

**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**1999 MTWCC 57**

**WCC No. 9906-8251**

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**CHEROL BRANCH**

**Petitioner**

**vs.**

**LIBERTY NORTHWEST INSURANCE COMPANY**

**Respondent/Insurer for**

**NORTHERN MOTOR INN**

**Employer.**

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**JUDGMENT**

**Summary:** Motel housekeeper filed claim for injury but credible evidence indicated her cervical disk condition arose over two week period due to lifting heavy laundry. Although claimant had not filed an occupational disease claim, and no occupational disease examination had been conducted, the parties waived their rights to a medical panel examination and stipulated that the Court may determine whether she suffered an injury or occupational disease.

**Held:** Claimant suffered occupational disease.

**Topics:**

**Injury and Accident: Accident.** Motel housekeeper filed claim for injury but credible evidence indicated her cervical disk condition arose over two week period due to lifting heavy laundry, not from any accident causing sudden onset. Although claimant had not filed an occupational disease claim, and no occupational disease examination had been conducted, the parties waived their rights to a medical panel examination and stipulated that the Court may determine whether she suffered an injury or occupational disease.

**Injury and Accident: Causation.** Motel housekeeper filed claim for injury but credible evidence indicated her cervical disk condition arose over two week period due to lifting heavy laundry, not from any accident causing sudden onset. Although claimant had not filed an occupational disease claim, and no occupational disease

examination had been conducted, the parties waived their rights to a medical panel examination and stipulated that the Court may determine whether she suffered an injury or occupational disease.

**Occupational Disease: Disease.** Motel housekeeper filed claim for injury but credible evidence indicated her cervical disk condition arose over two week period due to lifting heavy laundry, not from any accident causing sudden onset. Although claimant had not filed an occupational disease claim, and no occupational disease examination had been conducted, the parties waived their rights to a medical panel examination and stipulated that the Court may determine whether she suffered an injury or occupational disease.

¶1 The trial in this matter was held on August 31, 1999, in Kalispell, Montana. Petitioner, Cherol Branch (claimant), was present and represented by Mr. Garry D. Seaman. Respondent was represented by Mr. Larry W. Jones. Exhibits 1 through 9 were admitted without objection. Claimant, Tammy Derbyshire and Le Coe were sworn and testified. In addition the Court reviewed and considered the depositions of claimant, Dr. Robert D. Schimpff, and Dr. Kendal Flindt.

¶2 Prior to the trial testimony, the parties waived their rights to a medical panel examination and stipulated that the Court may consider whether the claimant suffered either an industrial injury or an occupational disease.

¶3 After all evidence had been presented, the Court deemed the matter submitted and rendered its decision from the bench, holding that the claimant sustained an occupational disease and not an injury. I further awarded costs to the claimant and denied attorney fees

¶4 The parties agreed that a transcript of the Court's oral decision shall constitute its findings of fact and conclusions of law. A copy of the transcript is attached to this Judgment. Summarized, I found that claimant's symptoms developed over approximately a two-week period of time when she was lifting heavy, wet laundry. I did not find her testimony of a sudden onset of symptoms credible. Medical testimony supported a finding that claimant's condition developed as a result of her lifting wet laundry over the approximate two-week period.

¶5 Accordingly, Judgment is hereby entered as follows:

¶6 1. Claimant is suffering from an occupational disease which caused a cervical disk condition. Since the claimant is found to have sustained an occupational disease, the respondent shall pay claimant's medical bills for treatment of her cervical condition.

¶7 2. In accordance with *Lockhart v. New Hampshire Ins. Co.*, 1999 MT 205, claimant's attorney is entitled to recover attorney fees out of the medical benefits to be paid.

¶18 3. The parties shall determine what other benefits are owed under section 39-72-405, MCA. The Court retains continuing jurisdiction to resolve any disagreement over non-medical benefits presently due.

¶19 4. Claimant is entitled to her costs in the amount of \$553.30.

