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Case Number 200,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM WELLER,	)	
	)	
Appellee Claimant-Below,	)	**No. 200, 2018**
Appellant,	)	
	)	
v.	)	
	)	
MORRIS JAMES LLP,	)	**ON APPEAL FROM THE**
	)	**SUPERIOR COURT OF**
Appellant Employer-Below	)	**THE STATE OF**
Appellee.	)	**DELAWARE**
	)	**C.A. No.: N17A-08-005 FWW**
	)	
	)	

APPELLANT'S REPLY BRIEF

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I. THE INDUSTRIAL ACCIDENT BOARD DECISION WAS FREE OF LEGAL ERROR AND BASED ON SUBSTANTIAL EVIDENCE, THEREFORE IT WAS LEGAL ERROR FOR THE DECISION TO BE OVERTURNED BY THE SUPERIOR COURT.

1. This Court has clearly set the *Dalton* standard for review of non-sponsored recreational activities in determining if such activity is within the course and scope of an employee's employment.

The Superior Court in its Opinion correctly set the standard of review as the Board's responsibility was to "correctly apply the *Dalton* factors…" (Op. 13). The standard of review for an appeal of a decision from the IAB is well established. In an appeal from the IAB, the function of both this Court and the Superior Court "is to determine only whether or not there was substantial evidence to support the findings of the Board. If there was, these findings must be affirmed." *State v. Dalton*, 878 A.2d 451, 454 (Del. 2005)(quoting *General Motors Corp. v. Freeman*, 164 A.2d 686, 689 (Del. 1960).

The Employer in its Answering Brief[1] conflates this issue by insisting on a standard different from the one that has already been determined to apply in this setting. The Employer's insistence on using the standard set forth in *Spellman* has already been rejected by the Superior Court. As indicated by the Board, and by the

[1] Herein, the Answering Brief is cited as "Ans. Brief __".

Superior Court, the appropriate standard to use in review is the *Dalton* standard. A-411; Op. 13.

2. The Superior Court erred as a matter of law determining that the Board committed legal error when it misapplied the second *Dalton* factor.

The Opening Brief identified why the Superior Court committed legal error in its rigid finding that the use of "employment related activity" was legal error. (Op. 20).

In response the Employer argues that the Board committed legal error when it misapplied the second *Dalton* factor and eliminated the mandatory participation component. Ans. Brief 26. Further, the Employer stated the Board's use of "sphere of employment related activity" is too elastic, even though the Board correctly identified the standard in the preceding paragraph. Likewise, the Employer failed to recognize identical language used by Delaware Courts in other employment and tort litigation without confusion or being too elastic. Ans. Brief 28-29.

First, the Superior Court committed legal error, as the Board's Decision is clear that the *Dalton* factors were used and applied. The standard used in *Dalton* consists of the following factors:

> (1) It occurs on premises during a lunch or recreation period as a regular incident of the employment; (2) the employer, by expressly or impliedly requiring participation, or by making the activity part of the service of the

> employee, brings the activity within the orbit of the employment; or (3) the employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee's health and morale that is common to all kinds of recreation and social life.

A-411.

The Board correctly identified the standard by indicating that "a significant holding in the *Dalton* case was that the factors were stated in the "disjunctive", in other words a claimant only needs to satisfy one for a finding that the activity was in the course and scope of employment." A-411. The Board determined that "after reviewing the record and the evidence…Claimant has met his burden to prove that his injury was in the course and scope of his employment." A-412. In the very next paragraph, and continuing with the same thought from the prior paragraph that correctly identified the second *Dalton* factor, the Board used the phrase "employment related activity" to articulate its findings with respect to the evidence by which the Employer brought the activity into the orbit, sphere, or scope of the employment. A-412.

The Board then applied the correct standard and found that "there was sufficient evidence presented to show that there was pressure on employees to play by implication it was an employment related activity"; management "testified about asking potential employees in job interviews whether they played softball"; witnesses testified they were asked in interviews whether they played softball and that they considered softball games as work events; and that two prior softball injury

claims were accepted under the Employer's workers' compensation insurance. A-412-413. In consideration of these findings, the Board found the Claimant satisfied the second *Dalton* factor as "there was clearly some actions taken by the Employer to bring participation in the softball team within the sphere of an employment related activity." A-412.

