OPINION ENTERED: August 3, 2012

CLAIM NO. 199004481

DARYL MCDANIEL PETITIONER

VS. **APPEAL FROM HON. OTTO D. WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

IRVIN WHITEHOUSE & SONS
DR. SARAH SCHEURICH
and HON. OTTO D. WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

STIVERS, Member. Daryl McDaniel ("McDaniel") appeals the February 29, 2012, opinion and order of Hon. Otto Daniel Wolff, IV sustaining, in part, a medical fee dispute filed by Irvin Whitehouse & Sons ("Irvin Whitehouse"). McDaniel also appeals from the order dated April 5, 2012, overruling his petition for reconsideration.

On May 5, 2011, Irvin Whitehouse filed a Motion to Reopen and Form 112 Medical Fee Dispute along with an affidavit of counsel for Irvin Whitehouse. The attached affidavit provides an adequate summary of the litigation and current medical fee dispute and states as follows:

> 1. The Plaintiff, Daryl McDaniel, suffered a physical injury on 12/5/1989 while acting within the course and scope of his employment. The injury occurred while he was moving a ladder. He experienced a strain of the back and neck. On 3/16/1992, the claim was settled for a lump sum of $32,727.36 leaving open the Plaintiff's entitlement to medical expenses.
>
> 2. A Medical Fee Dispute has previously been filed with respect to ongoing treatment. The Defendant/Employer contested the treatment of Dr. Scheurich, specifically, prescription medications Allezenniol, Amitriputuliline, Cyclovenzaprine, Gabapentin, and Tramadol. At that time, a utilization review determined that ongoing use of these prescription medications were not medically necessary or causally related to the work injury.
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> 3. Administrative Law Judge Lawrence F. Smith rendered an opinion on 8/21/2009. The Administrative Law Judge ruled that ongoing use of the medications was reasonable and necessary and therefore the Motion [sic] to be relieved of further payment was denied.
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> 4. The Plaintiff has continued to treat with Dr. Scheurich. Treatment rendered on 5/27/2010 revealed ongoing

back pain. Unfortunately, most of the treatment note is illegible, however, prescriptions were attached whereby the Plaintiff was clearly prescribed Lortab and Ultram. At that time, a drug screen was performed. The report was prepared on 6/3/2010. The report established that the Plaintiff was testing positive for amphetamines, cocaine and marijuana. The Plaintiff tested negative for the prescribed opiates.

5. Daryl McDaniel was seen for an Independent Medical Evaluation on 3/4/2011. The IME was performed by Dr. Ellen Ballard. Dr. Ballard notes that the Plaintiff was taking Gabapentin, Elavil, Tramadol, Cyclobenzaprine, Lortab. He [sic] was unaware of the exact dosage. Following a physical examination and review of medical records, Dr. Ballard diagnosed a history of back pain, sleep apnea, as well as an inappropriate urine drug screen positive for marijuana, cocaine, and amphetamines. Dr. Ballard concluded that there was no causal relationship between the 1989 work injury and the current treatment rendered by Dr. Scheurich. Further, Dr. Ballard noted that the Plaintiff was failing to follow reasonable medical advice, specifically, he was testing negative for the Hydrocodone that was prescribed as well as testing positive for illicit drugs noted above.

6. Based upon the foregoing, the Defendant/Employer has filed this Medical Fee Dispute contesting the relationship of the current treatment to the work injury, as well as, contesting all liability for ongoing medical expenses based upon the Plaintiff's failure to follow reasonable medical advice in the form

> of not taking prescribed medication while choosing to use illicit drugs instead.

Attached to Irvin Whitehouse's Form 112 are illegible medical records from Family Health Centers dated May 27, 2010, and copies of prescriptions for Ultram and Lortab dated May 27, 2010. Additionally, illegible progress notes from Dr. Sarah Scheurich are attached spanning June 1, 2010, through June 16, 2010.

Also attached to Irvin Whitehouse's Form 112 is a June 3, 2010, drug screen report. *It is important to note the date McDaniel's urine was collected is indicated on the report as May 27, 2010.* The report indicates McDaniel tested positive for amphetamines, cocaine, and marijuana. The report also indicates McDaniel tested negative for Hydrocodone.

