

Rilling, Lyle

TREATMENT

Fixity of condition

Whether a claim should remain open for further treatment depends upon the character of the industrially related condition and disability and the expected effect of particular treatment. A claim is ready for closure when the condition and disability are best characterized as essentially permanent, fixed and stable--that is, when with or without treatment, the condition is enduring, not temporary or transient and no fundamental or marked change can be expected.*In re Lyle Rilling*, BIIA Dec., 88 4865 (1990) [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No. 90-2-00834-3.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: LYLE A. RILLING**)
2)
3 **CLAIM NO. G-190478**)
4)
 DOCKET NO. 88 4865
 DECISION AND ORDER

5 APPEARANCES:

6
7 Claimant, Lyle A. Rilling, by
8 Tom G. Cordell

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10 Employer, E.M. Gostovich Masonry Construction Company, by
11 None

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13 Department of Labor and Industries, by
14 The Attorney General, per
15 Kent Mumma, Stephanie Farrell and Dennis J. Beemer, Assistants

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17 This is an appeal filed by the claimant, Lyle A. Rilling, on December 29, 1988 from an order of
18 the Department of Labor and Industries dated November 23, 1988 which set aside an order dated
19 March 9, 1988 and which made an award for permanent partial disability for unspecified disabilities of
20 25% as compared to total bodily impairment for "cervical residuals", less prior awards, and closed the
21 claim. The order dated March 9, 1988, which was set aside, would have closed the claim without
22 additional award for permanent partial disability. **AFFIRMED.**

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26 **PROCEDURAL AND EVIDENTIARY MATTERS**

27 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
28 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
29 Proposed Decision and Order issued on April 26, 1990 in which the order of the Department dated
30 November 23, 1988 was reversed and the claim remanded to the Department with instructions to
31 "provide further treatment and to take any other action which may be appropriate."
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34 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
35 prejudicial error was committed and said rulings are hereby affirmed.
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38 **DECISION**