The Superior Court committed legal error when it applied its rigid test to the Board's use of "employment related activity" in its Decision. The Board correctly identified the correct standard, applied the correct standard, and referenced substantial evidence in the record to support its Decision. The Superior Court, with the Employer in agreement, indicated that the use of "employment related activity" is too elastic. The Employer argues that this Court should disregard other Courts use of the same exact phrase as the Board here because they are tort cases whereas this is a workers' compensation case. Ans. Br. 29-30. This rings hollow, as those opinions dealt with determining whether the employee at the time of the misconduct was within or outside the employee's employment. Furthermore, the Employer disregards that this Court, in *Dalton*, affirmed the Board's Decision that used "in or about the employer's business". A-411-412. This language is more elastic than what is used in the Weller IAB Decision.

Second, the Employer argues that Board's Decision eliminated the mandatory participation requirement. Ans. Brief p. 26. However, this is not true. The Board in

its Decision clearly articulated that the Employer through its actions brought participation within the course and scope of Claimant's employment. A-412.

There are many instances in the record in which the Employer's management who exerted pressure upon employees to participate. Op. Brief 23-26. Further, the Employer disregarded the testimony from the CFO requesting the Claimant's attendance at the game where he was injured. A-22. CFO required him to prepare the cooler/beverages for the game, which involved leaving work early to accomplish. Id.

The reviewing Court does not have authority to alter any legally correct decision of the Industrial Accident Board that is supported by substantial competent evidence in the record, nor sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings. *Johnson v. Chrysler Corp.*, 213 A.2d 65, 66, 67 (Del. 1965). It is the responsibility of a reviewing Court to determine if the evidence is legally adequate to support the Industrial Accident Board's factual findings. 29 *Del.C.* §10142(b).

Here, the record is clear that the Board correctly identified and evaluated the applicable legal standard, and the record adequately supports its Decision. A-411-412. As such, the Superior Court committed legal error in reversing the Board's Decision.

3. The Superior Court erred as a matter of law in reversing the Board's Decision that the Employer took certain actions to bring softball with the orbit of employment.

a. Board's Finding that the Employer Exerted Pressure Upon Its Employees to Participate Which Brought the Activity Into the Orbit of the Employment.

The Board took into consideration the following when determining whether the Employer's conduct brought the softball into the orbit of employment:

> (1) the Employer exerting pressure on employees to participate in the activity, (2) the Employer inquiring and asking job applicants of the Employer if they played softball, (3) the Employer previously accepted two prior and separate softball related injury claims as work related and compensable under the Employer's Workers' Compensation insurance policy, and (4) the Employer expected the softball injury claims to be covered under the Employer's Workers' Compensation insurance policy not only for the Claimant's claim, but also for the two prior accepted claims.

A-412.

The Superior Court committed legal error when it weighed the evidence, determined questions of credibility, and made its own factual findings and conclusions that reversed the Board's Decision. *Chicago Bridge & Iron Co. v. Walker*, 372 A.2d 185 (Del. 1977); *Johnson*, 213 A.2d at 64. The Superior Court weighed and inserted its own findings and conclusions, as indicated by "any objective pressure came from team members in their individual capacities…" and "evidence illustrates independent actions by employees not attributable to Morris James as employer." Op. 21. The Board weighed the evidence and found that the Employer, through its Executive Director and CFO, in their official capacities, not

just as individuals, exerted pressure on employees to participate. A-412. In review of the record, witnesses testified to many instances in which the Employer's management exerted pressure on the employees to participate.

The Employer argues that the subjective pressures that the Board found are irrelevant, and incorrectly attempts to label the softball team as a loosely affiliated group of people who just happen to be employees of the Employer. Ans. Brief 30-31.