The March 14, 2011, independent medical examination ("IME") report of Dr. Ellen Ballard is also attached to the Form 112. Dr. Ballard's report notes "[t]he drug screen from 05/27/10 was positive for amphetamines, cocaine and marijuana." She set forth the following opinions:

> 1. Current diagnosis?
>
> The patient has a history of back pain but his testing, which shows pars defects, is not due to a work injury.

2. Is there a causal relationship between the current diagnosis and the work event of 12/05/1989? Please detail the findings that lead you to conclude that there is or is not [sic] causal relationship?

It is my opinion that there is no causal relationship between his back pain and a work incident of 12/05/1989. His testing has not shown any significant abnormalities that should continue to require treatment since 1989.

3. Please identify any co-morbid conditions that are currently present. Are the co-morbids impacting the symptoms and/or treatment for the work injury?

The patient has a co-morbid condition of having had suicide attempts and he also practices drug abuse. Amphetamines, cocaine and marijuana are all illegal substances that the patient was using while he was under pain management.

4. Do you find that the current treatment regimen for Mr. McDaniel is medically necessary and therapeutic? If not, please identify the specific treatment plan that you would recommend were Mr. McDaniel your patient. What would be the duration of treatment for the work injury?

It is my opinion that his current treatment is not necessary. His testing was negative for Hydrocodone so this may be the method, which he is using to support his other habit.

5. Is there any evidence of symptom magnification?

> He does have positive Waddell's and there is no evidence that this gentleman has any significant abnormality. Therefore, his subjective complaints are that of symptom magnification.

Attached to McDaniel's May 18, 2011, response to Irvin Whitehouse's motion to reopen/medical fee dispute is a letter from Dr. Sarah Scheurich, dated May 9, 2011, which reads as follows:

> This letter is in response to a medical fee dispute regarding my patient, Daryl McDaniel, DOB 2/24/59.
>
> Our clinic has been taking care of Mr. McDaniel for all his medical issues since 2/10/05. I started seeing him on 7/10/06. I have taken care of multiple medical problems through the years, including his chronic back pain that had been attributed to his work injury of 12/5/89. As of 7/28/09, he was on gabapentin, Elavil, tramadol, and cyclobenzaprine (Flexeril).
>
> I next saw him on 5/27/10, and he complained of worsening of his chronic back pain. Therefore, I decreased his amount of tramadol from 4 times a day to 3 times a day, and added Lortab to be taken once a day. A urine drug screen was performed at that visit that was abnormal. It revealed illegal drugs. It did not reveal any narcotics as he had just been prescribed these at that visit. We advised the patient that he must stop any use of illegal drugs if we were to continue prescribing tramadol and Lortab, and the patient voiced his understanding.

> We then saw the patient on 1/4/11 at which point a repeat urine drug screen revealed no illegal drugs. It again did not reveal narcotics as the patient had not been prescribed the Lortab since the 5/27/10 visit. Therefore, we restarted the patient's usual medications including the Lortab, and plan frequent monitoring of the patient with Kasper reports and urine drug screens.
>
> I hope this helps to explain my care of Mr. McDaniel's chronic pain.

Also in the record is a November 9, 2011, drug screen report concerning the analysis of a urine sample collected on November 2, 2011. The report indicates positive test results for Hydrocodone, and negative results for amphetamines, cocaine, and marijuana.

In the February 29, 2012, opinion and order, the ALJ set forth the following Introduction and Review of the Evidence:

INTRODUCTION

> This is a Medical Dispute filed by Defendant on May 2, 2011, contesting medical treatment prescribed by Plaintiff's treating primary care physician Dr. Scheurich. Dr. Scheurich has treated Plaintiff since 2005 for numerous medical conditions, including chronic back pain associated with his December 5, 1989 work injury. As of July 28, 2009 Dr. Scheurich's treatment for Plaintiff's chronic back pain was to prescribe Gabapentin, Elavil, Tramadol and Cyclobenzaprine (Flexeril).

