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EXECUTIVE COMMITTEE SUMMER PLANNING MEETING

The MICA Board and Executive Committee is scheduled to meet on July 30, 2019, at the Lodge of the Four Seasons Resort in Lake Ozark, Missouri. The resort will be the site of our June 2020 spring convention. This meeting will give the members the opportunity to review the property prior to the fall business meeting. They will share their observations of the property with you in October. President Matt Hymer has invited the Board of Directors, his Executive Committee, and Committee Chairs to attend the meeting so that they can plan the fall business meeting of MICA. This year, the Board has approved a pre-meeting educational seminar in conjunction with the fall business meeting. The Board will finalize the agenda for this seminar. There is no charge to attend the seminar but space is limited. Be sure to register early for the seminar.

The Board and Executive Committee will have several items to discuss. The main purpose of the meeting is to set the budget and technical program for the annual fall business meeting of MICA. This year’s fall business meeting is scheduled for October 16 & 17, 2019, at the Embassy Suites Downtown Omaha. The room rate for this year is $162 per night, single or double occupancy.

The Board will be reviewing several technical topics for presentations but is open to suggestions from the general membership. President Hymer will be developing the technical program and the pre-meeting seminar around his theme. He has already heard from some of the members regarding topics for the fall meeting, but he is open to all suggestions. If you have a topic that you feel would be of interest to the membership, please contact President Hymer or the MICA office. Matt can be reached at (417) 623-8840. Matt values your suggestions and input, so please call him with your ideas. He will be delighted to visit with you!

For the past nine years, we have held a table top display show for our associate members during our fall business meeting. The displays have been very well received by both the contractors and associate members. During their spring meeting, the associate members discussed ways to improve the table top show. These suggestions will be reviewed by the Board and Executive Committee at the planning meeting. We will keep you informed of the Board’s decision on the format for the mini tabletop trade show for this fall’s business meeting. This year the member firms classified as manufacturers will participate in the tabletop show.

The Executive Committee has several items of business to conduct in addition to setting the technical program for the fall business meeting. President Hymer will have the Executive committee review ongoing operating policies of MICA and review the budget summary from the spring convention. We will share the fall business program with you next month.
PRESIDENT’S MESSAGE

TO: THE MICA MEMBERSHIP

Summer is in full swing around here! I took a bit of a vacation last week and went fishing in northern Minnesota (back to Lake Vermilion, Paul Sawatzke!), with my oldest son and brothers. We had a fantastic time and while the fishing was a bit tougher this year, the weather is just downright fantastic. While I have no desire to do a winter in Minnesota, the summertime mid 80’s during the day, mid 50’s at night with no humidity, is hard to beat. Friday afternoon we were settling up with the owner, and he remarked about how hot it was.....87. Wow! Follow me back to good ol’ Missouri and I’ll show you miserable heat! I just love standing in the shade while the sweat absolutely rolls off of you!

Speaking of an opportunity to experience miserable Missouri heat, if you can, plan on attending the MICA Summer Planning Meeting July 29th-31st at Lodge of the Four Seasons on Lake of the Ozarks. I promise we will have it indoors. We rednecks do have air conditioning (mostly), and there is a very nice lake just a stone’s throw from the front door! This is where we will plan the sessions and topics for the fall meeting held in Omaha. While we have already discussed several good possible options, it can be difficult to continually find new and interesting topics. Come on down and throw out your suggestions as we’d love to have you, or if your schedule won’t allow and you have something you’d like to see addressed, shoot me an email or don’t hesitate to call my cell anytime.

Speaking of the heat, this is a good time to remind everyone of the dangers workers face with the high temperature/humidity. While heat exhaustion can happen any time of the year, obviously, June/July/August are prime times. For people working outdoors in hot weather, both air temperature and humidity affect how hot they feel. The "heat index" is a single value that takes both temperature and humidity into account. The higher the heat index, the hotter the weather feels, since sweat does not readily evaporate and cool the skin. The heat index is a better measure than air temperature alone for estimating the risk to workers from environmental heat sources. While OSHA does not have a specific standard that covers working in hot environments, nonetheless, employers have a duty to protect workers from recognized serious hazards in the workplace, including heat-related hazards. An overabundance of plain water, shade, and cool-down breaks are vital!