First, the Employer is incorrect in stating that the subjective pressures cited by the Board were only by fellow employees and not management. Ans. Brief 31. In review of the record, that the only people that exerted the pressure were the Employer's management. Op. Brief 23-26. The record is clear that it was the Employer's management that exerted the pressure on participation (A-308-310); Ms. Dawson testified that it was the Executive Director who would come and visit her office to ensure her participation (A-309); Ms. Dawson testified that her superiors ensured she participated in softball (*Id*.); Ms. Dawson testified that if she did not play, she "…certainly didn't feel like being haggled the next day…" by her superiors (A-311); Ms. Dawson testified that the Executive Director pressured her to play (A-314); Ms. Dawson would get permission from her supervisor leave work and participate in softball when work related matters were pending on the condition she would return to work after the game (A-313); Executive Director testified that if

light on participation and did not want to risk a forfeit or "have a bad reputation in the league", then either Executive Director or CFO would go around the Employer to employees to encourage participation (A-58-59); CFO would send an email to get employees to participate, if the employees did not respond, CFO would go directly to them in person (A-87); CFO directed Claimant to prepare and bring refreshments to the softball game, which he did during his work shift (A-93-94); and CFO directed employee to bring her softball supplies during work day (A-108).

This is substantial evidence to support the Board's finding that the Employer through the pressures exerted by its management, the Executive Director and/or CFO, brought the activity within the course and scope of Claimant's employment.

Second, the Employer argues that the pressures referenced in the present case are not similar to those in *Dalton*. Ans. Brief 31. However, this is incorrect and unsupported by the record. In *Dalton*, the employer "solicited volunteers…to participate in the softball game", Dalton believed that if a superior asked him to participate, that he should "make an effort to accommodate", and Dalton believed that in participating in the softball event he was furthering his employer's interests. In contrast, Dalton's employer argued that such participation did not occur during the course and scope of his employment. *Dalton* at 453.

Here, and like *Dalton*, the Employer pressured employees to participate. Op. Brief 23-26. The Employer, through its Executive Director who was responsible for

all non-lawyers of the Employer, testified that participation in the softball increased the productivity for the Employer, and that it was a goal of the Employer since 2001. A-80-81; A-412-413. As in *Dalton*, Claimant's participation was to further the Employer's interests. A-412; *Dalton* at 455. Here, the Claimant included his softball tasks, which were burdensome, on his yearly reviews with the Employer. A-27, 62, 69. This did not go unnoticed or questioned by the Employer. A-69. The testimony of the Executive Director indicated that the Employer deemed Claimant's softball participation in a positive light. Id.

The Employer further argues that in *Dalton* it was a "top-down" systemic method of communicating with respect to the softball event, and conversely, here the "softball communications came from fellow teammates and the elected softball coach. Ans. Brief 31. Thus, communications to participate were not made on behalf of the firm, as they were in *Dalton*." Ans. Brief 30-31. This notion is incongruent with the record. As in *Dalton*, here, the record is clear that it was the Employer's management that communicated pressures upon its employees to participate, not as "fellow teammates". Op. Brief 23-26.

Furthermore, Claimant was approached by a Partner of the Employer to coach the Employer's softball. A-18-19. There was no "election" as the Employer dictated who managed its team, because the Employer's management controlled the event. A-18-19. The record reflects that the Executive Director had sole authority over who

can participate on the team, and likewise made such determinations as to whether a lawyer that left the Employer could still participate on the Employer's softball team. A-21. Additionally, the Employer's HR Director testified that the Employer assigned an employee to handle such softball related tasks, and in years past it was the Claimant. A-128.

The Employer then argues that unlike *Dalton*, here, the employees "consented" to softball emails, and thus consented to be pressured into participation. Ans. Brief 32. In *Dalton*, the employer sent an "email" to its employees asking for "volunteers" to participate. *Dalton* at 452. Dalton felt pressure to participate, so he volunteered to participate to further the employer's interests. *Dalton* at 453. Here, as in *Dalton*, Claimant received an email to participate, was subjected to pressure, was directed to prepare and bring cooler to the softball event in which Claimant was injured, and believed his participation furthered his employer's interests. A-22; A-412. At best, Employer's argument leads to an absurd result. For example, assuming *arguendo* that the Employer is correct that the employees, who according to the record are "all" placed on the email distribution list by the Employer and any employee that would like to be removed can only be removed by requesting removal through the Employer's management, somehow consented to softball emails, and thus consented to being pressured, even though such employees never asked to be placed on the email distribution in the first instance. The Employer then expands

this result and implied that because the employees *consented* to the emails then they can be subjected to pressures to participate albeit by email, or most likely according to the record, in person by the Employer's management. Ans. Brief 32-33. As indicated above, the idea that the employees consented to be pressured is not supported by the record, nor is it supported by *Dalton*, whose fact pattern is similar to the record here.

b. Board's Finding with Respect to the Employer's Previously Accepted Two Prior and Separate Softball Injuries as Compensable Under Workers' Compensation Act.

