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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Trial Court Case No. 1507304

Kenneth L. Barr, Employee, Appellant,

v.

Darlington County School District, Employer,
and SC School Boards Insurance Trust,
Carrier, Respondents.

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SC Court of Appeals

NOTICE OF APPEAL

Appellant, Kenneth L. Barr, appeals the Decision and Order of the SC Workers' Compensation Commission Appellate Panel filed June 5, 2018. Appellant received notice of entry of the Appellate Panel Decision and Order (the final Agency Decision) according to an unsigned "Certificate of Service" by email on June 5, 2018. The Appellate has not been properly served as required by Statute, SC Code §42-17-60, which requires service by registered mail. Email service is allowed for under Commission Reg. 67-210 but a Regulation may not alter or add to the terms of a Statute. Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (SC App. 2006). A request for proper service has been made to the Commission and a Motion to Stay the appeal will be filed to allow for proper

service, and a Motion for Rehearing pursuant to SC Code §1-23-380.

Pursuant to SC Code §42-17-60, the grounds of the appeal and/or the errors of law presented to the Court are set out hereinafter:

1. That where the Defendants had sought to require the Claimant, who lives and worked for his employer in Darlington County to be evaluated not by a medical doctor but by a psychologist in Charleston, SC; and wherein the Claimant agreed to appear before a medical doctor for an independent medical evaluation pursuant to SC Code §42-15-80 by a local physician at reasonable times and places; and wherein an Order was issued without hearing granting the Defendant's Motion to Compel; and wherein the Claimant filed Writs of Mandamus and Prohibition before the Fourth Judicial Circuit Court alleging that the Defendants were not entitled to an evaluation by a psychologist but only by a qualified physician or surgeon at reasonable times and places, and wherein the Complaint sets forth that reasonable times and places has been interpreted by the SC Supreme Court to be in the Claimant's locality where he lives and works; and wherein the Circuit Court issued a temporary Restraining Order based on that verified complaint; and wherein after a telephone conference with the Defendants and the Commission, the Claimant agreed to dismiss the Writs of Mandamus and Prohibition (without an Order of the Circuit Court as requested by the Commission) and agreed to return jurisdiction to the Commission and file a Motion for Reconsideration which was filed on December 22, 2015; and

wherein thereafter the Commission issued a specific Order December 22, 2015 denying the Defendants' right to the evaluation by a psychologist but reaffirmed the right of the Defendants to an independent medical evaluation by a, "properly qualified examiner at reasonable time and place"; and wherein the hearing set for January 7, 2016 was postponed and reset for February 24, 2016; and wherein the Defendants took no action and did not notify the Claimant of an independent medical evaluation until January 25, 2016 setting an independent medical evaluation with Dr. Paul Pritchard again in Charleston, South Carolina for February 2, 2016 to which the Claimant renewed his objection on the basis that the examination was not at reasonable times and places as required by the Act to which Defendants filed another Motion to Compel without an Affidavit as to no qualified physician or surgeon being available in Darlington/Florence area for the SC Code §42-15-80; and wherein Commissioner Beck notified the parties that the Commissioner would grant the Motion; and wherein the examination was conducted on February 2, 2016; and wherein after formal written objections with supporting Memorandum of Law from Claimant were made as to numerous reports and documentary evidence offered by Defendants from out of area experts both prior to and at the February 24, 2016 scheduled hearing; and wherein on February 24, 2016 after those objections and at the time of the hearing, the Hearing Commissioner instead of excluding the evidence pursuant to Reg. 67-613 and SC Code §1-

23-330 and proceeding with the hearing, continued the hearing to allow the Defendants time to take the deposition of Dr. Paul Pritchard and telling the Claimant he could exercise his due process right to cross-examine these out of the area alleged experts by taking their depositions at his expense, based on the above, the Commission erred as a matter of law:

A. By allowing an examination which was not at reasonable times and places as is required by the Act and as was set forth in Commissioner Beck's Order as part of the agreement returning jurisdiction to the Commission, wherein the Commissioner's Order specifically noted that the examination was to be at, "reasonable times and places" and where such examination was not in accordance with the Supreme Court Decisions interpreting reasonable times and places;

