

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky
2020-SC-0609-WC

CONIFER HEALTH

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
NO. 2020-CA-0712-WC
WORKERS' COMPENSATION BOARD
NO. WC-16-95119

FRIEDA SINGLETON;
KENTUCKY WORKERS' COMPENSATION
BOARD; DR. DONNA BETZ; DR. KEVIN
HARRELD; AND HONORABLE CHRISTINA
HAJJAR, ADMINISTRATIVE LAW JUDGE

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In this medical fee dispute, Conifer Health (Conifer) argues that the Administrative Law Judge's (ALJ) determination of compensability for shoulder replacement surgery was not based on substantial evidence, and was, therefore, improper. Conifer appealed to the Workers' Compensation Board (the Board), which affirmed the ALJ. Conifer then appealed to the Court of Appeals, which affirmed the Board. Conifer has now appealed to this Court.

After thorough review, we affirm the Court of Appeals.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 15, 2016, Frieda Singleton (Ms. Singleton) was traveling to a work meeting in Louisville, Kentucky, from Shelbyville, Kentucky when she

was rear-ended by another vehicle. She sustained a shoulder injury from the motor vehicle accident for which she sought workers' compensation by filing a claim with the Department of Workers' Claims. She received medical treatment from her primary care physician, Dr. Donna Betz, and later Drs. Andrew Duffee and Kevin Harreld.

On July 11, 2016, after unsuccessfully managing Ms. Singleton's pain through a conservative approach, Dr. Duffee performed a right shoulder arthroscopy with removal of a foreign body and extensive debridement in both the glenohumeral and subacromial spaces with subacromial decompression and open subpectoral biceps tenodesis. This treatment alleviated Ms. Singleton's shoulder pain for some time, but it returned. She received cortisone injections in her right shoulder in November 2017 and March 2018 from Dr. Duffee. She also received Lidocaine patches and Tramadol from Dr. Betz to address her pain.¹

The parties entered into a settlement agreement, approved on July 26, 2018. The settlement awarded Ms. Singleton partial permanent disability benefits, and left open reasonable, necessary, and related medical expenses pursuant to KRS² 342.020.

¹ Conifer filed a medical fee dispute over the Lidocaine patches and Tramadol treatment, contending they were unreasonable, unnecessary, and unrelated to her work injury in addition to the medical fees at dispute in the case at bar. Dr. Betz was joined in the underlying action as a result. This issue was rendered moot upon Singleton's subsequent total shoulder replacement; therefore, we will not address it.

² Kentucky Revised Statute.

Ms. Singleton continued to seek treatment for the pain in her right shoulder. She was referred to Dr. Harreld, who saw her on May 24, 2019. Dr. Harreld diagnosed her with glenohumeral joint arthritis in her right shoulder and noted that the plain film radiographs of her right shoulder indicated a large osteophyte forming on the inferior aspect of the humeral head. He recommended platelet-rich plasma injections to treat her pain after Ms. Singleton expressed to him that she did not want to consider surgical options at that time.³ Eventually, Dr. Harreld determined that a total right shoulder replacement, or arthroplasty, was necessary due to Ms. Singleton's persistent and unmanageable pain. Dr. Harreld performed the surgery to replace her right shoulder on June 27, 2019.

Conifer filed a motion to reopen the claim and a concurrent Form 112 Medical Dispute with the ALJ on March 14, 2019, arguing that the surgery was not causally related to Ms. Singleton's work-related injury, and, therefore, not reasonable or necessary under the settlement agreement. Instead, Conifer posited that Ms. Singleton's shoulder replacement was necessitated by pre-existing glenohumeral joint arthritis. In support of its contention that the surgery had no causal relationship to her work-related injury, Conifer filed the

³ Conifer filed a medical fee dispute contending that the platelet-rich plasma injection treatment was unreasonable, unnecessary, and unrelated to her work injury in addition to the medical fees at dispute in the case at bar. Dr. Harreld was joined as a party as a result. This issue was also rendered moot upon Singleton's subsequent total shoulder replacement; therefore, we will not address it.

Independent Medical Examination (IME) Reports of Dr. Ronald Burgess and a utilization review (UR) by Dr. Jeffrey Schiffman as evidence.

The first IME report central to this case was performed by Dr. Burgess on May 15, 2019. Dr. Burgess wrote in the IME that, based on the radiographic evidence and Dr. Harreld's notes, Ms. Singleton would be a candidate for right total shoulder replacement "in the remote future." He stated: "I feel that the primary cause of her complaints is osteoarthritis of the right shoulder since her injury on 02/05/2016. I feel that the cause was preexisting labral tear along with the natural aging process exacerbated by the trauma of the motor vehicle accident."