39 The issue presented by this appeal is whether claimant Lyle A. Rilling's claim should remain
40 open indefinitely for further physical therapy. The Department contends the contemplated physical
41 therapy will not improve Mr. Rilling's underlying condition and that the claim should, therefore, be
42 closed. Mr. Rilling argues that, since his condition would deteriorate without physical therapy, his
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1 claim should remain open indefinitely for the provision of such treatment. We find that the essential
2 character of Mr. Rilling's condition is best described as "fixed", and that his claim was properly closed.
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4 Lyle A. Rilling sustained an industrial injury to his cervical spine on July 6, 1971 while assisting
5 other workers in setting a large pipe. He experienced pain between his shoulder blades and pain and
6 weakness in his right arm. Prescribed treatment has consisted of physical therapy, which Mr. Rilling
7 described as including the use of ultrasound, massage, and application of electrodes to his back. His
8 claim was open for approximately ten months following his industrial injury and closed in May 1972.
9 The claim was then reopened in December 1973 and closed again in May 1976, with an award for
10 permanent partial disability. The claim was reopened again in July 1977 and closed again in March
11 1978. The claim remained closed for nearly seven years until it was last reopened in May 1985. Mr.
12 Rilling is now 67 years old.
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18 Three physicians testified in this matter: Dr. David Miller, a certified specialist in internal
19 medicine who saw Mr. Rilling twice with respect to his industrial condition, in March 1988 and in
20 October 1988; Dr. E. Michael Graham, who is likewise a certified specialist in internal medicine who
21 examined Mr. Rilling one time in November 1989; and Dr. George R. Monkman, a certified specialist
22 in orthopedic surgery, who examined Mr. Rilling in July 1988. These physicians all agree that Mr.
23 Rilling has cervical radiculopathy at the C6-7 level related to his 1971 industrial injury, probably caused
24 by disc herniation and bony encroachment into the foramen. Both Dr. Graham and Dr. Monkman
25 agree that the treatment of choice probably would have been surgery, including laminectomy, although
26 at this late date the surgery would likely have an uncertain outcome. Mr. Rilling has not been
27 interested in pursuing surgery.
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33 Based upon Mr. Rilling's history, the doctors agree that physical therapy tends to relieve his
34 discomfort, improving his functioning. For instance, Dr. Miller told the Department in October 1988
35 "that the physical therapy that Mr. Rilling was receiving was predominantly stabilizing his functioning of
36 his arm." 1/12/90 Tr. at 13. Dr. Miller continues to believe "that physical therapy was needed and
37 would likely be needed indefinitely to maintain functioning of his right upper extremity." 1/12/90 Tr. at
38 13-14. Neither Dr. Miller, nor Dr. Graham, nor Dr. Monkman suggested what form of physical therapy
39 might be useful. Our Industrial Appeals Judge reasoned that Mr. Rilling's condition was not fixed and
40 stable because his disability is reduced with physical therapy and increases without physical therapy.
41 This reasoning is inadequate to resolve the difficult question of whether the claim should remain open
42 for treatment.
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1 Our courts have imposed the requirement that a condition must be "fixed" before a claim can
2 be closed. The term "fixed" does not mean "static":
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4 It is clear that where a claimant's condition is deteriorating or further
5 medical treatment is contemplated, the condition is not "fixed" and the
6 claim remains open so that treatment can be provided. However, if a
7 claimant's condition has stabilized to the point where no further medical
8 treatment is required, the condition is "fixed" for purposes of closing the
9 claim and determining the disability award. This interpretation aids the
10 purpose of the act to provide prompt and certain relief for the injured
11 workman.
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13 Pybus Steel v. Dep't of Labor & Indus., 12 Wn. App. 436, 439, 530 P.2d 350 (1975). Likewise: "
14 'Fixed' has been discussed in terms of permanence, signifying that the disability or physical condition
15 is "unchangeable" ... "lasting," or "stable" ...". Du Pont v. Dep't of Labor & Indus., 46 Wn.App. 471,
16 477, 730 P.2d 1345 (1986). In Du Pont the court found the medical evidence sufficient to support the
17 trial court finding that the condition was not "fixed." The physician wished to follow the claimant after
18 surgery for a period of months to see how the claimant's knee condition responded to the stress of
19 work, to alleviate pain, and to conduct a later re-evaluation.
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22 In Hiatt v. Dep't of Labor & Indus., 48 Wn.2d 843, 297 P.2d 244 (1956), our Supreme Court
23 discussed the concept of "permanence" of a claimant's condition in the context of a widow's claim for
24 pension benefits. The court considered the ordinary dictionary definition of "permanent": "Continuing
25 or enduring in the same state, status, place, or the like, without fundamental or marked change; not
26 subject to fluctuation or alteration; fixed or intended to be fixed; lasting; abiding; stable; not temporary
27 or transient." Hiatt, at 846. The court then explained:
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30 The use of the word "permanent" together with "disability" indicates the
31 character of the disability. It signifies that the disability has expectedly an
32 unchangeable existence; that the physical condition arising from the injury
33 is fixed, lasting, and stable. A person whose condition is remediable is not
34 permanently disabled.
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39 Hiatt, 48 Wn.2d at 846 (Emphasis supplied).

