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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JOHN SHEVCHUK, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and UNITED AIRLINES , Respondents.	A112724 (WCAB Case Nos. SFO 0407561 SFO 0416943)

INTRODUCTION

John Shevchuk petitions for review of an order and decision after reconsideration of the Workers' Compensation Appeals Board (Board), affirming the decision of the Workers' Compensation Judge (WCJ). Shevchuk challenges the Board's permanent disability and apportionment determinations.

BACKGROUND

United Airlines (United) aircraft mechanic Shevchuk sustained industrial injury to his low back and a compensable consequence gastrointestinal injury on March 15, 1994 and during a cumulative period ending November 17, 1997. He had previously received a stipulated award against United based on 4:3 (4.75) percent permanent disability after a 1991 industrial leg injury. After a hearing, the WCJ issued findings, award and opinion on decision dated September 10, 2002. She found Shevchuk 73 percent permanently

disabled, which resulted in an award based on 68:1 (68.25) percent permanent disability after apportionment.

In response to Shevchuk's petition for reconsideration, the WCJ rescinded her findings and award to allow for further development of the record on the issue of Shevchuk's feasibility for vocational rehabilitation (Cal. Code Regs., tit. 8, § 10859).[1] On December 9, 2002, the WCJ appointed rehabilitation counselor Sandra Schuster as independent vocational evaluator. At the next hearing, Schuster both testified and submitted a report.

On September 20, 2004, the WCJ issued findings, award and opinion on decision after rescission, again awarding Shevchuk benefits based on 68.25 percent permanent disability. Again, Shevchuk petitioned for reconsideration, which the Board granted, rescinding the WCJ's order and remanding the matter in order to allow the parties to reconstruct the file, which was "lost or missing." After the file was reconstructed, the WCJ reissued her original findings, award and opinion on decision, Shevchuk again petitioned for reconsideration, and the WCJ filed a report and recommendation on his petition. This time, the Board granted reconsideration to allow for further study of the factual and legal issues. On December 8, 2005, the Board issued its opinion and decision after reconsideration, affirming the WCJ's findings and award.

Shevchuk filed a timely petition for writ of review, which we denied on March 2, 2006. The Supreme Court granted his petition for review and transferred the matter back to us with directions to vacate our summary denial and issue a writ of review, which we have done.

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[1] At the hearing, the parties had submitted a September 4, 2001 report from vocational consultant Ron Fleck, but he had been unavailable to testify.

DISCUSSION

I.
PERMANENT DISABILITY LEVEL

Shevchuk first challenges the Board's determination that his pre-apportionment permanent disability level was 73 percent on the ground that unrefuted medical and vocational evidence "supports a finding" of total (100 percent) permanent disability. This contention reflects a basic misunderstanding of the substantial evidence rule, which is also illustrated by Shevchuk's reliance on *South Coast Air Quality Management District v. Workers' Compensation Appeals Board* (*Zapfel*) (2001) 66 Cal.Comp.Cases 1239.[2] "The findings and conclusions of the Board on questions of fact are conclusive and final [as] long as, based on the entire record, they are supported by substantial evidence." (*Save Mart Stores v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.App.4th 720, 723.) In *Zapfel*, the Board found substantial evidence that the applicant was totally disabled; in this case it did not. Shevchuk's argument that "if the *Zapfel* record supported a finding of 100 [percent] permanent disability, there can be no question that the record in the instant case supports the same finding," ignores the fact that the Board did not *make* the same finding in this case as in *Zapfel*.

In this case, the WCJ based her 73 percent permanent disability rating on the opinion of Steven Feinberg, M.D., the agreed medical examiner (AME), that Shevchuk

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[2] In any event, such "writ denied" cases are not binding on this court. (*County of San Luis Obispo v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 869, 878, fn. 5.)

was limited to "essentially the equivalent [of] a semi-sedentary level of work."[3] Shevchuk argues, however, that evidence he was not feasible for vocational rehabilitation mandated a finding of total disability.

"A permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market. The fact that a worker has been precluded from vocational retraining is a significant factor to be taken into account in evaluating his or her potential employability." (*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245-246.) "[A] determination that he or she cannot be retrained for any suitable gainful employment may adversely affect a worker's overall ability to compete. Accordingly, that factor should be considered in any determination of a permanent disability rating." (*Id.* at p. 243.)

In this case, the WCJ did consider the opinions of both vocational rehabilitation counselor Fleck and independent vocational evaluator Schuster that Shevchuk was not feasible for rehabilitation. She did not accept Fleck's findings at face value believing they were largely based on Shevchuk's own statements regarding his ability to perform certain activities, whereas Shevchuk's testimony in this regard was inconsistent. She further found Shevchuk was less than fully cooperative during the vocational rehabilitation process and voluntarily removed himself from a labor market identified by Schuster.