In a subsequent IME report, dated June 13, 2019, Dr. Burgess conveyed that the work injury had exacerbated the discomfort in Ms. Singleton's pre-existing glenohumeral joint arthritis without increasing its severity, and that Ms. Singleton was a candidate for a total shoulder arthroplasty.

Dr. Burgess reiterated much of the same during his deposition. He stated that his diagnosis of Ms. Singleton was osteoarthritis following "previous trauma," which is a degenerative disease, and which would require a total shoulder replacement preferably after she reached the age of sixty-five. He expressed that the motor vehicle accident exacerbated Ms. Singleton's discomfort but did not change the pathology in the shoulder. The full exchange is as follows:

Q. And, Doctor, what were [sic.] your opinion regarding the total shoulder arthroplasty?

A. I felt that on the information made available to me, that she had an osteoarthritic shoulder prior to the motor vehicle accident on December 5 of 2016. I felt that the incident exacerbated her discomfort, but did not change the pathology within the shoulder. Based on the radiographs, I felt that she would require an eventual total shoulder replacement.

Conversely, Ms. Singleton filed letters dated April 1, 2019 and July 16, 2019 that included the medical records of Dr. Duffee, Dr. Harreld, and her physical therapist. Ms. Singleton also offered proof through her own testimony regarding the causal relationship between the work injury and the surgery. She stated that she had no pain in her arthritic shoulder whatsoever until the work-related incident. The ALJ heard this testimony on December 2, 2019.

On January 22, 2019, the ALJ rendered her opinion. Therein, ALJ Hajjar stated that she considered the following evidence:

the May 15, 2019, June 5, 2019, June 13, 2019 report[s] and August 21, 2019 deposition of Dr. Ronald Burgess, and the June 6, 2019 UR of Dr. Schiffman in support of the motion to reopen. Plaintiff filed treatment records from High Field & Open MRI, Dr. Duffey, [sic.] and Dr. Harreld, and therapy records and testified at the hearing.

After discussing each piece of evidence in further detail, ALJ Hajjar stated as follows:

[a]lthough Dr. Burgess attributed the need for surgery to Ms. Singleton's pre-existing labral tear along with the natural aging process, he also stated her condition was exacerbated by the trauma of the motor vehicle accident. This ALJ is convinced by Ms. Singleton's testimony and by Dr. Burgess that she had a pre-existing condition which was dormant until the work-related motor vehicle accident in 2016 caused her condition to become active and disabling. Following

her surgery in 2016, she continued to have complaints which led to Dr. Harreld's recommendation for the total shoulder replacement. Although the surgery may have been needed eventually due to her pre-existing condition, Dr. Burgess agreed the work-related injury exacerbated her discomfort, and that she was a candidate for the total shoulder replacement because her shoulder pain was not responsive to conservative care and was interfering with her daily activities. Thus, this ALJ finds the need for surgery arose due to the work injury.

This ALJ was also convinced by Dr. Harreld and Dr. Burgess that the surgery was reasonable and necessary. Thus, this ALJ finds the total shoulder replacement compensable.

ALJ Hajjar relied on *McNutt Construction/First General Services v. Scott*⁴ and *Derr Construction Co. v. Bennett*⁵ to conclude that there was a causal relationship between the work-related injury and a hastening of the need for surgery due to Ms. Singleton's pain after thoroughly considering the evidence presented by Conifer and Ms. Singleton.

On February 4, 2020, Conifer filed a Petition for Reconsideration of the January 22, 2019 order, alleging that the ALJ determined the right shoulder replacement was reasonable, necessary, and related to the work injury against the evidence. ALJ Hajjar overruled that petition on February 20, 2020, finding that it was merely a re-argument of the merits of the claim. ALJ Hajjar further expounded upon the reasoning behind her decision, stating:

[t]he point of referring to the *Derr* case was to show that employers are responsible for medical expenses if it is determined that the work injury contributed at least to some degree to the need for surgery, even if the

⁴ 40 S.W.3d 854 (Ky. 2001).

⁵ 873 S.W.2d 824 (Ky. 1994).

surgery is already a possibility due to a pre-existing condition.

Ms. Singleton testified she had no pain prior to the injury. In his first report, Dr. Burgess initially stated the surgery would be needed eventually, possibly after the age of 65. However, in his second report, he agreed she was a candidate due to the radiographic evidence and Dr. Harreld's notes indicating her pain is not responsive to conservative care and was interfering with her daily activities. Dr. Burgess noted her arthritic changes were exacerbated by the accident and were the cause of her pain.