40 The claimant's attending physician in Du Pont recognized "the incompatibility of medical and legal
41 analyses". 46 Wn.App. at 478. It is our job to synthesize the two. Our goal, as indicated by the court
42 in Hiatt, is to determine the "character" of a claimant's disability, that is, whether it is permanent, fixed,
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1 and stable, for legal purposes under the Industrial Insurance Act.¹ A finding concerning the "character"
2 of a claimant's disability with regard to whether it is permanent, fixed, and stable, necessarily involves
3 a relative determination which takes into account the purpose of our Act. Pybus, supra, 12 Wn.App. at
4 439.²
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7 The medical testimony concerning the potential effects of physical therapy upon Mr. Rilling's
8 condition went beyond what was described in the Proposed Decision and Order. In March 1988, Dr.
9 Miller noted decreased range of motion in Mr. Rilling's shoulder, with decreased abduction and
10 adduction, and pain with movement. He also noted some mild muscle weakness. Dr. Miller theorized
11 that a decrease in function of any muscle could lead to atrophy and deterioration due to non-use. He
12 did not mention any atrophy in his examination notes. However, he could not remember whether this
13 omission was because he did not examine for atrophy or because he found none.
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16 In addition, Dr. Miller did not know whether Mr. Rilling was right or left-handed. He also relied
17 upon the erroneous belief that Mr. Rilling had been prescribed, and had received, physical therapy
18 from 1971 to the time he first examined Mr. Rilling in 1988. In fact, it appears from claimant's
19 testimony that he only received physical therapy during the periods when his claim was open. 1/31/90
20 Tr. at 40. In addition, Dr. Miller did not know whether or not Mr. Rilling had received physical therapy
21 between his first examination in March 1988 and his second in October 1988; he had not.
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24 Dr. Miller distinguished between relief of symptoms (palliative care) and stabilization of function.
25 The latter "has to do with motor use and motor function which is a separate part of the nervous system
26 anatomy than the sensory system which deals with pain and symptomatology". 1/12/90 Tr. at 27. He
27 conceded that physical therapy would not cure Mr. Rilling's radiculopathy. He also acknowledged that
28 his recommendation of physical therapy was primarily based on Mr. Rilling's statements of how he felt
29 when physical therapy was discontinued. He testified:
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37 ¹We have previously recognized the distinction between "factual fixity" of condition and
38 "legal fixity" of condition in a different context. See, In re Douglas G. Weston, BIIA Dec., 86 1645
39 (1987) and In re Charles Deering, BIIA Dec., 25,904 (1968).
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41 ²See also: WAC 296-20-01002, "Termination of Treatment: When treatment is no longer
42 required and/or the industrial condition is stabilized, a report indicating the date of stabilization
43 should be submitted This is necessary to initiate closure of the industrial claim Medically
44 Necessary: Those health services are medically necessary which, in the opinion of the director or
45 his or her designee, are: (a) Proper and necessary for the diagnosis and curative or rehabilitative
46 treatment of an accepted condition;"
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1 At the time I saw the patient and he was requesting physical therapy be
2 continued, his history to me was that when he discontinued that, his
3 condition worsened. The objective evidence that I had confirming that was
4 that he had told other physicians that previously, and that was the only
5 objective evidence that I had.
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7 1/12/90 Tr. at 26.