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[3] In her report and recommendation, the WCJ rejected a later report by Feinberg as "lacking in any foundation and based on little more than speculation." She seems to have initially misconstrued the statement in that report that "it is medically probabl[e] that the approximate percentage caused by the industrial injury/exposure is 100%." It is clear from the context that Feinberg did *not* mean that Shevchuk is *100% disabled*, but rather that 100 percent of his current disability is due to industrial as opposed to non-industrial factors. Later in her report, the WCJ calls Feinberg's statement "nonsensical," having apparently realized that although he declared himself "familiar with apportionment as mandated by Labor Code section 4663" (see *post*, fn. 5), he seems to have ignored that section's mandate to apportion not just to non-industrial injuries but to "other factors . . . including prior industrial injuries" (§ 4663, subd. (c)).

The WCJ found Schuster "forthright and credible." After a thorough assessment, Schuster found Shevchuk not feasible for vocational rehabilitation because of his attitude, perspective, anger, lack of patience, and perception of his disability. He exhibited unwillingness to participate in the vocational rehabilitation process and did not make a good effort during the testing segment of her assessment.

Substantial evidence supports the WCJ's conclusion that Shevchuk was not totally disabled.

II.
APPORTIONMENT

Shevchuk challenges the Board's apportionment determination on two grounds: 1) *no* apportionment is warranted because his back injuries do not overlap with his prior leg injury, and 2) if apportionment *is* warranted, the Board used the wrong apportionment formula.

A. Disability Overlap

For the first proposition, Shevchuk relies on the "writ denied" case (see *ante*, fn. 2) of *Los Angeles County Metropolitan Transit Authority v. Workers' Comp. Appeals Bd.* (*Belcher*) (2000) 65 Cal.Comp.Cases 730, in which a worker with a previous award for orthopedic injuries that limited his physical capacity to work sustained a kidney injury (total renal failure) that precluded any type of work because of daily dialysis. The Board found no apportionment because there was no overlap in the *way* the applicant's injuries impaired his ability to work. By contrast, in this case the WCJ found the impairments similar in kind: "The disability to the leg (preclusion from prolonged squatting and kneeling)[4] overlapped and are subsumed with the disability to his spine (limitation to semi-sedentary work)." Moreover, *Belcher* predated the new apportionment provisions

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4 Although the AME at the time of the 1991 injury did not impose any formal work preclusions, and Shevchuk testified at trial that he returned to his usual and customary job without restrictions, he had previously testified that the leg pain never went away completely and he avoided squatting and kneeling as much as possible, even after his last day of work.

of Senate Bill 899 (Stats. 2004, ch. 34, §§ 34 & 35, pp. 150-152, eff. April 19, 2004 (S.B. 899)).[5]

But Shevchuk maintains the new statutes have effectively eliminated the doctrine of overlap with regard to the seven body regions listed in section 4664, subdivision (c)(1),[6] which include the spine and lower extremities. He offers no elaboration, analysis, or argument in support of this contention, acknowledging that the Board rejected it en banc in *Strong v. City & County of San Francisco* (2005) 70 Cal.Comp.Cases 1460, 1461-1462 (*Strong*), where it ruled that section 4664 requires apportionment of disabilities involving different body regions, "unless the applicant *disproves* the overlap, i.e., the applicant demonstrates that the prior permanent disability and the current permanent disability affect different abilities to compete and earn, either in whole or in part." (See also *Sanchez v. County of Los Angeles* (2005) 70 Cal.Comp.Cases 1440, 1442 (*Sanchez*), en banc Board decision [same].) In this case, the

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[5] Labor Code section 4663, subdivision (a) now provides, "Apportionment of permanent disability shall be based on causation." New section 4664 provides, in pertinent part, "(a) The employer shall only be liable [*sic*] for the *percentage of permanent disability directly caused* by the injury arising out of and occurring in the course of employment. [¶] (b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof." (Italics added.)

All further statutory references are to the Labor Code.

[6] That subdivision provides in relevant part, "The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime."