Thus, this ALJ found the accident caused her pre-existing dormant condition to become active, and at the very least, contributed to her pain. The arthritic changes and the pain were why Dr. Burgess felt she was a candidate for the surgery, and why Dr. Harreld recommended the surgery. Thus, this ALJ finds the pain from the injury contributed to her need for surgery, and thus, the surgery is compensable.

Conifer then appealed to the Board, arguing that the ALJ misinterpreted the testimony of Dr. Burgess and that Ms. Singleton had the burden to prove a causal relationship between the need for surgery and the work-related incident. The Board affirmed the ALJ's decision, finding that the "record contains substantial evidence supporting the ALJ's determination." In so finding, the Board noted that:

[t]he crucial question in this case is not whether arthritis was present in the shoulder prior to the work injury, but whether Ms. Singleton would have required surgery at the time of the recommendation by Dr. Harreld if there had been no contribution by the work-related injury. [. . .] In his May 15, 2019 IME report, Dr. Burgess stated the medical treatment up to that date was reasonable, necessary, and related to the exacerbation of her osteoarthritis by the February 5,

2016 [motor vehicle accident (MVA)]. Dr. Burgess agreed the MVA exacerbated her pain. Dr. Harreld recommended replacement surgery based upon the painful shoulder condition caused by the MVA. The ALJ could reasonably conclude the need for surgery relates to the exacerbation of shoulder pain caused by the MVA.

The ALJ clearly accurately understood the opinions of Dr. Burgess as evidenced by her statement, “Although Dr. Burgess attributed the need for surgery to Ms. Singleton's pre-existing labral tear along with the natural aging process, he also stated her condition was exacerbated by the trauma of the motor vehicle accident.”

While Conifer has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. As such, the ALJ acted within her discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result.⁶

Conifer then appealed to the Court of Appeals, again arguing that the ALJ's decision was not based on substantial evidence. Namely, that the ALJ had misinterpreted the testimony of Dr. Burgess and that Ms. Singleton did not provide sufficient proof to rebut Dr. Burgess's testimony. The Court of Appeals also found that the record contained substantial evidence to support the ALJ's decision and a unanimous panel affirmed the Board, stating:

[t]he ALJ was convinced by Ms. Singleton's testimony that, after her 2003 surgery, her shoulder was asymptomatic until the 2016 work-related motor vehicle accident. And, the evidence supported Ms. Singleton's testimony that she was not having problems with her shoulder before the 2016 accident. Even Conifer Health's medical expert, Dr. Burgess, agreed that Ms. Singleton had a preexisting dormant

⁶ Citing *Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000).

condition, which became painfully active after the 2016 work accident.

The ALJ clearly understood and interpreted Dr. Burgess's opinions, as set forth in her January 22, 2020 opinion and February 20, 2020 order. The ALJ acknowledged Dr. Burgess's opinion that Ms. Singleton's preexisting labral tear, which precipitated the 2003 surgery, along with the natural aging process, attributed to the need for Ms. Singleton's total shoulder replacement surgery. However, the ALJ also noted Dr. Burgess's May 15, 2019 IME report wherein he stated that Ms. Singleton's medical treatment, up to that point, was reasonable, necessary, and related to the exacerbation of her osteoarthritis by the 2016 work-related accident. Moreover, Dr. Burgess admitted the 2016 accident exacerbated Ms. Singleton's pain. Dr. Harreld recommended the total shoulder replacement based upon the painful condition of Ms. Singleton's shoulder, which he attributed to the 2016 accident.⁷

Conifer now appeals to this Court.

We discuss additional facts as necessary below.

II. ANALYSIS

Conifer alleges that both the Court of Appeals and the Board erred in affirming ALJ Hajjar because she did not base her determination in the medical fee dispute upon substantial evidence. This argument has two parts: (1) that the ALJ misinterpreted the testimony of Dr. Ronald Burgess, and (2) that Ms. Singleton had the burden of proof and failed to present any affirmative evidence, beyond her own lay testimony, that her condition is casually related to the work incident.

⁷ *Conifer Health v. Singleton*, No. 2020-CA-0712-WC, 2020 WL 6819165, at *4 (Ky. App. Nov. 20, 2020).

