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NWLAA Case Law Review

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Average Weekly Wage – Other

Average weekly wage based on earnings prior to second injury rather than residual earning capacity per prior PPD award. *Christensen v. Stevedoring Services of America*, 37 BRBS 159 (ALJ Tureck 2002) (Charles Robinowitz for claimant; John Dudrey for employer/carrier).

Due to a 4/19/97 back injury claimant received \$320.41 PPD based on an average weekly wage of \$1,576.71 and a residual earning capacity of \$1,096.11. He injured his back again on 4/9/99 and became entitled to PTD as of 6/22/00. Based on earnings 52 weeks before the 1999 injury, the average weekly wage was \$1,140.59, yielding compensation rate of \$760.39. Employer contended claimant's average weekly wage should be \$1,096.11.

The ALJ held that because §10 states "the time of the injury shall be taken as the basis upon which to compute compensation" the AWW must be based on earnings in the year prior to the injury.

Average Weekly Wage - §10(a)

§10(a) calculation because claimant worked 77.4% of available days. *Castro v. General Construction Co.*, ___ BRBS ___ (BRB #02-0783, 5/13/03) (Nicole Hanousek for claimant; Ray Warns for employer/carrier).

Claimant earned \$40,466.00 in the 52 weeks prior to his injury, or \$778.19 per week, having worked 201.35 days or 77.4% of the 260 day standard work year for a 5 day per week worker. In several years before his injury his annual earnings were between \$38,422.00 and \$39,648.00.

The ALJ applied §10(a) per *Matulic v. Director, OWCP*, 32 BRBS 148 (9th Cir. 1998) (which requires use of §10(a) when a claimant works more than 75% of the workdays of the measuring year) and calculated an average weekly wage of \$1,004.37 (which is the equivalent of \$52,227.24 per year). As the 9th Circuit held that overcompensation alone was an insufficient reason to rebut the use of §10(a), and that was the only objection argued, the Board affirmed the ALJ's calculation.

Causation - §20 Presumption

Substantial evidence to avoid §20 presumption does not require employer to rule out all other causes, nor must physician unequivocally or affirmatively state there is no relationship.

Ortco contractors, Inc. v. Charpentier, ___ BRBS ___ (5th Cir., #02-60447, 5/21/03).

Surviving spouse contended that her spouse's heart attack and death was due to his employment. Dr. Tamimie unequivocally and unconditionally viewed the heart attack as

unrelated to employment. Dr. Daniels agreed with Dr. Tamimie. Dr. Eiswirth testified that decedent would have died no matter where or what he was doing because the only action that would have affected the outcome would have been if he had gone to the hospital, and the only connection with work was that he was at work when the attack process concluded. The ALJ initially concluded that claimant had not established a prima facie case, but even if she had the presumption had been rebutted. On appeal the BRB held that claimant had established a prima facie case but because the three physicians could not rule out that employment contributed to the fatal result of the heart attack and none of the three physicians unequivocally stated that decedent's work activities did not contribute to or accelerate death, employer had failed to rebut the §20 presumption. On remand the ALJ awarded LHWCA benefits. The BRB affirmed.

HELD, the BRB used an improper evidentiary standard, i.e., (1) rule out; (2) unequivocally state; (3) affirmatively state – three standards which mean the same. The BRB cannot require employers to rebut a §20 presumption by ruling out every conceivable connection between the injury and the claimant's employment. The LHWCA requires a lower evidentiary standard than this. The employer must adduce only substantial evidence that the injury was not work related. Substantial evidence is more than a modicum but less than a preponderance. The Court remanded the claim for reinstatement of the ALJ's first opinion which denied benefits to claimant.

Concurrent Disability - PPD/PTD/TD

Concurrent awards cannot be greater than maximum compensation rate. *Christensen v. Stevedoring Services of America*, 37 BRBS 159 (ALJ Tureck 2002) (Charles Robinowitz for claimant; John Dudrey for employer/carrier).