B. By postponing the hearing set for February 24, 2016 where the Defendants had specifically violated the directives of the Commission as to the performance of an independent medical evaluation and where the Commission had granted the Defendants the right to an independent medical evaluation on December 22, 2015 but Defendants did not schedule it and give notice to the Claimant until January 24, 2016 and wherein knowing about the objection to the report and even though the examination was conducted on February 2nd, there is no evidence in the Record that there

was any attempt to take the deposition prior to the February 24th hearing;

C. By postponing the hearing on February 24, 2016 without Motion as required by Rule 67-613 to allow the Defendants to take the deposition;

D. By postponing the hearing on February 24, 2016 and not proceeding with a hearing at that time excluding the documentary evidence as specifically objected to for numerous reasons including those as set forth in the Memorandum which was before the Commissioner, before and at, the Prehearing conference;

E. By not sustaining the objection to the submission of documentary evidence from several experts that had neither seen nor evaluated the Claimant and had no personal knowledge of the Claimant and/or which was not based on properly phrased hypotheticals and by continuing the hearing shifting the expense of cross-examination to the Claimant thus violating the Claimant's due process rights by requiring the Claimant to take the deposition of the Defendants' witnesses whose written reports the Defendants sought to submit into evidence, and which later and now serve as the very basis for the denial of the Claimant's right to benefits under the Act.

2. That the Commission erred as a matter of law by continuing the hearing set for February 24, 2016, and overruling objections to the documentary evidence sought to be admitted and

specifically the documentary evidence from Dr. Paul Pritchard, M.D., Dr. Mark T. Wagner, Ph.D., Dr. L. Randolph Waid, Ph.D., and Dr. David H. Eagerton, Ph.D. and by the denying the Claimant due process of law by shifting the responsibility and expense of taking the depositions of these witnesses to the Claimant wherein this evidence was specifically and highly prejudicial to the Claimant in that these reports served as the very basis for a denial of benefits. It is improper to shift the burden of expense for any testimony or evidence sought to be admitted by any party to the opposing party. The right to cross-examination of your accusers and/or opposing witnesses is one of the most fundamental rights guaranteed by due process.

3. That the Commission erred as a matter of law by continuing the February 24, 2016 hearing and allowing the submission of reports from Dr. Mark Wagner, Ph.D., Dr. L. Randolph Waid, Ph.D., and Dr. David H. Eagerton, Ph.D. whose reports were dated February 12, 2016, February 12, 2016 and February 14, 2016 respectively wherein the reports of Dr. Wagner, Ph.D. and Dr. Waid, Ph.D. were submitted under cover letter dated February 13, 2016 (Saturday) but with an Affidavit of Service on February 12th and which was not received until February 16th, the day after a Federal holiday on Monday the 15th. The report of Dr. Eagerton, Ph.D. was not mailed and filed, allegedly in accordance with the Administrative Procedures Act and the Rules of this Commission, until February 15th, again which was a Federal holiday, but was not received until February 16th for the

February 24th hearing. Although an Order denying the right to send Mr. Barr to Dr. Wagner, Ph.D. was entered December 22, 2015 and Depositions were taken of Dr. White, November 23, 2015; Dr. Skinner, December 10, 2015 and Dr. Lind, Ph.D., February 19, 2016, the reports of Dr. Waid, Ph.D., Dr. Wagner, Ph.D. and Dr. Eagerton, Ph.D. were not provided to the Claimant until February 16th, eight (8) days before the hearing. Those untimely reports then served as the very basis for denial of the Claimant's entitlement to benefits. Thus, a continuance was highly prejudicial to the rights of the Claimant to due process of law. There is no provision under the Workers' Compensation Act for the submission of documentary evidence except by Subpoena (§42-3-150) and the only exception is contained with the Administrative Procedures Act which provides that documentary evidence may only be submitted where it will not substantially prejudice the interest of any party.