(1) Standard of Review

Conifer argues that the ALJ's determination that the surgery was related to Ms. Singleton's work injury is generally subject to review of this Court under either the abuse of discretion standard or clearly erroneous standard by citing *Special Fund v. Francis*.⁸ Conifer further contends that the test for abuse of discretion in the context of workers' compensation is whether the ALJ's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles by citing *Officeware v. Jackson*.⁹

The claimant has the burden to prove each element of her claim in a workers' compensation case.¹⁰ However, when the claim has been closed or settled and a medical fee dispute arises subsequently, the party disputing the medical expenses carries the burden to prove that the expenses are not reasonable, necessary, and related to the work injury pursuant to KRS 342.020.¹¹ When the disputing party meets that burden, it is incumbent upon the claimant to provide medical evidence beyond the claimant's own lay testimony to controvert the proof of the disputing party.¹² Once done, "[t]he

⁸ 708 S.W.2d 641, 643 (Ky. 1986).

⁹ 247 S.W.3d 887, 892 (Ky. 2008).

¹⁰ *Gibbs v. Premier Scale Co./Ind. Scale Co.*, 50 S.W.3d 754, 763 (Ky. 2001).

¹¹ *Crawford & Co. v. Wright*, 284 S.W.3d 136, 140 (Ky. 2009) (citing *Mitee Enter. v. Yates*, 865 S.W.2d 654 (Ky. 1993)).

¹² See *Kingery v. Sumitomo Elec. Wiring*, 481 S.W.3d 492, 496 (Ky. 2015) (stating "ALJs are not permitted to rely on lay testimony, personal experience, and inference to make findings that directly conflict with the medical evidence, except in limited situations, such as matters involving observable causation.") (citing *Mengel v. Hawaiian-Tropic NW. & Cent. Distrib., Inc.*, 618 S.W.2d 184, 187 (Ky. App. 1981)).

ALJ has the sole discretion to determine the quality, character, and substance of the evidence and may reject any testimony and believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same party's total proof."¹³ The ALJ is entitled to a great deal of deference regarding its factual findings on appellate review.

It is the Board's role to "to carry out the same functions as an intermediate court reviewing the decisions of a court of original jurisdiction, to perform the error correcting function normally assigned to the Kentucky Court of Appeals, lacking only the power of constitutional review."¹⁴ The Board's review is limited to whether the ALJ's "order, decision or award is clearly erroneous on the basis of the reliable, probative and material evidence contained in the whole record," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."¹⁵

In this case, the Board correctly pointed to *Ira A. Watson Dep't Store v. Hamilton* for the principle that it "shall not reweigh the evidence and substitute its judgment for that of the ALJ with regard to a question of fact."¹⁶ In doing so, it determined that "[w]hile Conifer has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. As such, the ALJ acted within her discretion to determine which evidence to

¹³ *Wilkerson v. Kimball Int'l, Inc.*, 585 S.W.3d 231, 235 (Ky. 2019) (citing *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985)).

¹⁴ *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992).

¹⁵ KRS 342.285 (2)(d)-(e).

¹⁶ 34 S.W.3d 48, 52 (Ky. 2000).

rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result.” It needed look no further into the reasonableness of the ALJ’s findings, and undertook no such inquiry. Therefore, the Board acted within its authority.

Our Court has articulated the test for erroneous as a matter of law as applicable in this case with lucidity: “the test is whether the evidence compelled a finding in” favor of the party who carried the burden of proof before the ALJ.¹⁷ “It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor.”¹⁸ Instead, where the party who carries the burden of proof did not prevail before the ALJ, that party must point to favorable evidence “so overwhelming that no reasonable person could reach the same conclusion as did the ALJ.”¹⁹ The lodestar of our inquiry under *Special Fund* is whether the finding made by the ALJ is so unreasonable under the totality of the evidence that it must be reversed as a matter of law.

(2) Conifer presents no evidence so compelling that it renders the ALJ’s determination unreasonable concerning Dr. Burgess’s testimony.

Conifer argues that the ALJ erred because there was no evidence that the work-related injury contributed to or hastened the eventuality of a total shoulder arthroplasty. As the Court of Appeals properly noted, Conifer’s own

¹⁷ *Special Fund*, 708 S.W.2d at 643.

¹⁸ *Id.*

¹⁹ *Groce v. VanMeter Contracting, Inc.*, 539 S.W.3d 677, 682 (Ky. 2018) (citing *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984)).

medical expert, Dr. Burgess, testified that Ms. Singleton's pain from the work-related motor vehicle accident exacerbated the need for a total shoulder replacement. Dr. Harreld's medical notes also reflected that reality, considering he turned to surgery to remedy Ms. Singleton's pain after he and Drs. Duffee and Betz unsuccessfully attempted to treat it with a conservative approach. The testimony of Dr. Burgess, coupled with his written reports and the medical records from Drs. Harreld and Duffee clearly led the ALJ to determine that Ms. Singleton's pain did hasten the need for surgical intervention, regardless of her pre-existing osteoarthritic condition. ALJ Hajjar explicitly referenced this evidence, stating:

[i]n his first report, Dr. Burgess initially stated the surgery would be needed eventually, possibly after the age of 65. However, in his second report, he agreed she was a candidate due to the radiographic evidence and Dr. Harreld's notes indicating her pain is not responsive to conservative care and was interfering with her daily activities. Dr. Burgess noted her arthritic changes were exacerbated by the accident and were the cause of her pain.