Due to a 4/19/97 back injury claimant received \$320.41 PPD based on an average weekly wage of \$1,576.71 and a residual earning capacity of \$1,096.11. He injured his back again on 4/9/99 and became entitled to PTD as of 6/22/00. The ALJ concluded that compensation for the 1999 injury should be based on earnings 52 weeks before the 1999 injury, yielding an average weekly wage of \$1,140.59 and compensation rate of \$760.39. PPD from the 1997 claim plus PTD from the 1999 claim therefore was more than maximum compensation (\$871.76 before 10/1/99, \$901.28 before 10/1/00, \$933.82 before 10/1/01).

The ALJ concluded that claimant was not entitled to receive more than 200% of the NAWW (maximum compensation rate) from the two injuries, so employer was entitled to a credit to the extent the total of the two awards exceeded the maximum compensation rate in §6(b)(1).

Credit – Fraud

District court lacks jurisdiction per §27(b) to sanction claimant for filing fraudulent claim. *A-Z International v. Phillips*, 37 BRBS 1 (9th Cir. 2003).

ALJ concluded that claimant had filed a fraudulent claim and such conduct amounted to "disobedience to lawful process" per §27(b). He certified the matter to the district court with a recommendation that claimant reimburse employer for disability and medical expenses it had paid. In an earlier proceeding the 9th Circuit held that when the ALJ certified facts to the district court, it was the district court, and not the Benefits Review Board, which had exclusive jurisdiction over the matter. Employer then filed a complaint in the United States District Court seeking enforcement of the ALJ's order. The District Court dismissed, finding that its contempt power could not and should not be used to provide the requested relief.

On appeal, the 9th Circuit held that it lacked subject matter jurisdiction. Filing a fraudulent claim was not "disobedience to lawful process" as used in §27(b). Lawful process generally refers to use of summons, writs, warrants, or mandates to obtain jurisdiction over a person or property. Also, §31(a) provides that any claimant who knowingly and willfully makes a false statement or representation to obtain compensation is guilty of a felony. Congress did not intend to permit an employer to seek a contempt citation to recover damages from filing a fraudulent claim.

Credit – Miscellaneous

No credit for compensation paid by mistake for non-compensable condition. *Woodland v. Ingalls Shipbuilding, Inc.*, 37 BRBS 27 (ALJ 2003).

Employer paid compensation for a compensable plantar fascia tear and sprain and also mistakenly paid compensation for an unrelated bunion. Claimant had signed a compensation waiver agreement which said that if she was overpaid compensation employer could deduct the overpayment from wages. When employer discovered its mistake it deducted its overpayment from claimant's paychecks.

§15(b) states that no agreement by an employee to waive compensation shall be valid. Accordingly the "compensation waiver agreement" here was an invalid waiver.

§14(f) allows employer a credit for prior payments of compensation against future compensation. It does not authorize employer to recover the overpayment from future earnings. As claimant fully recovered without any entitlement to further compensation employer was not entitled to a credit.

Also, employer cannot use compensation paid for an unrelated injury to reduce its liability for a work related injury.

Exclusions – Clerical

Materials supply clerk was not a clerical worker. Worked in warehouse, not business office. *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (BRB 2003).

As a materials supply clerk claimant removed invoices attached to boxes and containers upon their arrival on trucks to employer's warehouse and then placed numerical code on each invoice to denote its destination within employer's shipyard. She took this code to a data entry clerk who recorded the data and created a receipt. She did not enter construction or repair areas or go on ships. She slipped on a pallet and injured her right knee.

In an earlier appeal the Board held that claimant's work was integral and essential to shipbuilding. On remand, the ALJ held that claimant mainly worked on the warehouse floor where traditional business office functions were not performed. On appeal employer contended that claimant was an excluded clerical worker. The Board affirmed because, as found by the ALJ, it was generally understood that a business office was an enclosed or semi-enclosed area characterized by presence of desks, chairs, telephones, computers, copy machines, and perhaps book shelves. Thus, claimant did not work exclusively in a business office, and she was not excluded as a clerical worker.

Exclusions – Jones Act

Oiler on dredge was member of crew and excluded from LHWCA. *Uzdavines v. Weeks*, 37 BRBS 45 (BRB 2003).

Surviving spouse contended that decedent was last exposed to asbestos when working as an oiler in the engine room of a dredge. The dredge was viewed as a vessel because it was a floating craft designed and used to transport the crane with its bucket on navigable waterways, and without the ability of the dredge to transport the crane it would have been unable to perform its mission of deepening the channel.