4. That the Commission erred as a matter of law by granting a Motion to Compel the Claimant and requiring the Claimant to sign a Release of Information Form wherein the Commission has no right under its statutory authority to require or compel the Claimant to sign such a form and wherein the Motion was granted without a hearing and wherein the Claimant forwarded an Authorization to Release Form directly to the medical group in question authorizing the specific release directly to Defense Counsel of all requested medical records. The Motion to Compel and Rule to Show Cause resulted in prejudice to the Claimant and

a hearing not being held on his claim from May through August 31, 2016.

5. That the Commission erred as a matter of law by issuing the 2nd Amended Order submitted by the Defendants wherein the Commissioner had issued his directives for an Order on November 17, 2016; and the Claimant immediately thereafter brought to the attention of the Commissioner that he did not address the alternative basis for Claimant's claim; that being that his exposure to VOCs in the workplace had resulted in causing and/or aggravating and causing to become symptomatic his chronic headaches. Nowhere in his directives had the Commissioner addressed this proposition and upon wherein upon bringing this to the attention of Defense Counsel and without further directive of the Commissioner, Defense Counsel amended the Order and made her own unsupported Findings of Fact and Conclusions of Law addressing the alternative claim for benefits, which is in violation of SC Code §42-9-5 and §42-17-40 and the prior Decisions of the SC Supreme Court.

6. That based upon the reliable, probative and substantial evidence in the Record, the Commission erred by not awarding the Claimant benefits where there is absolutely no evidence in the Record, expert or otherwise, that the Claimant's problems with headaches, memory, fatigue and confusion and psychological functioning are not causally related to his exposure to VOCs in the workplace.

7. That the Commission erred as a matter of law by considering and basing its opinion on the medical report and deposition of Dr. Paul Pritchard wherein the Record establishes that in violation of SC Code §42-15-95 the Defendants submitted letters and extensive medical records to Dr. Pritchard, without notifying the Claimant and pursuant to statute, all such evidence should have been excluded.

8. That the Commission erred as a matter of law where there is absolutely no expert medical opinion other than that the Claimant's headaches, memory, fatigue, confusion, neurological, and psychological problems stem from his exposure to VOCs from his job as a painter with the School District. Even Dr. Pritchard who opined in his report that he did not find that the Claimant had suffered from an encephalopathy; opined: that he could not, "speak authoritatively on the potential for impairment from the various paints and other compounds to which he reports on-the-job exposure"; that he recommended that he should be, "evaluated by an occupational medicine physician who has training and experience in toxicology"; that VOC exposure would cause acute headaches; and also opined and agreed that by history that his headaches were consistent with chronic daily headache.

9. That the Commission erred as a matter of law in the Statement of the Case in that it is an inaccurate summary of the testimony and evidence submitted.

10. That the Commission erred as a matter of law by not amending the Statement of the Case to add and/or to amend the

Statement to accurately reflect in the summary of the evidence, for example, after going to work for the School District as a painter using commercial paints, the Claimant did not continue to operate his painting business but only performed several side jobs. He also did not use commercial paints in his residential painting business.

11. That the Commission erred as a matter of law by considering the opinion of Dr. Eagerton, Ph.D. who as is admitted not a medical doctor, but, yet who stated his opinion to a reasonable degree of scientific and "medical" certainty. The Commission erred by considering this as a medical opinion for which the Ph.D. is not qualified.

12. That the Commission erred as a matter of law in making Finding of Fact #1 as written in that it misstates the position of the Claimant and does not represent an appropriate view of the evidence in the Record.

13. That the Commission erred as a matter of law by making Finding of Fact #2 which implies that the Claimant prior to his employment was diagnosed on a continual basis with conditions as outlined in that Finding of Fact. There is no evidence in the Record of a continuing diagnosis of or any treatment for any of those problems. The last medical report dated May 27, 2009 was for treatment of left arm pain; on September 19, 2008, upper respiratory infection with chest congestion; and on May 15, 2009, indigestion and prostrate.