¶10 5. Liberty Northwest Insurance Company has not acted unreasonably, therefore claimant is not entitled to attorney fees under section 39-71-611, MCA. Claimant is not entitled to attorney fees under section 39-71-613, MCA, which the Court finds inapplicable.

¶11 6. This Judgment is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶12 7. Any party to this dispute may have 20 days in which to request an amendment or reconsideration of this Judgment.

DATED in Helena, Montana, this 27th of September, 1999.

(SEAL)

/s/ Mike McCarter  
JUDGE

c: Mr. Garry D. Seaman

Mr. Larry W. Jones

Submitted: August 31, 1999

Attachment: Partial Transcript of Proceedings

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TRANSCRIPT OF COURT'S ORAL DECISION IN  
*BRANCH V. LIBERTY NORTHWEST INSURANCE COMPANY,*  
1999 MTWCC 57 (WCC NO. 906-8251)

1 THE COURT: Well, let's go back on

2 the record.

3 As I indicated when I started out with

4 this, I had read all the depositions and I had read

5 the medical records and looked at them pretty

6 carefully, and I listened carefully to the

7 testimony, and I am going to hold that this is an

8 occupational disease, not an injury.

9 The things that are persuasive, number 1,  
10 the physicians' testimony support that, assuming  
11 that she's telling the truth about lifting heavy  
12 objects over that period of time. That's number 1.  
13 Number 2, from the very, very beginning we  
14 have information that's consistent with her lifting

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1 laundry and consistent with laundry aggravating or  
2 causing a progression here of her neck symptoms.  
3 When I looked at Dr. Schimpff's record,  
4 there's an indication of a two-week history of  
5 increasing left arm pain, which would indicate that  
6 this is a developing progression thing. That's on  
7 page 1. I don't know whether Dr. Schimpff wrote  
8 that. I don't know exactly who wrote that.  
9 The next page says, Pain in left arm, six  
10 weeks, I think that's probably -- There's six weeks  
11 in that one, but when you go to the next page, it's  
12 two weeks in arm pain. But certainly her history  
13 there is consistent with the story that she's  
14 lifting heavy laundry.  
15 I don't have any contradictory evidence to  
16 indicate to me that she's lying about lifting that  
17 heavy laundry. If anything, I have confirmatory  
18 evidence from Lee Koe that she was lifting fairly  
19 heavy laundry. The doctors confirmed that that was  
20 probably under those circumstances the thing that

21 was causing this progression, assuming that sort of  
22 history. When I go to Dr. Schimpff's record,  
23 probably that's the most convincing thing for me to  
24 say that this is an occupational disease and not an  
25 injury.

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1 And maybe Claimant may feel that she had  
2 to have a specific incident to make a Workers'  
3 Compensation claim and maybe that's getting a little  
4 bit in the way of this -- of the history that's  
5 being given here by her.  
6 But anyway, if you look at Exhibit A, it  
7 says, Head housekeeper for North -- What is it?  
8 What do they call the motel? Whatever the motel's  
9 name is, does lots of lifting, no clear trauma. And  
10 again, that's consistent with her doing some pretty  
11 heavy lifting of this laundry over a fairly short  
12 period of time, couple of weeks, but not having any  
13 clear trauma, and I don't think Dr. -- Yeah, this is  
14 Dr. Schimpff -- would have written that down, No  
15 clear trauma, if she had reported to him that there  
16 was a specific incident. So I'm not persuaded there  
17 was a specific incident on the 19th, but I am  
18 persuaded that over that two-week period there was a  
19 progression and that laundry was causing a

20 progression, her lifting of that laundry.  
21 I'm also -- You know, when you get into  
22 history, the one thing that seems to scream at me in  
23 this case is that she was in a lot of pain on the  
24 20th. And I'm not convinced her recollection of  
25 what she told the doctors is all that accurate. I