Decedent was engaged in the mission of the dredge and worked on it as an oiler for 3-4 consecutive weeks. His employment history was not that of a land based maritime worker who happened to be working on a vessel at the time of injury. As a member of the crew he was excluded from the LHWCA.

Hearings – Dismissal/Withdrawal

Dismissal based on FRCP for failure to comply with ALJ's order improper. *Goicochea v. Wards Cove Packing Co.*, 37 BRBS 4 (BRB 2003).

Employer sent a subpoena to the LA Asylum Office of the INS to obtain documents relating to claimant because it sought to prove that claimant was not in the USA legally and therefore was not entitled to total disability because it would be illegal to hire him. The INS refused to honor the subpoena but requested claimant sign a release. Claimant refused, so in response to employer's motion the ALJ continued the hearing and ordered claimant to sign the release. When claimant failed to comply the ALJ cited FRCP 41(b) and 37(b)(2)(C) and entered an order dismissing the claim due to failure to comply. Claimant appealed.

§27(b) provides that if a person who disobeys or resists lawful order or process or neglects to produce after having been ordered to do so any pertinent book, paper or document, the deputy commissioner or Board shall certify facts to the district court which shall hear evidence in a summary manner and punish the person for a contempt if the evidence warrants. Because this rule specifically applies to the claim the Board concluded that the FRCP did not apply. The Board remanded the claim to the ALJ to consider whether the certification of the facts to the district court would be appropriate.

Miscellaneous

Spouse fails to prove suicide compensable. No bar to separate claim by daughter. *Holmes v. Shell Offshore, Inc.*, 37 BRBS 27 (BRB 2003).

Spouse sought compensation for death but lost because death was found to be a non-compensable suicide. Thereafter, the spouse's stepdaughter (decedent's daughter by an earlier marriage), who then was no longer a minor, sought compensation for death. The ALJ dismissed the claim because it involved the same forum, the same employer, the same attorneys, and a child who was in privity with her stepmother.

The Board reversed because although the issues were identical and were litigated, claimant was not in privity with her stepmother and therefore was not bound by the prior decision. The spouse was not the "virtual representative" of the stepdaughter because there was no express or implied legal relationship in which the spouse was accountable to the stepdaughter. Close familial relationships without something more was insufficient to invoke virtual representation. In the 5th Circuit virtual representation required either express or implied consent to legal representation.

Letter did not constitute modification request. *Trumble v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 167 (ALJ 2003).

On 3/16/93 the District Director issued a Compensation Order which recognized that employer had paid TTD for various periods due to a 3/21/91 injury. On 10/5/93 claimant's attorney sent the District Director a letter staging: "Claim is made ... for additional (temporary, total, permanent total, permanent partial, temporary partial) benefits in addition to those paid pursuant to your Order dated 3/16/93." Employer voluntarily paid periods of TTD between 10/1/93 and 6/28/95 but contended that claimant had not timely petitioned for modification.

The ALJ concluded that the letter did not constitute a valid request for modification because it did not allege a change in circumstances or mistake in the compensation order, did not claim a particular disability, and did not manifest a clear intention that the claim be processed in accordance with the Act. The boiler plate language cannot on its face suffice as a valid request for modification.

Permanent Disability – Employer’s Burden

Claimant terminated for misconduct. Employer did not have to show availability of suitable alternate employment thereafter. *Pope v. Ham Industries, Inc.*, 37 BRBS 119 (ALJ 2003).

Claimant was injured when working as a second class pipefitter. She returned to work on light duty but was fired on 12/17/99 when she was caught attempting to steal trash bags from her employer. After her termination she found other intermittent employment that paid a lower rate of pay. She reached maximum medical improvement on 6/10/00. Employer/carrier proved that claimant would still be employed but for her termination due to theft.

The ALJ held employer established the availability of suitable alternate employment by providing a light duty job which claimant was capable of performing within employer’s facility even though she had not reached maximum medical improvement. Because she was discharged for reasons unrelated to her disability, employer no longer had a continuing responsibility to identify new suitable alternate employment. Therefore, claimant was not entitled to compensation after her termination.