Again, we’d love to see you at Lake of the Ozarks in a few weeks! Hope to see you there.

Sincerely,

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The U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) will join businesses and organizations nationwide to recognize the importance and successes of workplace safety and health programs during Safe + Sound Week, August 12-18, 2019.

The week-long event encourages employers to implement workplace safety initiatives, and highlight workers’ contributions to improving safety. Businesses that incorporate safety and health programs can help prevent injuries and illnesses, reduce workers’ compensation costs, and improve productivity.

“Leadership commitment matters and demonstrates workplace safety is a priority,” said Acting Assistant Secretary of Labor for Occupational Safety and Health Loren Sweatt. “Safe + Sound Week reminds employers that safety and health programs help businesses save money, eliminate injuries, and most importantly save lives.”

OSHA’s message is simple: Water. Rest. Shade. Employers should encourage workers to drink water every 15 minutes, and take frequent rest breaks in shaded areas. Employers should:

- Encourage workers to drink water every 15 minutes; and take frequent rest breaks in the shade to cool down;
- Develop an emergency plan that explains what to do when a worker shows signs of heat-related illness;
- Train workers on the hazards of heat exposure, and how to prevent illness; and
- Allow workers to build a tolerance for working in heat.

The OSHA-NIOSH Heat Safety Tool is a free, downloadable app that calculates a worksite’s heat index and displays the associated risk levels. Users can receive precautionary recommendations specific to heat index risk.

(Continued on page 11)
FUTURE MICA MEETING DATES

Fall 2019 Annual Fall Business Meeting — October 16 & 17, 2019, Embassy Suites Downtown, Omaha, NE.

2020 Winter Board and Committee Meetings — January 23 — 26, 2020, DoubleTree by Hilton Grand Key Resort. Key West, Florida.

63rd Annual Spring Convention — June 22 — 25, 2020, Lodge of the Four Seasons, Lake Ozark, Missouri.

Fall 2020 Annual Fall Business Meeting — October 20 & 21, 2020, Downtown Omaha, NE.

64th Annual Spring Convention — June 21 — 24, 2021, Out of Region. Site TBD.

MICA MEMBER ADDRESS/INFO. UPDATES

Be sure to inform the MICA office of any changes or corrections to your listing for either the MICA Directory, e-mail correspondence or mailing address. Even if you update your company listing on the MICA website, please inform the MICA office of the changes. We try to be as current as possible with your help.

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levels to help protect employees from heat-related illness. The tool is available in English and Spanish.

OSHA's Occupational Heat Exposure page explains the symptoms of heat illness, first aid measures to provide while waiting for help, engineering controls and work practices to reduce workers' exposure to heat, and training.

NEW ERA OF DATA USE EMERGING IN CONSTRUCTION

Contractors report increasing ability to gather and analyze data helps improve project outcomes like budget, productivity and profitability

NEW YORK – July 9, 2019 – A new report released today by Dodge Data & Analytics, in collaboration with construction management software provider Viewpoint, a Trimble company, reveals a sea change in the way project data is gathered and analyzed across the construction industry—change that is poised to improve key project outcomes according to construction managers, specialty trade contractors and design/build firms surveyed. Tied to increased technology use and advancements, 64 percent of those who participated in the report said that their ability to gather and analyze data has improved or improved significantly.

The report, titled Improving Performance with Project Data SmartMarket Report: How Improved Collection and Analysis is Leading to the Digital Transformation of the Construction Industry, reveals that contractors believe improvements in field data collection will bring impactful change over the next three years, driving the industry’s digital transformation. If critical business data normalization can be accomplished, the results can increase key project outcomes such as budget, productivity and profitability.

The findings also reveal some important calls to action for continuous improvement in the industry:

- Contractors using commercial software to gather jobsite data report significantly higher satisfaction rates than those using paper forms or spreadsheets.
- Many contractors still have concerns about storing their data in the cloud, and in particular around how secure their cloud-stored data will be. Both general contractors and specialty trades list security concerns as the top reason for not managing data in the cloud, and among those surveyed, 65 percent still use on premise servers.
- While 86 percent of respondents are relying on anti-malware software to address data security, only 45 percent of those surveyed have implemented employee compliance training.