14. That the Commission erred as a matter of law and fact in making Finding of Fact #4 in that it does not properly reflect the evidence and it ignores the initial opinion Dr. White expressed on May 21st of 2015 that the Claimant was suffering from, "fatigue, migraines and memory loss" due to exposure to VOCs in the commercial paints used by the Claimant.

15. That the Commission erred as a matter of law and fact in Finding of Fact #5 in that it improperly states the psychological opinions and findings based on the neuropsychological testing conducted by Dr. Lind. Contrary to the Finding, it was Dr. Lind's opinions stated to a reasonable degree of psychological certainty that the test results were consistent with mild organic brain damage and he recommended repeat testing in one year as to whether or not that was progressive.

16. That the Commission erred as a matter of law and fact in referencing the testimony and opinions of Dr. Pritchard whose testimony and evidence should not have been admitted; however his testimony establishes that he found the Claimant's history to be consistent with chronic headaches; that he found the Claimant to be an accurate reporter; that he did not deny or dispute that the Claimant was having severe chronic headaches; that VOC exposure will cause acute headaches and that in reference to objective tests to confirm or deny headaches, Dr. Pritchard confirmed and stated the medical opinion that there were no objective medical

tests which will either confirm or deny headaches and specifically stated, "I would say none at all."

17. That the Commission erred as a matter of law and fact in reference to Finding of Fact #7 for the reasons as stated in the other Exceptions but in addition thereto, there is no evidence that Dr. Mark Wagner, Ph.D. had any personal knowledge of the Claimant nor was his report based upon actual examination, nor is there any evidence that his reports are based upon properly phrased hypotheticals and in addition thereto, he expresses no opinion as to whether or not the Claimant is suffering from severe disabling headaches.

18. That the Commission erred as a matter of law, in addition to all the foregoing reasons in reference to the consideration of the report by Dr. Randolph Waid, by considering his report in that there is no evidence that he expressed any opinion concerning the Claimant's headaches nor did he make any statement that the Claimant was not factually and truthfully reporting and was not suffering from severe disabling headaches.

In addition to the foregoing reasons for not finding this report to be not supportive of the denial of benefits based on severe chronic disabling headaches, and while it is true that the Claimant's primary complaint was and is one of disruptive headaches, Dr. Waid states that his headaches existed, "prior to his engagement in employment with Darlington County School District." There is absolutely no evidence in the Record that

the Claimant was suffering from headaches or chronic headaches at all prior to him going to work for the School District.

19. That the Commission erred as a matter of law and fact in making Finding of Fact #9 in that in addition to the objections as set forth hereinabove and that the Commissioner should not have considered this evidence at all based on the violation of the Claimant's due process right to cross-examine this Ph.D., here again in this Finding the Commissioner notes specifically that Dr. Eagerton, Ph.D., who is admittedly not a medical doctor, states a medical opinion to a reasonable degree of medical certainty.

20. That the Commission erred as a matter of law and fact in that the decision does not address Dr. Bennett's toxicological findings in reference to the Claimant's exposure and Dr. Bennett's opinion that Mr. Barr's severe disabling headaches stemmed from his exposure to VOCs in the paints with which he worked with the School District. The finding of Dr. Bennett in reference to headaches and his supportive toxicological opinions are not even referenced in reference to headaches.

21. That the Commission erred as a matter of law by making Finding of Fact #11. In addition to the Finding as set out not being factually accurate as to Dr. Healy's testimony in his deposition, the Finding of Fact does not address Dr. Healy's opinion that the Claimant's disabling headaches were caused by his exposure to VOCs and that that opinion was reaffirmed under oath at his deposition.

22. That the Commission erred as a matter of law in making Finding of Fact #12 and particularly specifically committed an error of law in this Finding by referring to there being no unusual or extraordinary conditions to his employment as there was no claim being made for any type of stress related claim or claim unrelated to physical inhalation or absorption exposure injury.