On May 27, 2010 Plaintiff presented to Dr. Scheurich with complaints of worsening back pain. At that time Dr. Scheurich decided to adjust Plaintiff's course of pain management by decreasing the amount of Tramadol and to add Lortab, to be taken once a day. On that day, perhaps to obtain baseline numbers before Plaintiff actually started taking Lortab, Plaintiff was asked to take a urine drug screen test. The test results were positive for amphetamines, cocaine and marijuana. Dr. Scheurich immediately discussed with Plaintiff that he must stop the use of illegal drugs if he were to be prescribed Tramadol and Lortab. On January 4, 2011 a repeat urine drug screen test was administered and revealed no illegal drugs. At that time Plaintiff's medications, including the Lortab, were restarted. In a May 9, 2011 letter-report Dr. Scheurich represented Plaintiff's continued program of medication would be frequently monitored, including the use of KASPER reports and urine drug screens.

When Defendant became aware of Plaintiff's May 27, 2010 drug screen results, it sent him for an evaluation with Dr. Ellen Ballard, general medicine. On March 14, 2011 Dr. Ballard wrote an IME report in which she opined there was no causal relationship between Plaintiff's present back pain and his work incident of December 5, 1989. She also opined Plaintiff was an illegal-drug abuser. She concluded by characterizing Dr. Scheurich's current treatment of Plaintiff as not necessary.

Armed with Dr. Ballard's input, Defendant filed a medical dispute contending there was not a relationship between Dr. Scheurich's current chronic

pain treatment and Defendant's work injury. Defendant also contended it should not be liable for any more of Plaintiff's medical expenses, because of Plaintiff's failure to follow reasonable medical advice in the form of not taking prescribed medication while choosing to use illicit drugs instead.

There are two determinations to be made, 1) Is Dr. Scheurich's treatment needed because of Plaintiff's 1989 work injury and, 2) is that course of treatment reasonable and necessary.

REVIEW OF THE EVIDENCE

On December 5, 1989 while working for the Defendant, Plaintiff injured his low back. This injury resulted in a permanent partial disability claim which was settled on March 17, 1992 in which Plaintiff received a $32,727.36 lump sum settlement and retained his entitlement to future medical benefits.

Back surgery has never been recommended as a form of treatment for Plaintiff's back condition, he has been treated with pain medications. In 1992 Plaintiff treated with Dr. Philip Tibbs, a neurosurgeon at University of Kentucky Hospital. He did not treat with another physician until approximately 2000, when he started to treat with Dr. Scheurich. His initial treatment involved over-the-counter pain medication, but this did not relieve his pain. On October 18, 2008 Dr. Scheurich wrote, "Mr. McDaniel is being treated by our clinic for his work injury of December 5, 1989. He is prescribed Gabapetin [sic], Elavil Tramadol and Cyclobenzaprine and needs to be seen by our office at least every six (6) months and then as needed for

exacerbations of back pain. The medications and visits are medically necessary and reasonable to treat the work injury." Page 4, Opinion and Award of 8/21/09).

Less than two years before filing this medical dispute, Defendant filed a very similar medical dispute in which it contended Dr. Scheurich's treatment of Plaintiff with Gabapentin, Tramadol, Cyclobenzaprine, Allezenninol and Amitriputuiline was not medically necessary or causally related to Plaintiff's work injury. On August 21, 2009 ALJ Lawrence Smith, in his Opinion and Order of August 8, 2009, fully adopted Dr. Scheurich's input, and overruled Defendant's medical dispute. ALJ Smith determined Plaintiff's need for the medications was causally related to the December 5, 1989 work injury and were reasonable and necessary to treat the work injury.

At Plaintiff's Final Hearing of January 18, 2012 he testified he sees Dr. Scheurich twice a year solely for the treatment of his work-related chronic back pain. He also treats with her at other times for his gout and heart condition. In a May 9, 2011 To Whom It May Concern, Dr. Scheurich wrote, "I have taken care of multiple medical problems through the years, including his chronic back pain that had been attributed to his work injury of 12/5/89."

In a post-award medical fee dispute, the burden of proof regarding the reasonableness or necessity of treatment is with the employer, while the burden remains with the employee concerning questions of work-relatedness of the condition being treated. Addington Resources Inc. v.