“Gathering siloed data from across their organization to analyze and improve project outcomes is a key challenge we work with clients to overcome daily,” said Viewpoint Chief Product & Strategy Officer Matt Harris. “Contractors are demanding easier, better and more consistent collection of data—from the office, across their extended teams and into the field—in order to enable better measurement of project performance and drive toward greater gains.”

The report also points to current and emerging means of gathering data via apps, cameras, sensors and wearables. “We think this is a critical area to watch in the future,” says Steve Jones, Senior Director of Industry Insights Research at Dodge Data & Analytics. “The smarter jobsite will transform the industry, but companies need their data gathering and analytics fundamentals in place before they can fully profit from all of the exciting technology that is now emerging, funded by an influx of venture capital, and directly addressing industry needs to reduce risk, improve productivity and improve safety.”

A complimentary version of the full SmartMarket Report is available at: viewpoint.com/analyticsreport.

Methodology
An online survey of contractors was conducted by Dodge Data & Analytics. A total of 187 responses are included in the analysis, including 140 prime contractors (general contractors, construction managers, construction design/contracting firms, design-builders and others) and 47 specialty trade contractors.

About Viewpoint: Viewpoint, a Trimble company (NASDAQ: TRMB), is a leading global provider of integrated software solutions for the construction industry. Viewpoint software enables customers to integrate operations across the office, team and field to improve project profitability, enhance productivity, manage risk and effectively collaborate across the broad construction ecosystem. With nearly 8,000 clients, including more than (Continued on page 14)
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OCI – housed within the Department of Labor’s Office of the Assistant Secretary for Policy – fosters a compliance assistance culture within the Department designed to complement its ongoing enforcement efforts. This Office focuses on helping enforcement agencies more effectively use online resources to deliver information and compliance assistance to help the American people. In August 2018, OCI launched Worker.gov and Employer.gov to provide information about workers’ rights and the responsibilities of job creators toward their workers.

**UPDATE OF HEAT STRESS AND OSHA**

The following article was written by Gary Auman and presented to the members at the June Convention of MICA.

It appears that the mandate for employers in the construction industry to provide heat illness protection to their employees is, if anything, more confusing after the decision of the Occupational Safety and Health Review Commission (OSHRC) in the Sturgill Roofing case than it had been before. Some individuals claim that the Sturgill decision will effectively prevent OSHA from enforcing heat illness prevention under the General Duty Clause, while others claim that OSHA is ready to propose or issue a new standard on heat illness prevention. Both are merely rumors, and I think I can safely say that neither is accurate. But I hope the following comments will put both “rumors” to rest, and clear up any misunderstanding about what the Sturgill decision did (and, importantly, did NOT) say.

First, a brief reminder about the General Duty Clause. This language is found at Section 5(a)(1) of the Occupational Safety and Health Act of 1970. The General Duty Clause requires all employers to “provide a place of employment for its employees free of recognized hazards that are causing or likely to cause death or serious physical harm. This is unlike standards that are promulgated under the authority of Section 5(a)(2) of the act that require employers to take certain specific actions with regards to its activities. The General Duty Clause addresses recognized hazards that are not regulated by any of the specific standards found in 5(a)(2).

On March 15, 2012 Judge Augustine, an OSHRC Judge out of the Denver office, issued a decision in case titled Secretary of Labor v. Post Buckley Schuh & Jernigan, Inc., finding that the hazard of heat illness is covered by

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**U.S. DEPARTMENT OF LABOR PROVIDES COMPLIANCE ASSISTANCE RESOURCES TO FIND AND FIX WORKPLACE HAZARDS**

The U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) has developed compliance assistance resources to help employers find and fix workplace hazards before they cause injury or illness.

Workplace injuries and illnesses are preventable when employers implement a proactive, systematic process for identifying and correcting hazards. OSHA is working with industry stakeholders to provide informative compliance assistance resources.