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9 Dr. Graham saw the claimant a year after the closing date. He theorized that, with injuries
10 involving disc herniation, there is most likely inflammation surrounding the disc and the nerve.
11 Physical therapy reduces the inflammation and swelling of disc and nerve tissues. If, on the other
12 hand, pressure from swelling is allowed to increase, then the nerve may become more ischemic and
13 loss of nerve fibers may occur. There is a risk or possibility of progression of the actual neurologic
14 loss. Thus, Dr. Graham believed that physical therapy would help to prevent further deterioration of
15 Mr. Rilling's underlying physical condition. However, he based this opinion on Mr. Rilling's report that
16 his physical function improved with physical therapy. At the same time, Dr. Graham noted that Mr.
17 Rilling's objective findings had not changed during the year prior to his examination, that is, between
18 his examination and Dr. Miller's last examination. This was true even though, by claimant's own
19 testimony, he did not receive any physical therapy during that period.
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23 Dr. Monkman expressed the opinion that physical therapy would not prevent sensory and
24 functional loss. Like Dr. Graham, Dr. Monkman did theorize that inflammation can contribute to
25 osteophytic formation (bony lipping) which can contribute, along with disc herniation and swelling of
26 the nerve itself, to nerve impingement. Nevertheless, when he examined Mr. Rilling in July 1988, Dr.
27 Monkman did not find muscle atrophy. Based upon the information which he reviewed, Dr. Monkman
28 did not believe Mr. Rilling's condition had changed very much since 1971. Although physical therapy
29 might provide intermittent symptomatic improvement, the therapy would not stop degenerative
30 changes in Mr. Rilling's condition. According to Dr. Monkman, there would be a continued natural
31 progression of Mr. Rilling's degenerative changes. Thus, even though physical therapy might be of
32 some benefit in improving symptoms, Dr. Monkman did not believe physical therapy would change Mr.
33 Rilling's actual level of impairment.
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37 Mr. Rilling testified that physical therapy reduces his pain and improves his function so long as
38 the physical therapy continues on a regular basis. Neither the medical testimony nor Mr. Rilling's
39 testimony convinces us that any measurable or describable progressive decline in his condition has
40 occurred over periods of time when he was without physical therapy; nor, are we persuaded that any
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1 progressive improvement in his condition occurred over periods of time when he had the benefit of
2 physical therapy. Indeed, it is clear that Mr. Rilling's condition did not in fact deteriorate between
3 March 1988 and November 1989 when he was not receiving physical therapy. Rather, each time
4 physical therapy has been instituted, it has provided Mr. Rilling with the same type of relief, to the
5 same extent.
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9 Mr. Rilling's experience remains simply that the relief of pain makes him feel better, which
10 allows him to function better, particularly in right arm pushing capacity. In the past, ultrasound has
11 been of no benefit. Application of electrodes caused Mr. Rilling to "really . . . feel good." 1/31/90 Tr. at
12 32. He now uses his own spa at home every day and "then it would be alright again." 1/31/90 Tr. at
13 38. Mr. Rilling further implied that the relief he experienced when he received a massage from a lay
14 person was similar to the relief he experienced from prescribed physical therapy. Mr. Rilling's own
15 experience, then, is most consistent with the view of Dr. Monkman, that his level of impairment has not
16 perceptibly changed with or without medically prescribed physical therapy. Although Dr. Miller's and
17 Dr. Graham's testimony focused upon change which medical science might expect, their general
18 recommendation for physical therapy over an indefinite period of time suggests that physical therapy
19 would actually do no more than relieve the claimant's symptoms on a temporary basis.
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23 After careful consideration of the entire record, we find that Mr. Rilling's condition and disability
24 causally related to his industrial injury are best characterized as essentially permanent, fixed, and
25 stable. With or without physical therapy, Mr. Rilling's condition is enduring and not temporary or
26 transient. No fundamental or marked change can be expected. We, therefore, hold that Mr. Rilling's
27 claim was properly closed on November 23, 1988 with an award for permanent partial disability.
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31 In so holding, we adopt from the Proposed Decision and Order Finding of Fact No. 1 and
32 Conclusion of Law No. 1. In addition, the Board enters the following findings and conclusions:
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35 **FINDINGS OF FACT**

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- 38 2. The claimant, Lyle A. Rilling, injured his neck July 6, 1971 in the course of
39 employment with E.M. Gostovich Masonry Construction Co. Treatment of
40 the condition causally related to this industrial injury has included
41 medication and prescribed physical therapy since 1971 including
42 massage, ultrasound, exercises and the placement of electrodes on Mr.
43 Rilling's back.
 - 44 3. As of November 23, 1988, Mr. Rilling's condition causally related to his
45 industrial injury was best described as cervical radiculopathy at C6-7
46 probably caused by disc herniation and bony encroachment into the
47 foramen. This causes Mr. Rilling to experience pain in his right arm and

1 shoulder and decreases the functional ability in his right arm, particularly in
2 his capacity to utilize pushing strength.