Perkins, 947 S.W.2d 421 (Ky. App. 1991).

The ALJ determined as follows:

> Work-relatedness:
>
> This ALJ is persuaded Plaintiff's need for the questioned medications is related to his December 5, 1989 work injury. Plaintiff was using the same medication less than two years ago and it was then determined, based upon Dr. Scheurich's input, that Plaintiff's need for the medicines was related to his work injury, nothing has changed on this issue. Dr. Scheurich's opinions on this issue merit much more weight than Dr. Ballard's because Dr. Scheurich is more familiar with plaintiff's pain situation.
>
> Continued Treatment Reasonable and Necessary:
>
> Pursuant to KRS 342.020 (1) an employer is required to provide an injured employee with all reasonable and necessary medical treatment needed to treat the effects of a work injury. The employer's obligation to pay medical benefits continues for so long as the employee is disabled regardless of the duration of the employee's income benefits. An employer has a strong obligation regarding the payment of medical benefits to an injured employee.
>
> Medical treatment is a two-way street requiring input, commitment and participation by both the medical provider and the patient; without such cooperation it is unlikely treatment will achieve the desired results. Plaintiff's medical records, as reviewed and commented upon by Dr. Ballard, indicate that while in pain management,

> Plaintiff used amphetamines, cocaine and marijuana and that he was not taking Hydrocodone, one of his prescribed work-related pain treatment medications. These facts do not show a patient who is committed to a supervised program of pain management.
>
> Defendant's position is not so much that Dr. Scheurich's treatment is not reasonable or necessary, but rather that it should not be obligated to provide Plaintiff with ongoing pain management treatment in light of his taking, illegal drugs and not taking the prescribed medication of Hydrocodone. Dr. Ballard was asked whether Plaintiff's current treatment regime was medically necessary and her complete answer was, "It is my opinion that his current treatment is not necessary. His testing was negative for Hydrocodone so this may be the method, which he is using to support his other habit."
>
> Though concerned with Plaintiff taking three illegal drugs while in pain management treatment, the greater concern is with Plaintiff not taking a prescribed drug (Hydrocodone). Hydrocodone is a part of Plaintiff's pain treatment program and should have shown up in drug screen test.
>
> As previously noted medical treatment is a two way street and it is unreasonable to ask Defendant to pay for medical treatment if Plaintiff is not going to follow the course of treatment.

The ALJ ordered as follows:

1. Defendant's Medical Dispute is, in part **SUSTAINED**.

2. During a three (3) month period, commencing at the date of this Opinion

> and Order, Plaintiff shall be weaned from all narcotic medications included in Dr. Scheurich's pain management treatment plan. Defendant shall provide Plaintiff with the narcotic medications during his course of weaning.
>
> 3. At the conclusion of that three (3) month period Defendant shall no longer be obligated to provide Plaintiff with narcotic medication.
>
> 4. Defendant shall remain liable to provide Plaintiff with all non-narcotic medication components of Dr. Scheurich's pain management program.
>
> 5. All motions for approval of attorney's fees shall be filed with the Administrative Law Judge by attorneys for plaintiff and employer within thirty (30) days from the final disposition of this order. Any such motions must include an itemization of services together with either the actual times or a reasonably accurate estimate of the times expended and each of the itemized services listed.

McDaniel filed a petition for reconsideration, asserting the ALJ erred by relying on Dr. Ballard's opinions "in finding that the Claimant was taking illegal drugs while in pain management treatment and in not taking the prescribed drug, Hydrocodone." As noted earlier, the ALJ overruled the petition for reconsideration.

On appeal, McDaniel argues as follows:

> Had the Claimant continued to not test positive for Hydocodone [sic], the ALJ

> clearly fashioned a remedy that would have been suitable and just for all parties. However, the ALJ disregarded the fact that the Claimant did take the Hydrocodone for the period it was prescribed and therefore he should be entitled to that treatment.
>
> The Claimant is taking the Hydrocodone and his urine screens document this. The ALJ erred in denying the Claimant this treatment modality considering the fact that Dr. Scheurich has monitored him with drug screens and he has tested positive for his prescribed medication and negative for any illicit drugs. Claimant made a mistake and he has rectified that mistake. Understandably, the ALJ was concerned, as was Dr. Scheurich, hence the drug screens. The ALJ should have allowed Dr. Scheurich to continue to monitor Claimant and allow her to treat her patient with the prescribed medication, Hydrocodone. Should the Claimant relapse, the Defendant has the option at their [sic] disposal of filing a renewed medical fee dispute.