Board expressly found the WCJ's decision was correct under the principles set forth in *Sanchez* and *Strong*, and Shevchuk has not convinced us otherwise.[7]

B. Apportionment Formula[8]

The WCJ consistently apportioned Shevchuk's permanent disability benefits by subtracting the percentage of permanent disability on which his prior award was based (4.75) from his current overall percentage of permanent disability (73). This is the method ("formula A") the court in *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16

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7 In the recent case of *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115, the court held the Board erred "in imposing on the claimant the burden of disproving overlap between the prior disability and the current disability." Contrary to the Board's conclusion in *Strong* and *Sanchez*, the court held the burden of proving overlap is part of the employer's overall burden of proving apportionment. (*Kopping, supra*, at p. 1115.) We acknowledge this recent development, but also note that Shevchuk did not raise the issue of the burden of proof as to overlap, and did not bring the *Kopping* case to our attention either when it was filed or at oral argument a month and a half later.

8 This issue is currently pending before our Supreme Court in *Brodie v. Workers' Comp. Appeals Bd*. (2006) 142 Cal.App.4th 685, review granted November 15, 2006, S146979, and *Welcher v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 818, review granted November 15, 2006, S147030.

Cal.3d 1, 5-6 (*Fuentes*) found to be required by the express and unequivocal language of former section 4750[9] (repealed by S.B. 899, Stats. 2004, ch. 34, § 37, p. 152).

Less than a month after the WCJ issued her report and recommendation on Shevchuk's petition for reconsideration, the Board issued an en banc decision in *Nabors v. Piedmont Lumber & Mill Co.* (2005) 70 Cal.Comp.Cases 856 (*Nabors*) in which a 4-2 majority agreed with the WCJ herein that *Fuentes* still governed permanent disability apportionment. In its opinion and decision after reconsideration, the Board herein noted that Division Two of this court had granted review in *Nabors*, but also that absent contrary appellate direction, it remained valid authority pursuant to *Diggle v. Sierra Sands Unified School District* (2005) 70 Cal.Comp.Cases 1480 ["significant" Board panel decision].

On December 20, 2005, the Fifth District published its opinion in *E & J Gallo Winery v. Workers' Comp. Appeals Bd.* (2005) 134 Cal.App.4th 1536 (*Dykes*) (review den. Mar. 1, 2006, S140645), in which, after exhaustive analysis (see *post*, pt. B.1.), the court held that "where an employee sustains multiple disabling injuries while working for the same self-insured employer, the employee is entitled to compensation for the total disability above any percentage of permanent disability previously awarded." (*Id.* at p. 1540.) In other words, the *Dykes* court adopted *Fuentes*'s "formula C" method of

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[9] Section 4750, whose purpose was "to encourage employers to hire physically handicapped persons" (*Fuentes, supra*, 16 Cal.3d at p. 6), then provided in its entirety, "An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury *when considered by itself* and not in conjunction with or in relation to the previous disability or impairment. [¶] The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury *as though no prior disability or impairment had existed*." (Italics added.)

The problem in *Fuentes* was that under 1971 amendments to the permanent disability schedule (§ 4658), benefits increase *exponentially* in proportion to the percentage of disability. (*Fuentes, supra*, 16 Cal.3d at p. 4.) Thus, for example, the benefits for 68.25 percent permanent disability plus the benefits for 4.75 percent permanent disability add up to appreciably less than the benefits for 73 percent permanent disability.

computing benefits: award based on current permanent disability rating, less amount payable for prior level of permanent disability (*Fuentes, supra*, 16 Cal.3d at p. 5). (*Dykes, supra*, 134 Cal.App.4th at p. 1553.)

In his petition for writ of review, Shevchuk notes that *Dykes* is directly on point and repudiates the Board's en banc decision in *Nabors*. After his petition was filed, and the matter remanded to us by the Supreme Court, Division Two of this court issued its opinion in *Nabors*, extending the rationale of *Dykes* to a case in which the employer was not self-insured, but covered by two different carriers at the time of its employee's injuries. (*Nabors v. Workers' Comp. Appeals Bd.* (2006) 140 Cal.App.4th 217 (review den. Aug. 23, 2006, S145097); hereafter *Nabors*, unless the Board's en banc decision is specified.)

Unable to distinguish it on the facts, United argues that *Dykes, supra*, 134 Cal.App.4th 1536 was wrongly decided. Our brethren in Division Two rejected this contention (*Nabors, supra*, 140 Cal.App.4th at pp. 226-228), and United advances no compelling reason for us to do otherwise. In order to establish a context for United's contentions, we begin by adopting and quoting in its entirety the *Nabors* court's summary of *Dykes* (*Nabors, supra*, at pp. 223-225):

[1.] The *Dykes* Opinion [fn. omitted]

Winery worker David Dykes sustained an industrial back injury in 1996, resulting in an award based on 20.5 percent permanent disability. In 2002, he became 73 percent permanently disabled after a second industrial back injury. The WCJ awarded Dykes benefits based on 73 percent permanent disability, less the amount of compensation previously awarded for the earlier injury. In other words, the WCJ computed the amount of the award using *Fuentes*'s formula C. Gallo, Dykes's self-insured employer, petitioned for reconsideration, which was summarily denied. (*Dykes, supra*, 134 Cal.App.4th at p. 1541.) Gallo petitioned for review, urging the application of formula A. (*Id.* at pp. 1543, 1554.)