23. That the Commission erred as a matter of law in making Finding of Fact #13 wherein the greater weight of the evidence clearly establishes that the Claimant was daily exposed to VOCs in the commercial paints with which he worked; that he had never had a problem prior to the time that he went to work with the School District in 2009 and first reported with headaches in 2010; and that his consistent complaint throughout and since 2010 has been severe chronic headaches; and wherein all of the lay and medical testimony and evidence supports that his chronic headaches are due to his exposure to VOCs.

24. That the Commission erred as a matter of law by making Conclusion of Law #1 wherein the Commission found that the evidence was not consistent with a Finding as a matter of Law that the Claimant had sustained injury by accident wherein the evidence specifically establishes that under subsection 42-1-160(f) combined with either and both §42-1-172 and §42-11-10, et. seq., that it is consistent with establishing that the Claimant sustained injury by accident in the nature of repetitive inhalation and absorption exposure. It also establishes that due

to his inhalation exposure and absorption exposure to VOCs compounds in the workplace on a continual and consistent basis from the normal exposure to Claimant as a commercial painter to commercial paints as part of his job that he suffers from an occupational disease.

25. That the Commission erred as a matter of law by not finding that the Claimant has an occupational disease as defined under SC Code §42-11-10, et. seq. The Claimant is a commercial painter and was exposed to commercial paints on a continual and daily basis in his job and was exposed, according to the evidence, to VOCs as part of the commercial paints he used continually throughout the day. The Claimant's job was that of a commercial painter and in that job and as part of that job, he was exposed to VOCs which are in excess of those hazards that are ordinarily incident to employment and which are peculiar to the employment in which he was engaged. His condition of severe chronic headaches stems directly from his exposure to VOCs in the workplace as part of the normal working conditions of his job due to his exposure to hazards peculiar to that particular employment as established by medical opinion evidence stated to a reasonable degree of medical certainty to which there is no contrary opinion in reference to the particular opinion that his chronic residual headaches are caused by his exposure to VOCs in the workplace.

26. That the Commission erred as a matter of law by not finding that the Claimant had sustained a repetitive trauma injury as defined under §42-1-172 and by failing to find as a

matter of law that the Claimant has sustained repetitive trauma.

The Commissioner's Conclusion of Law ignores the evidence in that Dr. White stated the opinion to a reasonable degree of medical certainty that in his opinion the Claimant's headaches, memory problems and fatigue were caused by his exposure to VOCs in the workplace on a daily and repetitive basis. Dr. Healy also expresses the same opinion that the Claimant's severe chronic headaches were caused by his repetitive exposure to VOCs in the workplace. In fact, Dr. Pritchard also expressed the same opinion and the Commissioner's Conclusion of Law to the contrary is an inaccurate statement of the facts and evidence presented. Dr. Nicholas Lind, Ph.D., according to the neuropsychological testing performed by Dr. Lind, found and stated the opinion to a reasonable degree of psychological certainty that Mr. Barr's cognitive complaints were secondary to his exposure to organic compounds. He also stated the opinion to a reasonable degree of psychological certainty that the Claimant's psychological problems were causally related to his exposure to VOCs in the workplace. He stood by those opinions in his deposition.

27. That the Commission erred as a matter of law in Conclusion of Law #4 in that the evidence clearly establishes both from a psychological standpoint of Dr. Lind's treatment and evaluation and the opinions of Dr. Marshall White, and more importantly, of the opinions of Dr. Healy that the Claimant's psychological problems stemmed from his exposure to volatile

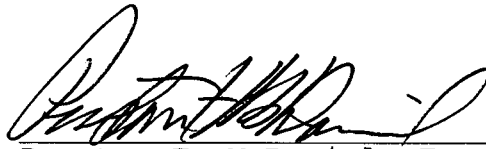
organic compounds and the severe chronic headaches that he had sustained as a result of that repetitive exposure.

28. That the Commission erred as a matter of law in making Conclusions of Law #5, #6, #7 which are based on and are a restatement of the denial of benefits, wherein the substantial evidence and all of the medical opinion evidence establishes that the Claimant has sustained a repetitive trauma injury and/or occupational disease resulting and arising out of his repetitive and continual exposure to VOCs in the workplace. He should be placed under the care of Dr. Healy, found to be not at maximum medical improvement, and allowed to treat for these residual severe problems in reference to his chronic severe headaches and fatigue and memory loss.