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1 think the doctors' records are probably more  
2 accurate than what her recollection is, but it  
3 just -- From the testimony, from the way she acted,  
4 the fact that she got surgery really quickly, tells  
5 me that she was in an awful lot of pain, and that  
6 was an acute thing.  
7 And the final thing that convinced me,  
8 there's no other explanation here other than  
9 something that's spontaneous, but I've got this  
10 record where she's reporting right from the very  
11 beginning a progression, and that progression is  
12 over a period of time that she's doing some fairly  
13 heavy lifting.  
14 So that's my resolution of the case, and  
15 I'll leave it up to counsel to figure out what those  
16 medical bills are and what other benefits are owed.  
17 And I don't make any determination on what might be  
18 due under -- What is it? Section 405 or 407? I

19 forget what section it is. 405. Larry knows the  
20 section numbers better than I do.

21 MR. SEAMAN: I guess the only other  
22 issue we have are costs and attorney fees.

23 THE COURT: Costs you get. Attorney  
24 fees -- I would have to find unreasonableness. Do  
25 we have attorney's fees under the Occupational

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1 Disease Act at this point?

2 MR. JONES: Your Honor, my  
3 recollection, and I can consult our code, is that it  
4 contemplates a hearing before the Department. We  
5 have the jurisdictional change now.

6 THE COURT: Right. Whatever the  
7 Department could do, I can probably do. Let me look  
8 at it and see what the section says. If there's a  
9 separate section as far as -- under the Workers'  
10 Comp. Act you have to prove unreasonableness.

11 MR. JONES: If I may, your Honor.

12 THE COURT: Go ahead.

13 MR. JONES: This case was initially  
14 brought and pled under the injury statute.

15 THE COURT: Right.

16 MR. JONES: I would have to say the  
17 Claimant didn't prevail, and it was only here at

18 trial that we added the O.D. issue in the interest  
19 of judicial economy. And we didn't really have a  
20 claim for an O.D. until today, so I would say that  
21 would take care of that issue because the Claimant  
22 didn't prevail on the issue she brought.

23 THE COURT: Under the Workers' Comp.

24 Act you sure have to prove unreasonableness in any  
25 event.

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1 What do you think, Garry?

2 MR. SEAMAN: I think they were  
3 unreasonable. They didn't pay any of the medicals  
4 on this case. I didn't get to bring in how much we  
5 had in medicals, but they were substantial.

6 THE COURT: I assume that.

7 MR. SEAMAN: Those haven't been  
8 paid. The creditors are there.

9 THE COURT: I know. I understand  
10 that.

11 MR. SEAMAN: Whether it was an injury  
12 or occupational disease, she was entitled to those  
13 temporary total disability benefits when she was  
14 healing up from that surgery. She was entitled to  
15 have those medical bills paid, whether or not it was  
16 an injury or an occupational disease. Based upon

17 that, I think they were unreasonable in that sense.  
18 They did not send this to the panel for  
19 any reason. If they thought it was an O.D. claim,  
20 they just simply left her out there saying this  
21 didn't happen within the course and scope of  
22 employment, and there was no evidence anywhere that  
23 this did not happen within the course and scope of  
24 employment. It's clear from everything that came  
25 in.

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1 MR. JONES: If I may, your Honor.  
2 THE COURT: Go ahead.  
3 MR. JONES: I think you would agree  
4 the law is clear that an insurer doesn't have to  
5 solicit a claim. The Galusha, Higgins and Galusha  
6 claim says that, Devlin versus those people, and for  
7 Liberty to pay the O.D. would have to say, No, we're  
8 soliciting an O.D. from you and you have to pursue  
9 your injury claim. So that's how we would address  
10 that argument.  
11 In the Ronnie Lewis case, this Court found  
12 a claimant's lack of credibility regarding the  
13 various testimony in that case with which you're  
14 more than familiar, your Honor. That lack of  
15 credibility led you to conclude no injury ever

16 occurred at work.