- OSHA’s Safe + Sound campaign webpage has resources and activities for finding and fixing hazards.
- OSHA’s Recommended Practices for Safety and Health Programs identifies key actions for hazard identification and assessment and hazard prevention and control.
- A fact sheet guides employers through the process of using an OSHA 300 log to identify workplace hazards, and prevent injuries and illnesses.
- A guide for managers and safety officers provides tips for conducting safety walk-arounds to identify hazards in the workplace and communicate with workers about hazards in their jobs.

OSHA's On-Site Consultation Program provides valuable services for job creators that are separate from enforcement. Job creators who implement workplace improvements can reduce lost time due to injuries and illnesses, improve employee morale, increase productivity, and lower workers' compensation insurance premiums.

Under the Occupational Safety and Health Act of 1970, employers are responsible for providing safe and healthful workplaces for their employees. OSHA’s role is to help ensure these conditions for America’s working men and women by setting and enforcing standards, and providing training, education and assistance. For more information, visit www.osha.gov.

(Continued from page 11)
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the General Duty Clause. Without going into the facts of that case, Judge Augustine concluded that heat illness was a recognized hazard that was causing or likely to cause death or serious physical harm. He also found that the NIOSH criteria document lists five feasible steps an employer can take, and that Post Buckley Schuh & Jernigan could have taken, to prevent the fatality that occurred in that case. From that point forward, OSHA has been enforcing heat illness prevention against employers in the construction industry under the General Duty Clause.

Following Judge Augustine’s decision, OSHA issued a memo dated July 19, 2012 in which it stated that it had issued a directive to expedite heat related illness inspections and to issue citations. Its stated goal was to obtain swift abatement and reduce heat related illnesses and deaths. The memo referenced the National Oceanic and Atmospheric Administration (NOAA) Heat Index Chart. OSHA has also developed an app for smart phones, which can be used as a guide by employers to identify situations in which remedial action is necessary by employers to prevent heat illnesses.

The NIOSH Criteria Document referenced by Judge Augustine listed six steps an employer can take to prevent heat illnesses and fatalities. The six steps include:

1. Develop procedures to acclimatize new employees and employees who have been away from the workforce to a high heat index environment.
2. Develop work-rest regimens on each job site with a high heat index.
3. Provide cool water and encourage employees to drink five to seven ounces of fluid every fifteen to twenty minutes.
4. Provide a cool rest area in close proximity to the worksite.
5. Provide training to employees regarding the health effects associated with heat stress, the symptoms of heat induced illnesses and methods of prevention.

The sixth part of the NIOSH criteria document was to require the employer to determine the health of its employees and use that information to determine whether they could work in a high heat index environment. Judge Augustine correctly pointed out that there are other federal laws such as the ADA which prevent an employer from obtaining that information. Therefore, this item on the list could not be enforced.

OSHA continued enforcing heat illness prevention under the General Duty Clause following Judge Augustine’s decision. Then, in 2012, OSHA cited Sturgill Roofing under the General Duty Clause for not having a heat illness prevention program following the death of a temporary employee working for Sturgill. The matter was heard by an Occupational Safety and Health Review Commission Administrative Law Judge (ALJ) who affirmed the OSHA citation. Among other things, the judge concluded that Sturgill should have ensured that all employees consumed certain amounts of water on an appropriate schedule. The Review Commission (OSHRC) agreed to review the decision. Finally, on February 28, 2019 the Review Commission published its decision. The three commissioners voted 2-1 to overturn the ALJ’s decision affirming the citation.

The decision of the OSHRC has provoked quite a bit of comment. One attorney who was interviewed felt that the Review Commission decision essentially precludes OSHA from using the General Duty Clause to enforce heat illness protection. Other attorneys who practice in this area have taken a more studied approach. One commentator felt that the decision of the Review commission was fact-specific. She feels (and I agree) that OSHA has not been precluded from using the General Duty clause to protect employees from heat illness. Both of the judges in the majority who voted to vacate the citation noted that they did not feel that OSHA had met its burden to prove the existence of a hazard and a feasible means of abatement. Both of these criteria must be proven to affirm a General Duty clause violation. The ALJ’s decision was a reflection of the mentality that the employer must have failed to provide a safe workplace because an injury/fatality occurred. The Review Commission has long rejected that argument, and did so again here.