The Board heard testimony that two prior softball injuries were accepted by the Employer as work-related injuries. A-107. The Board cited to testimony that the employees in the prior injuries were told by the Employer to submit their claims under Worker's Compensation, that were accepted, and that Claimant was told to do the same. A-412. As such, the Board found "there was clearly some actions taken by Employer to bring participation into the orbit of the Claimant's employment. A-412.

The Employer makes several arguments why this Court should ignore that the Employer accepted two prior softball injury claims, as being work-related. Ans. Brief 34. The Employer wants this Court to ignore the testimony from the Executive Director that the Employer could have, but did not, contest the two prior claims, as work-related. A-63.

The first argument the Employer makes is that the Employer did not expand the Claimant's job to include softball. Ans. Brief 34. However, this is factually incorrect. Shortly after Claimant was hired, Claimant was asked by a Partner of the Employer to assume the responsibilities for the softball event, which he did for many years. A-18-19. Due to these burdensome tasks, Claimant included such efforts in his yearly reviews, and these efforts were applauded by the Employer. A-27, 62, 69. On the date of the injury, CFO and Claimant testified that the CFO directed the Claimant to prepare and bring the cooler to the softball event. The Claimant suffered an injury during this event, for which the Employer required his presence at the softball event which resulted in his injury. 19 *Del. C.* §2301(19)(a). Thus, contrary to the Employer's assertion, the record is clear that the Employer did expand the Claimant's job to include the softball event.

Employer's next argument on why this Court should disregard the Employer's previous acceptance of softball injuries as work-related is that the Employer was only following statutory requirements in accepting such claims, and that they mistakenly accepted such claims as work-related. Ans. Brief 34. This argument is unavailing as the Employer in its execution of the documents pursuant to 19 *Del. C.* § 2362(a) is uncontroverted evidence that the Employer admitted that softball related injuries were work-related. The Employer then attempts to convince this Court that the statutory definitions do not apply to this Employer. Ans. Brief 36. However, the

Act is clear that the "*Employer*…the term shall include the *insurer*." 19 *Del. C.* §2301(11) (emphasis added). Lastly, the Employer admitted that after each of the prior accepted, work-related claims the Employer could have disputed each claim as not work-related, but did not do so. A-63.

The Employer could have made changes to softball events to ensure its employees were aware that it was not work-related, but did not do so. Clearly, the intent of the Employer was that these prior two claims, and Claimant's claim, were to be covered under workers' compensation as work-related. Ms. Atwell in her testimony stated that for both her claims she was told by the Employer to submit the claims under workers' compensation, which she did, and they were accepted by the Employer as work-related. A-298-299; A-412. For Claimant's claim, he was told the same by the Employer. A-412. The Employer, through its CFO, advised Claimant to contest the denial of his claim. A-50-51, 90.

The Employer's argument that it accepted the two prior claims as work related was a mistake is not supported by the record. Ans. Brief 37. The witnesses testified that they expected softball injuries to be covered under Workers' Compensation.[2] The HR Director provided hearsay testimony with respect to her conversation with prior insurance carrier that said it was a mistake to cover the claims as work-related

[2] Executive Director A-32, 62-65; CFO A-31-32, 89-90, 110; HR Director A-121, 126-127; Claimant A-29-31, 48; Ms. Dawson A-307-308, 313-313; and Ms. Atwell A-295-297.

(Claimant's counsel objected to such testimony, and the Board limited such testimony and did not find it relevant in its Decision). A-121-122.

