# The Pandemic, the Claims Desk and You: How Will COVID-19 Impact W/C?

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# Make sure you are:

10 CCR 2592.03 compliant

# What is (and is NOT) happening at WCAB district offices?

Latest & greatest:

- only expedited hearings at the district offices
- DWC will continue all other hearings and send parties notice
- new hearing dates (should be in the mail…just like the check?!?)
- thru April 3: DWC will continue to hear expedited hearings for parties that appear at the district offices
- DWC will hear status conferences, MSCs and priority conferences via CourtCall only

## Latest & greatest:

- If all parties do not appear via CourtCall the case will be continued and given
- All other hearings will be continued
- No trials or lien conferences will be heard during this time
- March 17 through April 3: DWC's district offices will be closed for filing purposes
- all filing deadlines are extended to Monday, April 6
- DWC will not accept walk-through documents or walk-in filings until the district offices reopen for filing purposes

## Latest & greatest:

- WCJs will focus on reviewing settlement documents and ruling on petitions submitted by the parties during the closure
- Parties may utilize the Electronic Adjudication Management System to file documents online.
- Parties may also mail settlement documents or petitions to the district office where the case is filed. Refer to the district office page for e-mail and other contact information
- Per DIR: "These changes are based on the best information currently available and are subject to change without notice as circumstances change"

Check the DWC and WCAB websites for updates.

# Coronaviruses
# &
# YOU!

aka How a little virus can have a BIG impact on your caseload

What is COVID-19?
Coronavirusdisease-19 (2019)

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## Questions

1. If employer has been providing modified work, but because of less clients or no client at all due to COVID-19, they decided to temporarily closed their shops prior to the government forced shutdown. (ex. hair salons, restaurants)
   Do we have to pay TTD?
2. If employer has been providing modified work, but because of less clients due to COVID-19, employer laid off some employees and the claimant is one of them prior to the government forced shutdown.
   Do we have to pay TTD?
3. If employer has been providing modified work, but because of safety and health concerned, employer decided to temporary closed their business due to COVID 19 prior to government forced shutdown.
   Do we have to pay TTD?

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## Questions

4. We can longer accommodate public safety employee's modified duty because the records dept was closed due to the virus. Are they entitled to 4850 benefits?
5. What about employees who are on mod duty, and now losing wages due to furlough or no work as a result of closure or lack of business? TTD due?
6. As a broker, I have many employer clients who are now beginning lay-offs to 20 - 30% of their staff. Any thoughts on how we can look to prevent the post term claims that will come from this. Anything to mitigate the exposure?
7. If ERs require potential EE to get tested, who is liable for the testing costs? What about where the test is required of a current employee?

## Questions

8. Injured worker who is on wage loss because employer could not accommodate light duties for 40 hours? Continue to pay the wage loss we have been paying? If so, what if it varied? What would we pay? Or would we refer them to file for EDD as the closure was due to pandemic and governmental closure of employer?

## Questions

- industry jobs are deemed "essential" (business is able to operate)
- due to industry slowdown, there is less mod duty available
- if 40 hours is normally available, but now only 24 hours (just like uninjured EEs), is that wage loss compensable?

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## How do we determine aoe/coe when the infection's source could be...literally:

ANYWHERE!

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## Across the country health officials & providers are:

1. attempting to id infected people
2. quarantining infected and potentially infected individuals
3. testing folks who have been exposed to the virus
4. treating those who test positive

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## When is the last time this happened on this scale?

not in MY lifetime
(and that's a VERY long time)

We don't have lots of precedent...in other words:

We're kinda making this up as we go along

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## As humans, we are sympathetic

But wearing our W/C hats, why do we care?

Potential liability for:
1. TD
2. PD
3. Death Benefits
4. Med treatments
5. 132a
6. S&W

PHEW!

## COVID-19 & DWC-1
## WHEN?

No duty to provide unless ER knows from "any source" of:
1. Injury, and/or
2. Claim of injury

*Honeywell v. WCAB* (Wagner)
(2005) 70 CCC 97

# Wagner (cont'd)

THUS mere exposure at work or elsewhere—even if exposed EE is quarantined (or other prophylactic measure of any kind are taken)—does NOT

=

Injury

(let alone injury AOE/COE)

REMEMBER: "reasonably certain" isn't in the labor code!