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4 4. As of November 23, 1988, physical therapy in the nature of massage or
5 the placement of electrodes on Mr. Rilling's back is sufficient to reduce Mr.
6 Rilling's sensation of pain and improve functioning of his right arm. Either
7 of these physical therapy modalities has the same result and provides only
8 temporary relief which continues only so long as the massage or
9 placement of electrodes occurs at regular intervals. No form of physical
10 therapy provides any lasting relief from symptoms nor does it improve Mr.
11 Rilling's underlying condition. Mr. Rilling receives equivalent relief from the
12 use of a home spa as well as from lay massage.
- 13 5. Generally, physical therapy provided for a condition such as Mr. Rilling's
14 over an indefinite period of time may have the benefit of reducing irritation
15 and inflammation. It may reduce swelling of nerve and disc tissue as well
16 as lessen development of bony growth in the spine, all of which can be
17 contributing factors to cervical radiculopathy. In Mr. Rilling's particular
18 case the provision of physical therapy will not produce these benefits
19 within some reasonably definable period of time. The only benefits
20 received from physical therapy by Mr. Rilling during a definable period are
21 limited to symptomatic, temporary relief.
- 22 6. As of November 23, 1988, the essential character of Mr. Rilling's disability
23 causally related to his industrial injury of July 28, 1971 was best described
24 as fixed and stable. His condition was not in need of further medical
25 treatment which could reasonably be expected to reduce his impairment.
26 His industrially related condition, described as C6-7 cervical radiculopathy,
27 was relatively permanent, unchangeable, lasting and stable. No
28 fundamental or marked change in this condition would be gained by
29 provision of physical therapy, which is the only treatment which has been
30 recommended to Mr. Rilling and is acceptable to him.
- 31 7. As of November 23, 1988, Mr. Rilling's physical impairment causally
32 related to his industrial injury is best described as equal to 25% as
33 compared to total bodily impairment due to cervical residuals.

34 **CONCLUSIONS OF LAW**

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37 2. As of November 23, 1988, Mr. Rilling's condition causally related to his
38 industrial injury of July 28, 1971 was no longer in need of treatment within
39 the meaning of RCW 51.36.010.
- 40 3. Mr. Rilling's permanent partial disability related to his industrial injury within
41 the meaning of RCW 51.08.150 and 51.32.080 is best described as 25%
42 as compared to total bodily impairment for cervical residuals.
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44 3. The order of the Department of Labor and Industries dated November 23,
45 1988 which made an award for permanent partial disability equal to 25%
46 as compared to total bodily impairment for cervical residuals, less a
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1 previous award under the claim, and which closed the claim with time loss
2 compensation as paid, is correct and is affirmed.

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4 It is so ORDERED.

5 Dated this 30th day of November, 1990.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS

7
8 /s/ _____
9 SARA T. HARMON Chairperson

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11 /s/ _____
12 PHILLIP T. BORK Member

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14 **DISSENT**

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16 The majority chooses to characterize Mr. Rilling's condition "fixed" and his claim ready for
17 closure even though all physicians who testified were in agreement that physical therapy has the
18 beneficial effect of reducing Mr. Rilling's pain and, thereby, improving the functioning in his right arm. I
19 dissent.

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22 In addition to identifying the temporary benefits of physical therapy while such therapy is
23 provided, both Dr. Miller and Dr. Graham expressed serious concern that Mr. Rilling's underlying
24 condition also would deteriorate unless physical therapy continued. Dr. Monkman at least allowed for
25 the possibility. Neither RCW 51.04.010, nor the interpretation given by our courts, direct that such a
26 risk should be taken:

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29 Considering the act in its entirety, it is implicit that a workman who
30 sustained an industrial injury is entitled to receive medical care and
31 attention as may be reasonably required. The act should therefore be
32 construed, in the light of its declared purpose and intent, by providing that
33 a workman may not be rated for permanent total disability until his
34 condition becomes static or fixed, thereby affording him beneficial care
35 and treatment from the time of his injury.

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37 Pend Oreille Mines etc. v. Dep't of Labor & Indus., 64 Wn.2d 270, 272, 391 P.2d 210 (1964).
38 Likewise, in the language which the majority cited from Pybus, "[i]t is clear that where a claimant's
39 condition is deteriorating or further medical treatment is contemplated, the condition is not "fixed" and
40 the claim remains open so that treatment can be provided." (Emphasis supplied) Pybus Steel v. Dep't
41 of Labor & Indus., 12 Wn.App. 436, 439, 530 P.2d 350 (1975).

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45 When all is said and done, Mr. Rilling has shown that two good and sufficient reasons exist for
46 holding his claim open for treatment: (1) to reduce his pain and maintain the functioning in his right
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1 arm; and, (2) to guard against the risk of further deterioration of his underlying condition. It is,
2 therefore, improper to characterize Mr. Rilling's condition as "fixed." His claim should remain open
3 until these reasons for further treatment no longer exist.
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5 Dated this 30th day of November, 1990.
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11 FRANK E. FENNERTY, JR.

Member
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