17 So here there was a question of  
18 credibility given the discrepancy between her claim  
19 and the doctors' reports, and the Court could have  
20 inferred, had it found her not credible, to the  
21 extent you did Ronnie Lewis, that in fact she had  
22 not been hurt at work. And in Ronnie Lewis you said  
23 it's not necessary to show how she got hurt. It's a  
24 course and scope issue. So Liberty's entitled, I

25 think, to rely on that case any time there's an

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1 issue of credibility, and I think the Court would  
2 agree, any time there's a major discrepancy between  
3 the physicians' records and a claimant's reports,  
4 there's an issue of credibility.

5 THE COURT: Well, I don't know  
6 whether I would go quite that far, but, I mean,  
7 certainly in many cases that may be true and  
8 probably is true.

9 Well, here's what I think. First, I think  
10 Larry is right. There was only a claim for the  
11 injury, and that's what they were -- that's what  
12 they were defending against and they have prevailed  
13 on that particular point.

14 Second, I think I would be hard-pressed to

15 hold him unreasonable particularly where there's  
16 representation of counsel when the occupational  
17 disease case hasn't been pressed in the  
18 alternative. And one of the problems is if I just  
19 ruled on the -- I can't speak today. I need Lee  
20 Koback in here to articulate for me. If I ruled on  
21 this case in its original posture, then you would  
22 have gone back, run through the mill, and then  
23 certainly you could have filed an Occupational  
24 Disease case, and certainly at that point they would  
25 have had a responsibility to do it. Whether or not

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1 it's good adjusting for them not to do that is  
2 another -- is another issue, but neither side  
3 pursued that.  
4 The other point is that there was --  
5 there's a credibility issue here. I did resolve it  
6 against the insurer, at least to some extent. I  
7 didn't fully resolve it against the insurer because  
8 I have some questions about -- my question, and  
9 found against her as far as a specific incident on  
10 that Sunday. But there's nothing mentioned in that  
11 first report. A question arises because of the  
12 blank form.  
13 There's an indication in Dr. -- The first

14 doctor, Dr. Flindt's testimony, that she had a  
15 specific concern about insurance. So there -- even  
16 though she prevails ultimately even on the  
17 Occupational Disease claim, it's not a case that  
18 there's no basis for taking to trial. I think there  
19 were legitimate questions that could legitimately be  
20 taken to trial, not only on the Workers' Comp. case,  
21 which I've decided against her, but also on the  
22 Occupational Disease case. So I think under those  
23 circumstances I have to deny it. I'll do that  
24 subject to looking at the Occupational Disease Act,  
25 but I think that's pretty much where it's going to

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1 end up.

2 MR. JONES: If you were to change  
3 your mind, would you leave the record open to  
4 address what would have to be a --  
5 THE COURT: If there's additional  
6 evidence that would have to be taken?  
7 MR. JONES: Well, what I'm getting  
8 at, you told us which way you're going to go unless  
9 when you read the Statute something directs you in a  
10 different direction. So if you were to do that, I'm  
11 wondering if the record would be left open for  
12 Liberty to address what would now be a new issue

13 that has been raised.

14 THE COURT: Under the Occupational

15 Disease Act.

16 MR. JONES: Yes, your Honor.

17 THE COURT: See, the problem was, I

18 wasn't thinking about that when I suggested that we

19 combine the two. I don't know whether I

20 specifically suggested that, but I certainly pushed

21 you in that direction, and I wasn't thinking about

22 the attorney's fees issue, that there might be a

23 difference. I was more concerned about litigating

24 this thing twice and perhaps having her deny her

25 benefits that she's going to get right now. I was

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1 more concerned with that happening than I was

2 thinking about whether or not there would be a

3 technical difference between the attorney fees.

4 Let me look at the Attorney's Fees Act

5 right now. What Act are we under? The '97?

6 MR. JONES: Yes, your Honor, the

7 '97.

8 THE COURT: This didn't get changed

9 in the House Bill 592; did it?

10 MR. JONES: Your Honor, I would have

11 to look at the Bill.