After surveying the applicable statutes (*Dykes, supra*, 134 Cal.App.4th at pp. 1541-1543), the *Fuentes* opinion (*id.* at pp. 1544-1547), and the en banc decision in

Nabors (*id.* at pp. 1547-1548; []), the court concluded *Fuentes* was no longer controlling after S.B. No. 899 (*id.* at p. 1548). First, the court noted that the *Fuentes* court repeatedly stated its holding was required by the express and unequivocal language of section 4750, going so far as to suggest that repeal of that section would create the opportunity to apply another apportionment formula, and a year later, in *Wilkinson v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 491, 500 []), confirmed that its adoption of formula A rested exclusively on former section 4750. (*Dykes*, at pp. 1548-1549.) Next, the court pointed out the "significantly different approaches" to apportionment between former section 4750 (current injury considered by itself as if no prior disability existed) and new section 4664 (conclusive presumption that prior disability still exists). (*Id.* at p. 1549.) Finally, the court rejected the *Nabors* en banc majority's conclusion that the policy of encouraging employers to hire the disabled dictates the use of formula A, noting the new legislation's presumption that prior disability exists, the lack of evidence that any apportionment formula promotes hiring the disabled better than another, and the numerous anti-discrimination statutes enacted since *Fuentes*. (*Id.* at p. 1550.) In sum, the court concluded that "the Legislature contemplated a variation in determining apportionment by repealing section 4750 and replacing it with different language in section 4664 for apportioning liability among multiple injuries." (*Ibid.*)

Turning its attention to the meaning of the new apportionment provision, the court concluded the plain language of section 4664, subdivision (a) (*ante*, [fn. 5]) means that "[a]n employer is liable for the direct consequences of a work-related injury, nothing more and nothing less." (*Dykes, supra*, 134 Cal.App.4th at p. 1551.) Furthermore, "section 4664 contemplates accumulating multiple disability awards rather than subtracting percentage levels of disability." (*Ibid.*)[10] But the court noted that while the new statutes, in conjunction with the permanent disability schedule (see *ante*, [fn. 7]) and

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10 "The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime" except under certain enumerated circumstances. (§ 4664, subd. (c)(1).)

the life pension provision,[11] may be interpreted to permit several different approaches to apportioning liability, yielding quite disparate results, the Legislature did not specify any particular method of calculating an award. (*Id.* at pp. 1551-1552.)

Guided by the specific legislative mandate of section 4664, subdivision (a), as well as the overriding principle of liberal construction of workers' compensation laws for the benefit of injured workers (§ 3202), and mindful of the exponentially progressive nature of the permanent disability tables, which serve to compensate employees with higher levels of permanent disability "in greater proportion" to those with lower levels, the court concluded that only formula C ensures both that an employee is adequately compensated and that an employer is liable only for the percentage of disability directly caused by the current injury. In other words, an employer is liable for that part of a worker's overall disability that exceeds his prior disability level. (*Dykes, supra*, 134 Cal.App.4th at pp. 1551-1552.)

The *Dykes* court could "ascertain no legislative intent to compensate an employee who has sustained two or more disabling injuries while employed by the same self-insured employer less than a similarly situated employee who has sustained a single industrial injury resulting in the same level of permanent disability. By not recognizing the injured employee's total disability[,] and artificially shifting compensation down on the permanent disability tables, all of the other formulas shortchange an employee by treating him or her as though no prior injury or disability existed, which is . . . no longer permitted under Sen[ate] Bill [No.] 899." (*Dykes, supra*, 134 Cal.App.4th at p. 1553.) Moreover, any other formula for apportionment among multiple injuries "creates a windfall to the employer and places an unreasonable burden on the injured employee who must compete in the open labor market with a permanent disability." (*Ibid.*) Finally, the court pointed out that under the old law, evidence that Dykes had been rehabilitated from

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11 "If the permanent disability is at least 70 percent, but less than 100 percent, 1.5 percent of the average weekly earnings for each 1 percent of disability in excess of 60 percent is to be paid during the remainder of life, after payment for the maximum number of weeks specified in Section 4658 has been made." (§ 4659, subd. (a).)

his prior injury would have defeated any apportionment at all, rendering Gallo liable for an award based on 73 percent permanent disability, in addition to the benefits already paid for the earlier injury. (*Id.* at p. 1554.) Under present law, taking his prior level of disability into account, as required by section 4664, subdivision (a), the "percentage of permanent disability directly caused by" the current industrial injury is the additional percentage of disability that takes him from 20.5 percent to 73 percent disabled. Dykes was therefore entitled to an award reflecting the difference between a 20.5 percent disability and a 73 percent disability on the permanent disability table applicable to the subsequent injury. (*Ibid.*) [End of quotation.]