Thus, this ALJ found the accident caused her pre-existing dormant condition to become active, and at the very least, contributed to her pain. The arthritic changes *and* the pain were why Dr. Burgess felt she was a candidate for the surgery, and why Dr. Harreld recommended the surgery. Thus, this ALJ finds the pain from the injury contributed to her need for surgery, and thus, the surgery is compensable.

The evidence she considered here was "of substance and relevant consequence [and had] the fitness to induce conviction in the minds of reasonable men"²⁰

²⁰ *Miller v. Tema Isenmann, Inc.*, 542 S.W.3d 265, 270 (Ky. 2018) (quoting *Smyzer v. B.F. Goodrich Chem. Co.*, 474 S.W.2d 367 (Ky. 1971)).

when finding against Conifer in the dispute. Conifer has pointed to no evidence so compelling in its favor that it renders the ALJ's determination unreasonable, only evidence it wishes the ALJ would have taken over the rest. That ALJ Hajjar made her determination against Conifer's favor is not grounds for reversal, and it is not within this Court's purview to "third guess both the [Board] and the Court of Appeals on the same evidence."²¹

(3) Conifer presents no evidence so compelling that it renders the ALJ's determination unreasonable as to causation.

Next, Conifer contends that Ms. Singleton failed to present any affirmative evidence, beyond her own lay testimony, that her condition is causally related to the work incident. The impetus of Conifer's argument is that the medical records presented by Ms. Singleton do not establish causation to a probable degree of medical certainty, and that her testimony was insufficient to rebut the testimony of Dr. Burgess. Therefore, Conifer requests that this Court find that the ALJ's opinion was not based on substantial evidence, as Ms. Singleton has not met her burden to prove that the total shoulder replacement was causally related to the work injury.

As we discussed *supra*, the burden in a medical fee dispute is upon the employer to show that the expenses were unreasonable, unnecessary, and unrelated to the work injury.²² When the disputing party meets that burden,

²¹ *W. Baptist Hosp.*, 827 S.W.2d at 687.

²² *Crawford & Co.*, 284 S.W.3d 140 (citing *Mitee Enter. v. Yates*, 865 S.W.2d 654 (Ky. 1993)).

the claimant must provide medical evidence beyond the claimant's own lay testimony to controvert the proof of the disputing party.²³ The ALJ then weighs that evidence, and its finding will not be disturbed by this Court unless the party with the burden that did not prevail before the ALJ can point to some evidence in the record that is so substantial to compel a finding in Conifer's favor as outlined in *Special Fund v. Farris*.²⁴

Conifer makes no such showing here. As we described above, Ms. Singleton's medical records, lay testimony, and the testimony of Dr. Burgess were in harmony according to ALJ Hajjar. ALJ Hajjar noted the fact that Ms. Singleton's medical records articulated the intensity of the pain, which was onset by the work-related injury, and that all means of conservative treatment had been exhausted to manage that pain. As the ALJ stated in her opinion and order overruling Conifer's motion to reconsider, all the evidence led her to the conclusion that the pain caused by the work-related injury necessitated Ms. Singleton's shoulder replacement. It was solely within the purview of the ALJ to hear and weigh the evidence, discard what she found unconvincing, and keep what she found relevant and probative to the reasonableness, necessity, and relatedness to the work injury.²⁵ Conifer has pointed to no evidence to the

²³ See *Kingery*, 481 S.W.3d at 496 ("ALJs are not permitted to rely on lay testimony, personal experience, and inference to make findings that directly conflict with the medical evidence, except in limited situations, such as matters involving observable causation.") (citing *Mengel v. Hawaiian-Tropic NW and Central Distrib., Inc.*, 618 S.W.2d 184, 187 (Ky. App. 1981)).

²⁴ 708 S.W.2d at 643.

²⁵ *Paramount Foods*, 695 S.W.2d at 419.

contrary. The ALJ meticulously examined and considered the evidence presented. There are no grounds for us to disturb her findings. Therefore, we hold that the ALJ did not err in finding for Ms. Singleton in the medical fee dispute. Likewise, the Court of Appeals properly affirmed the Board.

III. CONCLUSION

Based on the foregoing, we affirm the Court of Appeals.

All sitting. All concur.

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