12 THE COURT: I don't remember. Maybe  
13 it did.  
14 If what this thing says if an insurer  
15 requests that a hearing be held before the  
16 Department and the claim is determined compensable  
17 by the Department after the hearing, and the insurer  
18 does not appeal the Department's decision to the  
19 Workers' Compensation Judge, reasonable cause, etc.,  
20 and attorney's fees as determined by the Department  
21 shall be paid to the claimant attorney by the  
22 insurer.  
23 I don't have any trouble since the  
24 jurisdiction is changed as substituting the Workers'  
25 Compensation Court for the Department. The problem

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1 is is applying that, and it's the insurer's request,  
2 and the insurer's request would basically be only if  
3 the medical panel procedure was followed and the  
4 medical panel determination was adverse and the  
5 original recommendation of the Department was  
6 adverse to the insurer. Do you understand how that  
7 works, Garry?  
8 MR. SEAMAN: I'm reading it right  
9 now.  
10 THE COURT: Okay.

11 MR. SEAMAN: Looks like paragraph 2  
12 says that attorney fees are payable, if I prevail.  
13 THE COURT: Well, except that --  
14 MR. SEAMAN: Am I wrong?  
15 THE COURT: Pardon?  
16 MR. SEAMAN: I'm just -- Read it real  
17 quick, and I just -- If I prevail before the Work  
18 Comp. Judge I'm entitled to the fees, according to  
19 613. That's what we're looking at; aren't we?  
20 THE COURT: Right, but under 613 as  
21 written before House Bill 592 was adopted, the  
22 hearing would be before the Department.  
23 MR. SEAMAN: Right.  
24 THE COURT: Then the appeal would be  
25 to the Court. But in effect, for that second

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1 paragraph to apply, the Department would have had to  
2 have decided the case at the Department level in  
3 your favor, and then at that point you would have to  
4 prevail in the Workers' Compensation Court for me to  
5 award fees.  
6 So with the Department being divested of  
7 jurisdiction and jurisdiction coming to the Court,  
8 it's going to be paragraph 1 that I think applies,  
9 because this isn't an appeal situation.

10 MR. SEAMAN: Didn't they waive their

11 right to take it to the Board when we started this

12 hearing here today?

13 THE COURT: Right.

14 MR. SEAMAN: And therefore it went

15 before the hearing and --

16 THE COURT: You both did, but I guess

17 what I'm saying, if you read the first paragraph, it

18 says if an insurer requests a hearing, for that to

19 happen under the Department procedure, that both of

20 you -- both of you waive, you would have to

21 request -- you would have to personally have a claim

22 that would have to be a referral to the medical

23 panel, the medical panel decision would have to be

24 in favor of the Claimant and adverse to the insurer

25 and the Department would have to adopt that as its

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1 initial recommendation.

2 MR. SEAMAN: Right.

3 THE COURT: Otherwise it wouldn't

4 request a hearing, the shoe would be on the

5 claimant's foot to request the hearing.

6 So I think I may have messed up your

7 attorney's fee claim in -- And we may have messed it

8 up in proceeding this way, although if you went back

9 through this procedure, it may be that you would  
10 have ended up -- it may have ended up accepting this  
11 even if it denied the Workers' Comp. claim if you  
12 had pursued the Occupational Disease part. I don't  
13 know what would have happened.

14 MR. SEAMAN: That would have  
15 happened.

16 THE COURT: I know you would, but  
17 see, I think -- Well, I may have messed up the  
18 attorney's fees and muddled the attorney fees issue,  
19 but I think it's more important that her entitlement  
20 to benefits gets adjudicated.

21 MR. SEAMAN: I agree.

22 THE COURT: And I didn't intend to  
23 deprive you of an opportunity to do the attorney  
24 fees or anything of the sort. And under the  
25 Workers' Comp. Act, you would have had to prove

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1 unreasonableness, so actually this is a lower  
2 standard under this Act.