# How do we determine ***compensability*** for those who are infected?

# COMPENSABILITY

To receive benefits, the injury must occur on the job (AOE/COE)

- Not at home
- Not while off-site
- Not doing personal errands

# COMPENSABILITY

Didn't happen at work?
Nor otherwise reasonably related to work?
=
not compensable

Must be some connection between injury and work.

Connection does not need to be the sole cause.

## Got the "flu"?

*Might* have caught at work from boss, but not normally aoe/coe

REASON:
1) too tough to determine what caused the illness
2) who cares?
   a) TD? Nope! Off work 1-3 days?
   b) PD? Nope!
   c) Treatment? Chicken Soup!?!?

## Compensability Test

1. AOE/COE:

   Burden of proof: EE

## Standard for Nonocc Disease Narrow:

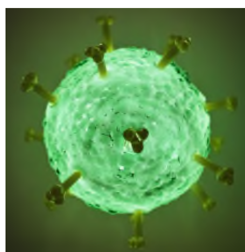
- contracting disease while employed isn't enough (*Pacific Employers v IAC* (1942) 19 Cal.2d 622)

Per the CA Sup Ct: "The narrower rule applicable to infectious diseases arises from the obvious problem of determining causation when the source of injury is…uncertain…and often wide spread…[H]igh costs of avoidance and treatment for infectious diseases, coupled with the fact that such illnesses often cannot be shown with certainty to have resulted from…the workplace…explain the different line-drawing by our courts in the area of non-occupational disease."

*Latourette v. WCAB*
*1998 63 CCC 253*

## Reason: tough to determine causation when the injury's (infection's) source is:

1. uncertain
2. product of invisible (and often widespread) viral or bacterial organism



*LaTourett v WCAB,* (1998) 63 CCC 253

## ER can be liable for otherwise non-aoe/coe disease if:

- risk at work > risk to general public ("special risk"); and/or
- injury is caused by intermediary (human or "instrumentality of work") (Maher)

## EE's Burden of Proof

What will AA claim?

- absent of identifiable causes, the infection must be aoe
- doesn't this stand the normal burden of proof on it's head!?!?
- doesn't it suggest that ER should "prove a negative" (something that is *only* IMPOSSIBLE to do!?!?)

# Gotta love it:

AA:

My guy is infected and I *think* it came from work…YOU prove it didn't!

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# The problem?

The darn case law!!!
(it's not very good for us!)

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## Work > General Public Risk
## Bethlehem Steel v. IAC (1949) 7 CCC 250

FACTS:
- Epidemic in shipyard: 10 cases of conjunctivitis
- Epidemic *everywhere* in SFO

ISSUE:
Can EEs prove AOE burden?

Holding:
Yes

Reasoning:
- Shipyard > general population
- Shipyard = "special exposure in excess of the community

## Bethlehem's implications for COVID-19?

If ER virus concentration
>
general population
=
AOE

1. Doctors
2. Nurses
3. all other health professionals
4. non-health pros? (janitor)

## "Special Risk" Allegations
## Very fact driven!

aka no clear cut answer!

(such a lawyerly explanation!)

1. EE shows employment resulted in a "special risk" of exposure
2. EE proves infection
3. Burden shifts: ER demonstrates source(s) of non-industrial exposure

## Do we have any relevant virus-related case law re: "special risk"

that is directly on point to coronavirus?

PRETTY CLOSE!

GULP

FACTS:

- teacher contracted viral cardiomyopathy from exposure to students' viruses
- QME confirmed: more likely than not

HOLDING: aoe/coe

# REASONING:

- general rule = nonoccupational diseases do not arise out of the employment
- exception exists "if the employment subjects the employee to an increased risk compared to that of the general public."

*Culver City Unified v. WCAB* (Grawe) 82 CCC 757

# *City of Turlock v WCAB* (2007) 72 CCC 931

FACTS:

- EE contracted Hep C
- worked in city sewers
- no specific source of disease was pinpointed

ISSUE: Is Hep C compensable given the lack of evidence directly tying the disease to employment?

HOLDING: yes!?!?

## *City of Turlock v WCAB* (2007) 72 CCC 931

REASONING:
- doctor testified that EE "likely" contracted Hep C from sewer
- EE has no other nonindustrial potential sources

RULE #1: if work increases risk and no other non-AOE/COE risks can be id'd, will be deemed "reasonably probable"

RULE #2: search for alternative explanation (potential for exposure is everywhere)

## "instrumentality of work"

FACTS:
- CNA hired with TB
- Treatment as condition of employment
- Bad reaction to treatment

ISSUE:
Compensable?