As the ALJ determined the contested medical treatment is work-related and that finding is not contested, it will not be addressed.

In a post-award medical fee dispute, the burden is on the employer to prove the contested medical expenses are unreasonable or unnecessary. See Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991). The claimant, however, bears the burden of proving work-relatedness. See

Addington Resources, Inc. v. Perkins, 947 S.W.2d 421 (Ky. App. 1997). Pursuant to KRS 342.275 and KRS 342.285, the ALJ, as the fact-finder, determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. See Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He or she may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. See Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

Since Irvin Whitehouse had the burden of proof on the issue of the contested medical expenses being unreasonable and unnecessary and was successful before the ALJ, the sole issue on appeal is whether substantial evidence supports the ALJ's conclusion. See Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. See Smyzer v. B.F. Goodrich Chemical Co., 474 S.W. 2d 367, 369 (Ky. 1971).

Because the evidence relied upon by the ALJ does not support the ALJ’s determination to wean McDaniel off of narcotic medication, specifically Lortab, for the reasons articulated in the February 29, 2012, opinion and order, we vacate and remand. The opinion and order clearly indicates the rationale behind the ALJ's decision to wean McDaniel off Lortab was that McDaniel tested negative for Hydrocodone. The ALJ did not state which of the three drug screens was influential in his decision. The ALJ merely stated as follows:

> Plaintiff's medical records, as reviewed and commented upon by Dr. Ballard, indicate that while in pain management, Plaintiff used amphetamines, cocaine and marijuana and that he was not taking Hydrocodone, one of his prescribed work-related pain treatment medications. These facts do not show a patient who is committed to a supervised program of pain management.

Consequently, the ALJ concluded as follows:

> Though concerned with Plaintiff taking three illegal drugs while in pain management treatment, the greater concern is with Plaintiff not taking a prescribed drug (Hydrocodone). Hydrocodone is a part of Plaintiff’s pain treatment program and should have shown up in drug screen test.

> As previously noted medical treatment is a two way street and it is unreasonable to ask Defendant to pay for medical treatment if Plaintiff is not going to follow the course of treatment.

The ALJ's conclusion is not only incompatible with the record but also incompatible with his own fact-finding. The prescriptions attached to Irvin Whitehouse's medical fee dispute indicate McDaniel was prescribed Lortab on May 27, 2010. The urine drug screen report, also attached to the medical fee dispute, indicates McDaniel's urine was drawn on the same date Lortab was originally prescribed- May 27, 2010. This drug screen report indicates McDaniel tested negative for Hydrocodone, a logical result since Lortab was prescribed on the same date his urine was collected for the drug screen. This is consistent with Dr. Scheurich's May 9, 2011, report in which she states the May 27, 2010, drug screen "did not reveal any narcotics as he had just been prescribed these at that visit." The ALJ acknowledged this fact in his opinion and order stating as follows:

> On May 27, 2010 Plaintiff presented to Dr. Scheurich with complaints of worsening back pain. At that time Dr. Scheurich decided to adjust Plaintiff's course of pain management by decreasing the amount of Tramadol and to add Lortab, to be taken once a day. On that day, perhaps to obtain baseline

> numbers **before Plaintiff actually started taking Lortab**, Plaintiff was asked to take a urine drug screen test. The test results were positive for amphetamines, cocaine and marijuana. Dr. Scheurich immediately discussed with Plaintiff that he must stop the use of illegal drugs if he were to be prescribed Tramadol and Lortab. (emphasis added).