Permanent Disability – PTD

ALJ concludes first PTD payment, when equal to maximum compensation rate, should include all prior annual increases. *Gutierrez v. International Transportation Services*, 37 BRBS 227 (ALJ Mapes 2003).

Claimant was injured on 12/28/99, reached maximum medical improvement on 1/15/02. The maximum compensation rate on 12/28/99 was \$901.28 and on 1/15/02 was \$966.08. The ALJ awarded TTD prior to 1/15/02 @ \$901.28 and PTD as of 1/15/02 at an initial rate of \$966.08. Employer requested reconsideration, arguing that claimant’s initial PTD rate should be \$901.28, the maximum compensation rate on the day of injury.

The ALJ referred to §6(c), which states that the maximum compensation rate (200% of NAWW) applies to all employees currently receiving compensation for PTD as well as those “newly awarded” compensation during such period. Because claimant was “newly awarded” PTD as of 1/15/02 he was entitled to the maximum rate in effect at that time.

[Editor’s note: If claimant’s compensation rate had been less than maximum compensation he would not have been entitled to the annual adjustments that accumulated between the date of injury and the effective date of PTD. *Bowen v. Director*, 24 BRBS 9 (9th Cir. 1990).]

Settlements

Unrepresented claimant allowed to withdraw from §8(i) agreement before ALJ approval. *Rogers v. Hawaii Stevedores, Inc.*, 37 BRBS 33 (BRB 2003).

Claimant, when unrepresented, sent a completed §8(i) agreement to the ALJ. The ALJ convened a hearing to determine if the agreement was procured by duress. By the time the hearing convened claimant had retained an attorney who argued that the agreement should not be approved because it had been procured by duress. The ALJ approved the settlement, and claimant appealed.

The Board held that per *Oceanic Butler, Inc. v. Nordahl*, 21 BRBS 33 (5th Cir. 1988) the claimant (but not the employer) had a right to rescind an unapproved settlement. Claimant’s agreement to waive compensation was not binding unless it was administratively approved. As claimant effectively withdrew from the settlement prior to approval the agreement was vacated.

§8(i) agreement not set aside when claimant returned to work after approval. *Hansen v. Matson Terminals, Inc.*, 37 BRBS 40 (BRB 2003).

A §8(i) agreement which provided for a lump sum payment of \$162,000 stated that it was based on claimant's representation that his injuries would prevent him from returning to work as a laborer in the longshore industry. If claimant returned to work as a laborer and suffered a new injury the subsequent employer would be entitled to a credit toward any future claim for PPD or PTD or medical benefits from proceeds of the agreement. After the agreement was approved claimant returned to work as a member of a wharf gang, a less physically demanding position, and a position which technically was not classified as a laborer. The ALJ denied employer's request to set aside the agreement. The Board affirmed.

The Board held that there had been no misrepresentation because, as held by the ALJ, claimant had not returned to work as a laborer. Also, the agreement did not include an express right of rescission. It merely provided that if claimant returned to work as a laborer and had a new injury the new employer would be entitled to credit.

Situs – Adjoining Area

Warehouse 65-70 miles from docks not a covered situs. *Charles v. Universal Ogden Services*, 37 BRBS 37 (BRB 3003).

Claimant truck driver loaded his truck at employer's warehouse in Harahan, Louisiana, near the Mississippi River, and drove to docks on the Gulf coast, 65 to 70 miles away, where he loaded them into containers, removed spoiled and other items from the containers, placed them in the truck, and then returned to the warehouse. The containers were taken to offshore oil rigs. Claimant was injured at the warehouse.

The Board held that the warehouse was not a covered situs. The Mississippi River played no role in the functioning of employer's business or that of the surrounding businesses. There were no docks near the warehouse and the nearest delivery point was 65-70 miles away. The warehouse could have been located anywhere. Employer made no deliveries on the Mississippi. The facility had no functional relationship to maritime commerce and was not an adjoining area.

Status – Integral Employment

Claims adjusters lacked status. *Buck v. General Dynamics Corporation*, 37 BRBS 53 (BRB 2003).