As I discuss below, I feel that the OSHRC is using the Sturgill decision to put OSHA on notice of the Review Commission’s concerns with OSHA’s overuse (and perhaps improper use) of the General Duty clause as an enforcement tool in many different situations, including but not limited to heat illness prevention.

My take is that the Review Commission used this case to send a message to OSHA, that OSHA is overusing the General Duty Clause instead of promulgating specific OSHA standards. I have been advising and defending employers for forty-plus years in OSHA matters. I have dealt with quite a few General Duty Clause cases and reviewed many more. When the Occupational Safety and
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Health Act (the Act) was adopted into law, I believe Congress expected the General Duty Clause to be used by OSHA to protect employees until a specific standard could be promulgated. My belief has been buttressed by the language used by the Review Commission in footnote 9 in the Sturgill decision in which it stated:

“We note that when reviewing the history of cases in which the Commission has addressed the general duty clause, … the Commission has from time to time changed its view as to the scope of the provision and what the Secretary must prove for each of its elements. The general expectation was that once a hazard was identified through the general duty clause, OSHA would then engage in rule-making to ensure the hazard was addressed by a standard. While practical considerations may have lead OSHA, over the years, to rely on the general duty clause in lieu of setting standards, the provision seems to have increasingly become more of a ‘gotcha’ and ‘catch all’ for the agency to utilize, which as a practical matter often leaves employers confused as to what is required of them.”

I have always taken the position that OSHA standards are intended to put industry on notice of what is expected of it to protect employees. I believe that one of the reasons it takes OSHA so long to promulgate a new standard is the painstaking process which is required to get a proposed standard into a final rule. This process is intended to provide all stakeholders an opportunity to be involved in the process to ensure that not only are all safety and health concerns addressed, but that they are addressed in such a way as to require feasible remedial measures to protect employees.

I feel that the Sturgill decision is broader than the heat illness question alone. From its decision, the Review Commission appears to be chastising OSHA to some extent for overusing the General Duty clause in place of specific rulemaking in general. As you are probably aware, OSHA has used the General Duty Clause to cite employers on workplace violence issues. It has issued a directive to employers on distracted driving that it (OSHA) will cite employers under the General Duty Clause if the employer does not prohibit texting while driving. It is a virtual certainty that if an employee is seriously injured as a result of either scenario (workplace violence or distracted driving), OSHA will issue a citation to the employer under the General Duty Clause. But the circumstances of every case will differ, and employers will still be in the dark as to what specific steps they need to take to prevent such injuries. This lack of specificity (guidance) by OSHA, which could be overcome by standard setting,
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DODGE MOMENTUM INDEX INCREASES IN JUNE

The Dodge Momentum Index moved 4.0% higher in June to 146.1 (2000=100) from the revised May reading of 140.5. The Momentum Index, issued by Dodge Data & Analytics, is a monthly measure of the first (or initial) report for nonresidential building projects in planning, which have been shown to lead construction spending for nonresidential buildings by a full year. The June increase for the Momentum Index reflected a 6.1% jump by its institutional component and a 2.4% gain by its commercial component.

Despite the improvement shown by the Momentum Index in June, planning for commercial and institutional building projects has clearly stepped back from the torrid pace set during the first half of 2018. Indeed, the average of the overall Momentum Index through the first six months of 2019 was 4.3% lower than the same period a year ago, with the commercial component down 5.2% and the institutional component down 3.0%. What June’s improvement does affirm is that the broader pullback by the Momentum Index remains gradual, and that there are still ample projects at the planning stage to maintain stability for construction spending in the near term.

In June, there were 17 projects each with a value of $100 million or more that entered planning. The leading institutional projects were a $375 million detention facility in Mount Clemmons, MI and the $360 million Dignity Health Dominican Hospital in Santa Cruz, CA. The leading commercial projects were the $250 million Seaport Square office building in Boston, MA and a $200 million warehouse in Suffolk, VA.
appears to be a driver in the Sturgill decision.