HOLDING:
Yes

REASONING:
- "Employer takes the employee as he finds him at the time of employment"
- Job at least partially contributed to illness (1%)
- Job req'd treatment

*Maher v. WCAB* (1983) 48 CCC 326

## Maher's lessons for COVID-19?

Even if infection isn't AOE/COE

IF

aggravation caused by work

and/or

aggravation caused by treatment for work

=

entire virus impact work-related

Don't forget about the 1% rule

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## IDing a source of nonindustrial exposure can turn on:

EE's nonindustrial exposure to high risk places:

- hospitals
- nursing homes
- cruise on the Diamond Princess
- visits to China, Italy, Mar-a-Lago and other "hot spots"

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# IMPORTANT

Keep track of region-specific reports

if (nope…when!!!) you see reports specific to local geographic locations:

- airports
- mall
- hospitals
- etc.
- LA Times has a tracker

keep in mind for later use to rebut

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# Healthcare Workers

Healthcare workers (hopefully) follow stringent protocol to avoid spreading disease

FOCUS:
1) whether there protocols were in place,
2) whether protocols were followed (contrast more lax precautions when away from work)?

ALWAYS maintain detailed records about potential exposures

If 1 & 2 are answered "yes", ER has a much stronger case

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## There are no statutory presumptions of compensability for healthcare workers...

mostly:
EXCEPTION: LC 3208.05:

- presumption triggered *if:*
  a. healthcare worker
  b. suffers injury
  c. while undergoing care to prevent the development ***or*** manifestation of...
  d. any blood-borne disease, illness, syndrome or condition
  e. recognized as occupationally incurred by:
     - Cal-OSHA
     - federal CDCC, or
     - other appropriate entities

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## What kind of injuries/conditions caused when trying to prevent/treat Coronavirus?

We don't know...YET (stay tuned)

Bloodborne?

Not sure
(more later)

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## TD
## QUARANTINED WORKERS

Employers are *already* sending employees home who *might* have been exposed!

Who pays these employees what?

Does a quarantine itself give rise to w/c benefits (such as TD)?

Short answer?
We've already discussed this...
NO!

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## ...BUT

I'm no expert, this analysis faces a possible snafu:

collective bargaining agreements (CBA)

Dealing with a union?
Don't tell ER that EE isn't entitled to "wage replacement"...
...that's what labor attys do!
Just tell ER "no TD"...
...that's our bailiwick!

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- ER learns EEs have been exposed to an infected EE
- CDC says “send ‘em home for two weeks”!

TD?

No (not yet)

Identify infected employee?

Heck no! (ADA, FEHA)

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## Can you imagine this?
## (I bet you can!)

- CDC predicts spread of deadly disease will double
- CA passes legislation requiring in high risk areas to "awareness & prevention"

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## Awareness & Prevention

Includes:
- what is/how contracted
- id high risk areas
- id types of work where risk is highest
- id personal risk factors causing increased risk for some

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## Don't need to imagine this?

Coronavirus, right?
NOT!!!!

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# Valley Fever
# &
# AB 203

- signed into law 10/10/19
- annual training requirement eff 5/1/20

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# Valley Fever (FV)?

Who cares?

We do (best example/analogy available)

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## *Ranulto Cruz v Hall Management* 2019 Cal.Wrk.Comp. P.D.. LEXIS 29

FACTS:
- PQME- “medically probable” death caused by prevalence of dust at work and EE's “significant” industrial exposure

HOLDING: aoe/coe

REASONING:
"causation" proof is met if EE's *risk of contracting* VF is:

1. “medically probable”, or
2. zone of danger
3. need not prove to “medical certainty”

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## *Tim Abernathy v Harris Wolf CA Almonds* 2015k Cal.Wrk.Comp. P.D. LEXIS 547

Facts:
QME stated, to a "reasonable medical probability", contracted VF from:
- current job
- earlier job
- home

QME did not discuss whether EE's work placed EE at a "materially greater risk" to VF as compared to the public

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## *Tim Abernathy v Harris Wolf CA Almonds*

Holding:
remanded for further development of the record

## Serious & Willful Claims

LC 4553: "....compensation otherwise recoverable shall be increased one-half, [plus] costs and expenses not to exceed...$250)...