The Employer attempts to minimize the documentary evidence before the Court with respect to the Employer's execution of hold harmless agreements for the softball events, and the Employer's willingness to accept liability for injuries to non-employees at the softball events. Ans. Brief 39. The record indicates that these hold harmless agreements were executed by the CFO and in her official capacity as "Controller" of the Employer. A-110. It is curious that an employer would execute hold harmless agreements and be willing to accept liability for non-employees at the softball events if it was just for random participants and was not work related. A-77-78. The execution of these hold harmless agreements, willingness to accept liability, prior acceptance of claims, assignment of employees to organize softball events, pressures upon employees to participate, and the documentary evidence demonstrates that the Employer intended for this to be an activity covered under workers' compensation.

In the totality of the circumstances, the record is evident that the Employer, through its actions and inactions, brought the activity into the orbit of employment.

c. Superior Court Should Have Affirmed, and the Supreme Court Should Affirm, the Board's Decision as a Matter of Public Policy.

Based on the testimony of all involved, it is clear that the Employer expected for the softball event to be covered under Workers' Compensation.[3] The Executive Director testified that after the second accepted softball injury, the Employer switched insurance carriers and the Executive Director relied upon the broker to ensure "same coverages" which would have included the softball event. A-131-132. The Claimant was not involved in these conversations and was not aware of any switch in policies and/or coverages. It is also clear that the employees were not informed that the softball event was no longer covered under Workers' Compensation. A-272-273. The employees were not provided the opportunity to make an informed decision whether to participate due to the activity not being covered. In fact, Ms. Dawson, made such an informed decision not to participate due to Claimant's injury not being covered. A-307.

The Employer in response argues that the employees' "mistaken"/unilateral expectations of coverage are not relevant; that softball was never a part of Claimant's employment; and all of Claimant's medical bills were paid. Ans. Brief 39-40. This is not accurate.

First, the record is clear that all of the witnesses, including the Employer's management, expected the softball event to be covered by Workers' Compensation.

[3] Executive Director A-32, 62-65; CFO A-31-32, 89-90, 110; HR Director A-121, 126-127; Claimant A-29-31, 48; Ms. Dawson A-307-308, 313-313; and Ms. Atwell A-295-297.

Indeed, the Executive Director testified that he expected the new insurance policy would have the same coverages as before, which includes coverage for softball injuries under Workers' Compensation. A-131-132. The CFO advised the Claimant that he should contest the denial of coverage. A-50-51, 90. Thus, unlike the Employer's belief that it was the employees' "mistaken" expectations of coverage, it was actually the employees' expectation of coverage because this is exactly how the Employer handled the prior two injury claims and the Employer failed to alert the employees anything to the contrary.

Second, the Employer argues that softball was never a part of the Claimant's employment. Ans. Brief 40. As explained herein, the record is clear that: shortly after his hiring, Claimant was asked by a Partner to assume responsibilities for the softball events, which he did. Claimant included such softball related tasks in his yearly reviews, which were equated by the Employer as an active member of the Employer. Claimant was instructed by CFO to prepare and bring the cooler, during work hours, to the softball event where he was injured. Thus, the record is clear that the Employer brought the softball event into the Claimant's orbit of his employment.

Third, the Employer incorrectly stated the all of the Claimant's medical bills have been paid. Ans. Brief 40. However, this is not true, as the Claimant was responsible for co-pays and other out-of-pocket related medical expenses.

The Employer stated that in the interest of public policy, the Court should disregard the record which includes testimony of all of the witnesses' expectations of coverage so that "insurance companies can accurately set premiums and employers can continue to support recreational activities". Ans. Brief 40.

The Employer admitted that it could have contested the two prior claims, and made changes to the softball event, but did not. The Employer admitted that it changed policies and expected "same" coverages, but relied upon its broker. The employees were not a party to these discussions, nor were they made aware of any resulting changes. The Employer admitted that it could have alerted the Employees that the softball event was no longer a covered event, but did not. Thus, the employees were aware that prior claims were covered, but were not afforded the opportunity to make an informed decision to not participate anymore due to the activity not being covered. Indeed, Ms. Dawson, after Claimant's injury, made such an informed decision not to participate any longer due to Claimant's injury not being covered. A-307. In consideration of the Employer's argument as to insurance premiums, in essence, it would seem to be a simple task for the Employer to have explained to its employees prior to the event whether any resulting injuries would be covered or not covered under Workers' Compensation. It is clear that the Claimant should not be penalized for the Employer's failure to do so.