29. That the Hearing Commissioner and then Commission erred as a matter of law by issuing an Order upon which it did not make specific Findings of Fact and Conclusions of Law as to the essential issues presented to the Commission for hearing. In this matter, the original Hearing Commissioner in his Notes for Decision made no Findings of Fact or Conclusions of Law as required by law concerning one of the "essential" issues presented to him for hearing, that being whether or not the Claimant's headaches were causally related to his exposure to the commercial paints in his job. Without further Findings of Facts or Conclusions of Law after this was brought to the attention of the Hearing Commissioner, Defense Counsel submitted another proposed Order including Findings of Fact and Conclusions of Law

on that issue although with no direction and no further Findings were made by the Commissioner. That Order was signed/filed within one (1) day of the submission of that proposed Order. Both Statute and case law require the Commissioner, not Defense Counsel, to make detailed Findings of Facts and Conclusions of Law on each "essential" issue presented for decision.

Respectfully submitted,



Preston F. McDaniel, Esquire
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

and

Gerald Malloy, Esquire
MALLOY LAW FIRM
Post Office Box 1200
Hartsville, South Carolina 29551

Attorneys for Appellant

June 29, 2018

Other Counsel of Record:

Kirsten L. Barr, Attorney
Trask & Howell
Post Office Box 2167
Mt. Pleasant, SC 29463
(843) 881-1027

Attorney for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

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Trial Court Case No. 1507304

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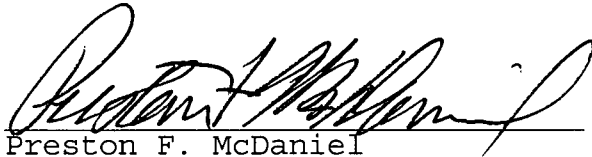
v.

Darlington County School District, Employer,
and SC School Boards Insurance Trust,
Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the **NOTICE OF APPEAL** by depositing a copy of it in the United States Mail, postage prepaid, on June 29, 2018 addressed to: Ms. Amy Bracy, Judicial Director, South Carolina Workers' Compensation Commission, Post Office Box 1715, Columbia, South Carolina 29202 AND also serving a copy upon Kirsten L. Barr, Attorney, Trask & Howell, Post Office Box 2167, Mt Pleasant, SC 29463.

Dated: June 29, 2018



Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Appellant

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 30 years.

Preston F. McDaniel

Matthew Robertson

Telephone (803) 771-7211

Facsimile (803) 252-0709

June 29, 2018

Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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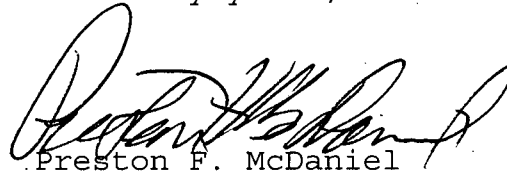
**RE: Kenneth L. Barr, Employee, v. Darlington County
School District, Employer, and SC School Boards
Insurance Trust, Carrier.
Trial Court Case No.: 1507304**

Dear Ms. Kitchings:

Enclosed for filing is a Notice of Appeal in the above case.
Also enclosed are the following:

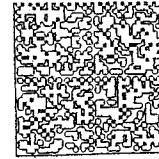
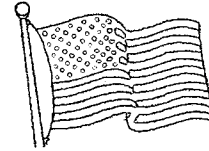
1. Proof of Service of the Notice of Appeal on the Respondents;
2. A copy of the Orders which are to be challenged on appeal.
3. A Filing fee of \$100.00.

Sincerely yours,


Preston F. McDaniel

PFM/kth
Enclosures

cc: Kirsten L. Barr, Attorney
Ms. Amy Bracy, Judicial Director, SCWCC
Gerald Malloy, Esquire, Appellate Counsel



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