Employer set up its own workers' compensation unit and hired claimants (Buck and Rondeau) as adjusters. They filed occupational disease/repetitive trauma claims and argued that their work was integral to construction, repair, loading, or unloading of vessels because their work resulted in injured employees being returned to the work force as soon as possible. The ALJ granted employer's motion for summary judgment, and the Board agreed that claimants' jobs were not integral to shipbuilding, in the sense that their failure to perform their jobs would not impede the shipbuilding process.

Status – Other

Status when travel by boat to and from work sites was not transient or fortuitous. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (BRB 2003).

Claimant had been assigned to work as a rigger on an oil production facility in the Bayou Penchant Oilfield which was surrounded by water and marsh and accessible only by boat via various canals. Claimant was transported by boat, 45 minutes each way, for 18 of 34 days but performed his work on a platform. He was injured when, while riding on a boat returning from this site, he struck his back against the side of the boat. The ALJ held that claimant was transiently and fortuitously on navigable waters when injured and therefore was not covered.

The Board held that an employee who was regularly assigned by his employer to travel on navigable waters was covered under Perini and was not transiently or fortuitously on navigable waters. Once employer assigned claimant to travel to a platform by water he was performing a work assignment during the duration of his time on the boat. Therefore, as a matter of law, claimant was covered under the LHWCA.

Status – Significant time

Work moving wood pilings from water's edge not maritime. *Dickerson v. Mississippi Phosphates Corporation*, 37 BRBS 58 (BRB 2003).

Employer manufactured fertilizer at a plant located in the Port of Pascagoula, Mississippi, off Bayou Casotte, a navigable waterway. It received phosphoric rock by vessel, converted it to a fertilizer, and shipped it out by rail, truck, or barge. Claimant did not load or unload a vessel, did not work in materials handling department which loaded or unloaded vessels, and did not maintain or repair equipment used to load or unload a vessel. A one two week assignment included removing pilings from the water's edge. The ALJ held that this was not covered employment because it was not a regular part of his employment and this work had no connection to the docking of ships or to the loading, unloading, building, or repairing of vessels. The Board affirmed.

Vocational Rehabilitation

Total disability due during vocational training. VR precluded employment. *Castro v. General Construction Co.*, ___ BRBS ___ (BRB #02-0783, 5/13/03) (Nicole Hanousek for claimant; Ray Warns for employer/carrier).

Following compensable knee injury claimant enrolled in a vocational rehabilitation training program sponsored by the OWCP. Employer established the availability of suitable alternative employment. As of the date of hearing claimant had not completed his program. He sought 35% PPD for his right knee and TTD and PTD while enrolled in the vocational rehabilitation program. The ALJ concluded that claimant's training program precluded employment, and the training program would give claimant the best long term earning potential. He awarded TTD until claimant reach maximum medical improvement and PTD thereafter until the projected date of completion of the program.

The BRB followed *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192 (1993), *aff'd*, 29 BRBS 22 (5th Cir. 1994). Entitlement to benefits during a vocational rehabilitation program is not automatic but depends on analysis of various factors relevant to ascertaining whether employment is reasonably available. The lack of specific authorization in the statute is not important. For example, nominal awards are not specifically mentioned in the statute but they are viewed as a rational interpretation of statute. If the rehabilitation program prevents employment, the employment is unavailable to the claimant even if it is otherwise suitable. In this situation employer cannot satisfy its burden, and claimant is entitled to total disability until the date alternative employment become available.

The regulations do not give employers a role in forming or approving vocational rehabilitation. Therefore, the OALJ has no jurisdiction to address the propriety of vocational rehabilitation, and whether or not claimant receives services is subject to the district director's discretion. Employer was not deprived of due process because the case was not transferred to the OALJ upon its request.

§8(f) – Absolute Defense

Untimely request for §(f) relief. *Quinn v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 78 (ALJ 2003).