2. United's critique of *Dykes*

United raises some of the same arguments that were raised and resolved in *Dykes* and/or *Nabors*, without adding anything new or demonstrating any flaws in the reasoning of those opinions.

First, United maintains the Legislature intended to incorporate *Fuentes*, *supra*, 16 Cal.3d 1 and formula A into statutory law when it enacted sections 4663 and 4664. United asserts that the Board's en banc decision in *Nabors* was correct, and supported by language in *Strong, supra*, 70 Cal.Comp.Cases at page 1467, to the effect that once disability overlap is established, apportionment is achieved by subtracting the percentage of disability due to the overlapping prior injury from the percentage of combined disability after the new injury. By contrast, United concludes, the *Dykes* court reasoned incorrectly. We disagree.

United's contention that the express language of sections 4663 and 4664 (specifically, the use of the term "percentage of disability") codified *Fuentes*, *supra*, 16 Cal.3d 1 and formula A was rejected by the *Nabors* court, which pointed out that "[f]ormula A and formula C are alternate methods of calculating benefits based on the *percentage* of total disability caused by each of two successive injuries." (*Nabors, supra*, 140 Cal.App.4th at p. 226, citing *Dykes, supra*, 134 Cal.App.4th at p. 1554.) The only difference, as amicus curiae California Applicants' Attorneys Association explains, is whether the percentage apportioned to the disability caused by prior injury is deducted

from the bottom or the top of the combined disability rating. United adds nothing to undermine the *Nabors* court's conclusion.

United's next criticism of *Dykes, supra,* 134 Cal.App.4th 1536 is that formula A is consistent with the purpose of S.B. 899 to stimulate the economy and remedy the "crippling effects" of workers' compensation on California business. This proposition is based partly on uncodified section 49 of S.B. 899, which provides that it take effect immediately in order "to provide relief to the state from the effects of the current workers' compensation crisis at the earliest possible time." The remainder of United's discussion under this rubric is essentially a policy argument on behalf of "the Business community" that every aspect of S.B. 899 should be interpreted in a way that results in lower benefit payments to injured workers. This argument does not undermine the legal analysis of the *Dykes* court, which was presumably aware of the business community's "hope[s]" for S.B. 899.

Next, United raises the issue of the state's policy encouraging employers to hire the handicapped. Here, as elsewhere, United fails to convince us that the *Dykes* court's reasoning (*Dykes, supra,* 134 Cal.App.4th at p. 1550; see *ante,* p. 9) is anything but sound. (See also, *Nabors, supra,* 140 Cal.App.4th at p. 227.)

Finally, United contends that *Dykes, supra,* 134 Cal.App.4th 1536 created an anomalous and unjust rule that applies to only certain classes of employers in violation of the equal protection rights of others. The gist of this argument is that *Dykes* applies only to self-insured employers. On the contrary, pointing out that the *Dykes* court properly limited its holding to the facts of the case before it, but expressly eschewed deciding whether formula C was applicable in other circumstances as well, the *Nabors* court extended its rationale to an injured worker whose employer was insured by two different carriers at the times of his injuries. (*Nabors, supra,* 140 Cal.App.4th at pp. 225-226.)

C. Conclusion

Since United has not persuaded us to diverge from the *Dykes* rationale, and since the *Dykes* holding is directly applicable to the facts of this case, we conclude that formula C is the correct method of calculating Shevchuk's permanent disability benefits. Moreover, since Shevchuk's current injuries directly caused him to become 73 percent permanently disabled, a life pension was imposed as a matter of law under section 4659, subdivision (a). (*Dykes, supra*, 134 Cal.App.4th at p. 1555; *Nabors*, *supra*, 140 Cal.App.4th at p. 228.)

DISPOSITION

The Board's order after reconsideration is annulled, and the matter returned to the Board with directions to reverse the WCJ's order, and recalculate the amount of Shevchuk's permanent disability benefits in accordance with this opinion.

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Sepulveda, J.

We concur:

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Reardon, Acting P.J.

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Rivera, J.