## What constitutes "serious and willful" misconduct?

*Johns-Manville Sales Corp v. WCAB (Horenberger)* (1979) 44 CC 878

FACTS:
- ER failed to provide adequate lighting in a truck yard
- result: slip and fall

## *Horenberger* defined S&W:

"It follows that an employer guilty of serious and willful misconduct must know of the dangerous condition, know that the probable consequences of its continuance will involve serious injury to an employee, and deliberately fail to take corrective action."
- negligence will not suffice
- must also include an "element of malice, recklessness, or indifference to human safety."
- conduct must qualify as "quasi-criminal"

## *Horenberger*

-"failure to furnish sufficient lighting [is] nothing more than simple negligence…"

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## *Eastwood (Deceased) v. Cooper Construction* (NPD)

2015 Cal. Wrk. Comp. P.D. LEXIS 587

FACTS:

- carpenter died as a result of heat exposure while
- working in 100 deg
- had access to water, shade and frequent rest periods

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# *Eastwood*

HOLDING: no S&W

REASONING: not "quasi criminal"

# Serious & Willful

*Abron v. WCAB*
(1973) 34 Cal.App.3d 232, 237

"The mere failure to perform a statutory duty, in itself, is not willful conduct."

HOWEVER....

## *Johnson v IAC* (1952) 112 Cal.App.2d 263

Failure to comply with a LC safety provision

*IF*

done:

- knowingly, and
- willfully

=

Serious & Willful

- Declarations of emergency…!?
- Recommendations (strong) to stay at home….!?
- Recommendations to self-quarantine….!?

As governmental recommendations (demands) increase, what potential Serious & Willful claims does the ER who fails to heed them face?

If recommendations/orders become LC Safety Provisions, watch out!

Are violations of orders (the exact nature of which are changing daily, if not hourly, in California and across the US) a "statutory duty"?

## Let's go over the checklist
(assuming not dealing with LC safety order)

1. **negligence will not suffice**: ER's requirement that EE violate safety command from local or state government would seem, on the face of it, to be *intentional* *violation*

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## Let's go over the checklist
(assuming not dealing with LC safety order)

2. **"element of malice, recklessness, or indifference to human safety":**
   - ER attempting to salvage business by instructing EE to violate governmental safety commands may not be "malicious"
   - given the government's goal (safety), ER's countermands may be deemed "reckless" or—at least—"indifferent"

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## Let's go over the checklist (assuming not dealing with LC safety order)

3. conduct must qualify as "**quasi-criminal**"

## 3. conduct must qualify as "quasi-criminal"

fact dependent:

- what *exactly* did ER command/prohibit?
- what did EE do in response to ER's communal prohibition?
- nature of the governmental instruction:
  - Recommendation?
  - Order?
  - LC safety order?
  - Cal/OSHA?
  - State of emergency order?

# How's your headache so far?

It's going to get worse!

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## SB 893:

- would create "rebuttable presumption"
- for hospital EEs who
- provide "direct patient care in an acute hospital to include infectious diseases and musculoskeletal injuries"

Creates presumption that certain infections arose aoe/coe

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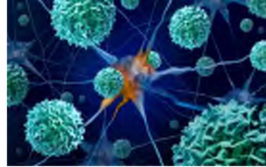
## What types of diseases/infections?



1. TB
2. Meningitis
3. Staphylococcus aureus skin infections
4. Blood borne infectious diseases

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## That's strange!

Coincidence:
SB 893 arrived just as Covid-19 started spreading!

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## But is Covid-19 "bloodborne"?

Let's ask the American Association of Blood Banks:

Per AABB, probably not...
...but too early to tell

## NEVERTHELESS

SAFETY FIRST !

AABB is urging banks to take numerous precautions
(just in case)

# The presumption extends waaaaay beyond LDW

Most of this statute's presumption extends
- ➢ three months beyond end of employment
- ➢ for each full year
- ➢ up to 5 years

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# Do you see a problem here?

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## What we know:

- Coronavirus will continue to spread through 2020
- the bill was approved late last summer
- the bill's presumption takes effect 1/1/21

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## Do we think this applies to coronavirus?

- don't think so (but not sure!)
- a few tricks in Sacramento could remedy that "problem"!