Employer requested §8(f) relief when the claim was still at the OWCP level. The director denied relief but suggested employer request a formal hearing if it objected. Thereafter, employer and claimant agreed to a compensation order. The order did not mention §8(f) relief. The worker died approximately one year later, and employer requested §8(f) relief for the worker's claim and for the death claim. The Director granted §8(f) relief for the death benefits only. Employer responded with a renewed request for §8(f) relief in the worker's claim and enclosed a request to transfer the case to the OALJ if the application was denied. In response, the Director noted that the original §8(f) claim had been denied six months earlier, and if employer wanted relief the Director would assert the absolute defense. The Director asked if employer still wanted to pursue the matter. Nearly six months later employer again requested approval of its claim or referral to the OALJ.

The ALJ dismissed employer's application for relief. Because employer did not fully litigate the §8(f) claim prior to the entry of a compensation order which included permanent disability, employer's current application for §8(f) relief was untimely. Once the compensation order became final the claim could only be reexamined under a §22 modification request, and employer had not made any such request.

§8(f) – Greater Disability

§8(f) denied when employer failed to prove degree of permanent disability due to injury in absence of preexisting condition. *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 37 BRBS 6 (4th Cir. 2003); *Newport News Shipbuilding v. Pounders*, 37 BRBS 11 (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Ward*, 37 BRBS 17 (4th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Winn*, 37 BRBS 29 (4th Cir. 2003).

In four separately decided claims Newport News Shipbuilding relied on a report from its company physician, Dr. Reid, who sometimes was supported by a report from an attending or consulting physician, to support its claim for §8(f) relief. In each case the ALJ refused to accept Dr. Reid's conclusions, concluding instead that Dr. Reid (and the other physicians) had improperly calculated the current disability and subtracted the disability due to the preexisting condition instead of determining the degree of disability due to the injury in the absence of the preexisting condition. The Board and Court of Appeals affirmed, finding that the ALJ's conclusions were based on substantial evidence, and the ALJ had discretion to reject an un rebutted opinion as pure conjecture or to discount opinions that lacked supporting explanation or supporting evidence.

In *Cherry*, Dr. Reid stated that the disability was not caused by the 1995 injury alone but was materially contributed to and made materially and substantially worse by the preexisting back disability. Without the preexisting disability the 1995 injury would have resolved with no permanent disability.

In *Pounders*, Dr. Reid stated that the preexisting pleural fibrosis/restrictive lung disease and hypertensive cardiovascular disease and diabetes contributed to claimant's impairment, and if he only had asbestosis his AMA rating would be 15% less than it is. In dicta, the court also observed that a company doctor, however honest, was likely to give the close calls to those who pay their salaries.

In *Ward*, Dr. Reid stated that the neither the 1987 injury or the 1989 injury alone would have disabled claimant from performing light duty shipyard work but the combination of the two disabled him from this employment.

In Winn, claimant was awarded 20% impairment/disability due to asbestosis. Dr. Reid said that if claimant did not have COPD (i.e., only had asbestosis) his impairment would be 10% less. An IME concluded that claimant had 10% impairment, but the majority was due to chronic bronchitis, and impairment from asbestosis alone was 4%.

§8(f) – Preexisting Manifest Disability

§8(f) denied: insufficient proof of preexisting disability. *Newport News Shipbuilding & Dry Dock Co. v. Cherry*, 37 BRBS 6 (4th Cir. 2003).

Claimant injured his back in 1987 but after ten days returned to unrestricted work until a second injury in 1992, which resulted in restrictions for fourteen days before a full work release. In 1995 claimant strained his back again, but this time he had permanent restrictions. Dr. Reid, a company doctor, reviewed the records and stated that claimant's disability was not caused by his 1995 injury alone, but this disability was materially contributed to and made materially and substantially worse by his preexisting chronic back disability. The 1995 injury was rather minor. If he had a normal back it would have resolved with no permanent disability. The attending physician agreed in a check the box report. Notwithstanding these reports the ALJ concluded that Dr. Reid's conclusions were pure conjecture and denied §8(f) relief. The BRB affirmed.

The Court held that the ALJ reasonably determined that claimant's temporary back injuries in 1987 and 1992 were not long lasting physical problems that constituted an existing partial disability. They were not a serious, lasting physical problem. The ALJ had discretion to discredit testimony that these injuries caused a "weakened defective back structure" as pure conjecture bereft of supporting date or medical analysis. After all, claimant had returned to work without any restrictions.

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