In Dr. Scheurich's May 9, 2011, report, she references a January 4, 2011, repeat drug screen that did not reveal illegal drugs in McDaniel's system but also did not reveal any narcotic medication, "as the patient had not been prescribed the Lortab since the 5/27/10 visit." We are unable to locate a copy of the January 4, 2011, drug screen in the record. It is important to note the ALJ acknowledged Hydrocodone would not have been in McDaniel's system at the time of the second drug screen by stating as follows in the February 29, 2012, opinion and order:

> On January 4, 2011, a repeat urine drug screen test was administered and revealed no illegal drugs. **At that time Plaintiff's medications, including the Lortab, were restarted**. In a May 9, 2011 letter-report Dr. Scheurich represented Plaintiff's continued program of medication would be frequently monitored, including the use of KASPER reports and urine drug screens. (emphasis added).

The November 2, 2011, drug screen report, which is filed in the record, indicates a positive result for

Hydrocodone. The ALJ does not discuss the November 2, 2011, drug screen report in the February 29, 2012, opinion and order.

Dr. Ballard's opinion McDaniel's "testing was negative for Hydrocodone" set forth in the March 14, 2011, IME report was relied upon by the ALJ. However, Dr. Ballard's report indicates she only reviewed the May 27, 2010, drug screen before rendering her opinion. Dr. Ballard's report does not indicate she reviewed the January 4, 2011, repeat drug screen, and her report was generated before Dr. Scheurich's May 9, 2011, report and the November 9, 2011, drug screen which is positive for the presence of Hydrocodone. Consequently, there is no basis for Dr. Ballard's opinion McDaniel's "testing was negative for Hydrocodone so this may be the method, which he is using to support his other habit." As acknowledged by the ALJ, the record reveals McDaniel was prescribed Lortab on May 27, 2010, the same date a urine sample was received for the drug screen. Thus, Hydrocodone would not have appeared in McDaniel's urine. While Dr. Ballard did opine, in the March 14, 2011, report that McDaniel's "current treatment is not necessary," this statement appears to be based on Dr. Ballard's misunderstanding of the facts surrounding McDaniel's use of Lortab.

We also note Dr. Ballard's opinion McDaniel's "current treatment is not necessary" seemingly encompasses the entirety of McDaniel's treatment regimen which includes Gabapentin, Elavil, Tramadol, Cyclobenzaprine, and Lortab. Further, Dr. Ballard did not express an opinion regarding the reasonableness of this treatment regimen as required by applicable case law. See Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); National Pizza Company vs. Curry, 802 S.W.2d 949 (Ky. App. 1991).

It is clear the *sole* basis for the ALJ's decision to wean McDaniel off Lortab is because of his incorrect belief McDaniel was not taking the prescribed Lortab. As the ALJ stated in the opinion and order, "Hydrocodone is a part of Plaintiff's pain treatment program and should have shown up in drug screen test." This belief reflects a misunderstanding of the record specifically with regard to the timing of McDaniel's drug screens in comparison to the timing of the Lortab prescriptions by Dr. Scheurich. Therefore, we vacate the ALJ's decision which includes weaning McDaniel from all narcotic medication included in Dr. Scheurich's pain management plan over a three-month period and ordering Irvin Whitehouse is no longer obligated to provide McDaniel with narcotic medication following the three-month weaning period. On remand, the ALJ shall enter

additional findings of fact concerning the reasonableness and necessity of McDaniel's current treatment regimen based on the evidence in the record. We believe this is necessary because the record establishes the May 27, 2010, drug screen was performed on the same date McDaniel was prescribed Lortab and Dr. Ballard did not have the benefit of the January 4, 2011, drug screen report, Dr. Scheurich's May 9, 2011, report, and the November 9, 2011, drug screen report.

Accordingly, that portion of the February 29, 2012, opinion and order sustaining, in part, the medical fee dispute and ordering McDaniel be weaned off all narcotic medications included in Dr. Scheurich’s pain management treatment plan, and thereafter Irvin Whitehouse is no longer obligated to provide McDaniel with narcotic medication, and the April 5, 2012, order ruling on the petition for reconsideration are **VACATED**. This matter is **REMANDED** to the ALJ for entry of an amended opinion and order consistent with the opinions set forth herein.

AVEY, CHAIRMAN, CONCURS.

SMITH, MEMBER, NOT SITTING.

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