Not tough to imagine:

- ➢ hospital EEs claiming industrial causation
- ➢ defendants trying to prove alternative theories
- ➢ occurred months and months earlier

=

lots of litigation

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## Sacramento didn't mean to do this...

Bill proposed 1/26/20 (seemingly eons ago!)

AABB, CDC *suggest* Covid-19 isn't blood borne, it would help avoid the lawyers if we could

1. get medical clarification
2. get legal clarification by:
   a. killing the bill
   b. amending the bill to clarify what conditions are presumed compensable
   c. including language to the effect that flues/COVID-19 aren't covered

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## Sacramento didn't mean to do this... (con't)

there is yet another way to decrease potential litigation...
...but we don't want *that!*

GULP!

legislative clarification that flues/Covid-19 ***ARE*** covered!

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## If a claim is presented, here are some guidelines for you to investigate whether the claim may be AOE/COE:

1. Has the employee tested positive for coronavirus?
   Or are they under quarantine only?
   Are they displaying any symptoms? (cough, fever, sore throat, runny nose, chills, etc.)
2. What level of quarantine are they doing at this point?
   Is it self-quarantine, or were they ordered to be quarantined by a medical professional?
   Are they i.e.; still going to grocery store? Jogging/exercising, traveling to family or friends' homes?

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## If a claim is presented, here are some guidelines for you to investigate whether the claim may be AOE/COE:

3. Is this employee working from home? Capable of working from home? Are other employees working from home? Do they have to go into the office to pick up/drop off things? Frequency?
4. What practices are in place or did the insured implement additional practices in light of the pandemic? What steps were/are in place to protect the employees? To prevent exposure? Any protective gear like masks, gloves, hand sanitizer provided? Were these measures being followed? If not, how do we know? Are there shared surfaces that everyone has to touch? (Ex: the same door handle, etc.)

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## If a claim is presented, here are some guidelines for you to investigate whether the claim may be AOE/COE:

5. Are there other possible exposure locations for this employee? i.e.: a school, an event that was not yet cancelled, polling place, store, restaurant, gym, visiting someone in a hospital recently?
6. What other family members are in the household and have they had any known exposures? Neighbors? What about other places you frequent (gym, grocery store, yoga, etc)?

## If a claim is presented, here are some guidelines for you to investigate whether the claim may be AOE/COE:

7. Is there surveillance around the time of the possible exposure?
8. What if any known clusters of exposure have occurred in their geographic region in recent weeks? Any media reports of known outbreaks in your area? Links to websites you can provide, or at least tell me so I can find them myself? (Ex: LA Times has a tracker that breaks down by neighborhood.)

## If a claim is presented, here are some guidelines for you to investigate whether the claim may be AOE/COE:

9. History of respiratory problems? Any history of that? Prior pneumonia? Preexisting conditions like asthma? Where did you treat? Name/place/address/neighborhood? Have you ever smoked cigarettes? Vaping? Drink, use drugs? Allergies over the years?
10. How often do/did you visit relatives who don't live with you during the outbreak? Were they sick? When? How? Symptoms?

## If a claim is presented, here are some guidelines for you to investigate whether the claim may be AOE/COE:

11. If positive test result: when, where, who? Get the address of the location, and/or phone number and the proper name.
12. After the fact: Did you require a ventilator? Type of pneumonia? When were you diagnosed with pneumonia? Did the doctor say what type of bacteria? (Covid-19 makes people more susceptible to pneumonia.) Where did you treat? Name/place/address/neighborhood?

If a claim is presented, here are some guidelines for you to investigate whether the claim may be AOE/COE:

13. How many children do you have? Did they bring home anything? When? What school did they go to? When did the school shut down, or when did they stop going?
14. What were the last few restaurants you went to? When? Where?

If a claim is presented, here are some guidelines for you to investigate whether the claim may be AOE/COE:

15. If health care worker: ask about safety protocol, were other EEs adhering to it, did management f/u, etc.
16. Who is your health insurer? Card/group #/member # (good for subpoenas). Which pharmacy do you use?

## The physician should also be contacted to determine the following:

1. Were diagnostic tests performed for a definitive diagnosis?
2. Within a reasonable degree of medical certainty, did the condition arise out of and in the course and scope of employment?

## Enough reality…

On a lighter note…

## Now that we've all learned how to wash our hands...

## ...tomorrow we start learning about shapes and colors!

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