So, where does that leave employers in the area of heat illness protection? First OSHA has not published an Advanced Notice of Proposed Rule Making (ANPRM) indicating an intention to promulgate a rule on heat illness protection. I can tell you that if and when OSHA does issue an ANPRM on heat illness protecting we will advise you of it and we will advocate for you, as your trade association, as the rulemaking proceeds.

Second, OSHA can and will continue to cite employers under the General Duty Clause for failing to protect employees from heat related illnesses. Sturgill has not changed this. What should you be doing as an employer to provide heat illness protection for your employees? Whether you are concerned with protecting your employees, avoiding a citation, or both, heat illness has been identified as a recognized hazard to employees, especially in construction. I suggest that you establish a heat illness prevention program. Further I suggest you strive to have your program follow the five components of the NIOSH criteria for heat illness protection. You should (1) establish a procedure to acclimatize your employees; (2) set a work/rest regimen (this will vary depending on the heat index and the type of work being performed); (3) establish a program for regular hydration of all employees (depending again on the heat index and the type of work being performed); (4) establish a cooling off area in close proximity to the job site; and (5) effectively train your employees in the types of heat illnesses, the symptoms of each, how they can recognize the symptoms in themselves and others and the first aid steps to take when those symptoms are observed. Your program should be in writing and it should be the responsibility of supervisors and management to ensure compliance at each site.

In spite of the Sturgill decision I feel OSHA will still be able to inquire as to the steps you are taking to protect your employees from heat illness during an inspection as long as they have a reasonable concern for the health of your employees. The one thing the Sturgill case did for employers is to require OSHA to specifically identify the heat illness hazard on any jobsite, to demonstrate that the employer’s heat illness prevention program is not effective to prevent heat illness, and to prove that alternative and more effective steps are feasible for the employer. One additional step you might consider to enable you to demonstrate that you have an effective heat illness prevention program will be to have your program reviewed.

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The preceding is just the tip of the iceberg, but it gives you a start. We at your trade association will continue to monitor OSHA rulemaking and we will take steps on your behalf, if necessary, to respond to any efforts by OSHA to set standards in heat illness prevention, workplace violence and distracted driving, the three areas currently being enforced by OSHA using the General Duty clause.

WHISTLEBLOWER PROTECTION

OSHA’s Whistleblower Protection Program enforces protections for employees who suffer retaliation for engaging in protected activities under more than 20 federal laws.

The investigation of complaints of retaliation against employees is conducted by investigators in OSHA’s regions. OSHA’s investigators are neutral fact finders; they do not work for either the complainant or respondent (employer).

In addition to OSHA, the agencies below provide anti-retaliation protections in various capacities:

The **U.S. Equal Employment Opportunity Commission (EEOC)** enforces laws that prohibit discrimination against employees because of race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information, and retaliation against employees for opposing such discrimination. To learn more about EEOC’s laws, or to file a complaint, visit www.eeoc.gov or call 1-800-669-4000.

The **Wage and Hour Division (WHD)** of the U.S. Department of Labor enforces Federal laws on the minimum wage, overtime pay, wage recordkeeping, and child labor requirements of the Fair Labor Standards Act. WHD also enforces the Family and Medical Leave Act, migrant and seasonal worker protections, worker protections in certain temporary guest worker programs, and the prevailing wages for government-funded service and construction contracts. To learn more about WHD's laws, or to file a complaint, visit www.dol.gov/whd or call 1-866-4-USWAGE (1-866-487-9243).

The **National Labor Relations Board (NLRB)** protects the rights of most private-sector employees to join together, with or without a union, to improve their wages and working conditions. To learn more about NLRB's laws, or to file a charge, visit www.nlrb.gov or call 1-866-667-NLRB (6572).

**Federal Employees**

With the exception of U.S. Postal Service employees, the Occupational Safety and Health Act does not cover retaliation allegations from federal employees, but there are several environmental statutes that do. However, all federal agencies are required to establish procedures to ensure that no employee suffers retaliation for reporting unsafe or unhealthful working conditions, or for otherwise engaging in safety or health activities.
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