In the interest of public policy, and in consideration of the Board's Decision and the evidence therein, the Superior Court should have, and this Court should, affirm the Board's Decision.

4. The Superior Court erred by weighing the evidence and reversing the Board's Decision that productivity is a substantial direct benefit to the Employer.

In both IAB's Decisions, the respective Boards found that the Employer derived a substantial benefit from the employees' participation in softball. A-169, 412-413. In the later IAB Decision, the Board weighed the evidence and determined that the testimony of the Executive Director of the Employer was "more definitive" with respect to his testimony that participation in softball increased productivity and that it was the Employer's goal since 2001. A-412-413. The Board concluded that the Employer derived a "substantial direct benefit" from the employees' participation in the form of increased productivity and cited to and relied upon the Employer's Executive Director's testimony as an officer of the Employer. A-413.

The Superior Court committed legal error when it weighed the evidence and testimony before the Board. The reviewing court is empowered to review findings of the Board on the record, but the scope of such review is narrow, since the Court does not sit as the trier of fact with authority to weigh evidence, determine questions of credibility, and make its own factual findings and conclusions. *Chicago Bridge & Iron Co.*, 372 A.2d at 185; *Johnson*, 213 A.2d at 64.

The Employer in response argues that the benefit of "goodwill" in *Dalton* is more tangible than the benefit of productivity as found by the Board here. Ans. Brief. 21. Here, the Board asked direct, follow-up questions to the Executive Director to ascertain any benefits beyond morale and camaraderie, and the Executive Director not only indicated that ultimate productivity would be increased, but that it was the goal of the Employer since 2001. A-81; A-412-413. Furthermore, the CFO testified that if the Executive Director testified that productivity was increased, then he meant it. A-338.

Here, as in *Dalton*, the Claimant participated in the softball event to further the Employer's interests. The Board's responsibility was to sit as the trier of fact with authority to weigh evidence, determine questions of credibility, and make its own factual findings and conclusions. The Board did just that, and like the first Board, the Board stated that the Executive Director's "testimony was more definitive and not qualified…" and the Board "will continue to rely on his representation as an officer of the firm that Employer realized a benefit in the form of increased productivity." A412-413.

In error, the Superior Court weighed the evidence with respect to testimony by Eric Monzo, whereas the Board correctly disregarded such testimony. The Superior Court cited to Mr. Monzo's testimony that "Monzo did not believe Morris James benefitted from…softball games." Op. 5. However, such testimony by Mr.

Monzo was not credible as the Employer's counsel at the remand hearing indicated to the Board that while Mr. Monzo is a Partner at the Employer, he is not in charge of the Employer's finances, he doesn't measure the Employer's productivity or like and is not in any position to testify about Employer's benefit. A-204. The Board correctly weighed and determined issues of credibility with respect to Mr. Monzo's testimony and did not find it compelling; but in error, the Superior Court weighed this testimony and cited to it in the Opinion. Op. 5.

The Employer, like the Superior Court, relies on the testimony of Mr. Monzo. As indicated above, the Board weighed Mr. Monzo's testimony and determined issues of credibility, and did not find it compelling.

The Superior Court erred when it weighed the evidence and determined that there was not substantial evidence to support the Board's finding that there was a substantial direct benefit to the Employer by the employees' participation in the softball event. Op. 18. The Board correctly weighed the evidence, determined the credibility of the witnesses, and made an independent factual finding. A-412-413. *Johnson*, 213 A.2d at 64, 66. The Superior Court committed legal error when it reversed the Board's Decision.

CONCLUSION

One of the critical holdings in *Dalton* is that the factors are stated in the "disjunctive", and in other words, a Claimant only need satisfy one for a finding that the activity was within the course and scope of employment. Here, the Board found that Claimant satisfied two of the *Dalton* factors. In the Decision, the Board adequately explained how the Claimant's injury, in consideration of the substantial direct evidence, arose out of the course and scope of his employment.

For the foregoing reasons, Appellant respectfully requests that this Honorable Court reverse the Opinion of the Superior Court and uphold the Decision by the Industrial Accident Board, dated as August 1, 2017, that (i) determined that Claimant's injury on June 10, 2015 was in the course and scope of his employment for Morris James LLP, and (ii) awarded Claimant a reasonable attorney's fee.

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