section 4.33.

The only cost that is in dispute is the functional capacity assessment at a cost of $950.00. Claimant seeks to tax this as a cost. The fee was not broken down into examination and report cost. (Ex. 10 p. 4) In Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 845 (Iowa 2015), the Iowa Supreme Court held that only the cost of drafting a report in lieu of testimony by a physician is taxable as a cost in a worker's compensation case. Under this standard, I cannot award the functional capacity examination bill as a cost. The remaining costs are allowable and are assessed against defendants.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant healing period benefits commencing April 15, 2013, through August 19, 2013 at the rate of seven hundred thirty-three and 20/100 ($733.20).

Defendants shall pay claimant seventy-five (75) weeks of permanent partial disability at the rate of seven hundred thirty-three and 20/100 ($733.20) commencing on the stipulated date, May 14, 2014.

Defendants shall pay accrued benefits and costs in a lump sum together with interest, pursuant to Iowa Code section 85.30 and file subsequent reports as required by this agency.

Defendants are entitled to a credit for benefits previously paid.

Claimant's weekly rate of compensation is seven hundred thirty-three and 20/100 dollars ($733.20).

Defendants shall pay claimant's medical expenses as shown in Exhibit 8 with credit for benefits previously paid pursuant to Iowa Code section 85.38(2).

Defendants shall immediately transfer claimant's treatment to either Dr. Kyle Galles or Dr. James Nepola. Employer shall choose one provider for treatment, after consultation with the providers on whether they will accept the claimant as a patient. Defendants shall pay for such reasonable and necessary treatment causally connected to the right and left shoulder injuries.

Defendants shall pay claimant for the Dr. Kuhnlein examination in the amount of three thousand five hundred twenty-three and no/100 dollars ($3,523.00) pursuant to Iowa Code section 85.39.

Defendants shall pay medical travel expenses in the amount of eight hundred thirty and 54/100 dollars ($830.54) pursuant to Iowa Code section 85.27.

Defendants shall pay all costs of this action with the exception of the functional capacity evaluation.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rule 876 IAC 3.1(2).

Signed and filed this ___10th____ day of August, 2016.

_____

JOSEPH L. WALSH
DEPUTY WORKERS'
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