3 MR. SEAMAN: Right.

4 THE COURT: So that'll be my final  
5 ruling.

6 (Off the record discussion.)

7 MR. SEAMAN: I guess the other issue

8 is the issue of attorney fees as opposed to the lien  
9 with the medical provider, and that's before the  
10 Supreme Court right now. And that's -- I know  
11 that's contrary to your ruling right now, but that  
12 was just argued and we're waiting for a decision on  
13 that in the next --

14 MR. JONES: As you know, your  
15 Honor --

16 THE COURT: Let's go off the record  
17 on this one.

18 MR. JONES: Probably a good idea.

19 (Off the record discussion.)

20 THE COURT: I've been discussing with  
21 counsel what we do as far as paying medical  
22 providers, and in two cases, I don't remember the  
23 names of them. Larry, do you have them off the top  
24 of your head?

25 MR. JONES: The case I'm involved in

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1 is Petak. It was argued, in my best recollection,  
2 in February or so of this year in front of the  
3 Supreme Court.

4 THE COURT: And a decision in that  
5 case and the companion case, I think the companion  
6 case was Lockhart.

7 MR. JONES: That is it, your Honor.

8 THE COURT: I determined that no  
9 attorney lien applied to medical benefits payable to  
10 medical providers and therefore could not be  
11 withheld, that the medical providers had to be paid  
12 a hundred percent of the rates they were specifying  
13 for their payment.

14 That case has gone up to the Supreme  
15 Court. The Supreme Court has taken the issue  
16 seriously enough to have had it orally argued, and  
17 they only orally argue about a dozen cases a year,  
18 and I think they did so in -- all seven of them.

19 MR. JONES: That was right, your  
20 Honor.

21 THE COURT: So they're treating that  
22 appeal seriously. It was argued in February, we do  
23 not know the outcome of that. So my -- I want to  
24 freeze the situation. I recognize it's possible  
25 that the Supreme Court might not agree with my

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1 decision, and therefore in this case what I'm going  
2 to order is that pending that decision, the Supreme  
3 Court decision, that the medical providers be paid  
4 80 percent and that Liberty --

5 MR. SEAMAN: Seventy-five.

6 THE COURT: I'm sorry. Seventy-five  
7 percent. This case went to trial so the attorney  
8 fee would be 25 percent if it applies to medical.  
9 And so pay the medical providers 75 percent and  
10 withhold 25 percent. You don't need to pay that  
11 tort to the Court. You're making all these other  
12 payments, so I don't think you'll default on that if  
13 it comes to that. And do that pending what the  
14 Supreme Court decides. Once the Supreme Court  
15 decides it, then that will direct us on what we  
16 should do.

17 MR. JONES: Your Honor, unless Garry  
18 has anything else, can we clarify that your decision  
19 is final for appeal purposes and that starts the  
20 running of the appeal time?

21 THE COURT: Well, the question is do  
22 you want a written decision or do you want just this  
23 decision and a transcript to constitute my final  
24 decision?

25 MR. JONES: We would be happy just

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1 with the transcript. I don't know what Garry's  
2 preference is.

3 MR. SEAMAN: That would be fine.

4 THE COURT: Okay. Why don't you --

5 What I'll do is as soon as she sends it to me, I'll  
6 enter judgment attaching that and I'll certify it as  
7 final at that point in time and I will take care of  
8 it.

9 MR. JONES: That way we can consult  
10 with our clients about the status of the case.

11 THE COURT: Okay. Fair enough.

12 MR. SEAMAN: Thank you.

13 MR. JONES: Thank you, Judge.

14 THE COURT: Thank you.

15 (Hearing concluded at 4:15 p.m.)

16 CERTIFICATE

17

18 I, BETH GILMAN, RPR, do hereby certify  
19 that the foregoing is a true and correct transcript  
20 of the proceedings held in the above matter on the  
21 31st day of August 1999.

22 DATED this day of 1999.

23

24

25 BETH GILMAN, RPR

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