Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: November 15, 2019

CLAIM NO. 199409732

YELLOW SERVICES, INC. PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

TERESA HAYES
DR. JAMES MURPHY/MURPHY PAIN CENTER
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING & REMANDING
* * * * * *

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

STIVERS, Member. Yellow Services, Inc. ("Yellow Services") appeals from the June 14, 2019, Order and the July 11, 2019, Order overruling its petition for reconsideration of Hon. Chris Davis, Administrative Law Judge ("ALJ"). In the June 14, 2019, Order, and in response to this Board's January 25, 2019, Opinion remanding, the ALJ determined Dr. James Patrick Murphy will be allowed to prescribe opioid medication "as he sees fit pending any new medical dispute."

On appeal, Yellow Services asserts three arguments. First, it asserts the ALJ erred by concluding Dr. Murphy is allowed to continue to prescribe opioid medication. Next, it asserts the ALJ erred by not considering the report of Dr. Daryl Caringi which contains a weaning schedule. Finally, Yellow Services asserts the ALJ erred by not making any finding as to whether additional proof concerning a weaning schedule was needed.

We vacate the June 14, 2019, and July 11, 2019, Orders *in full* and remand to the ALJ for additional findings.

BACKGROUND

The Board's Opinion entered January 25, 2019, contains the following factual background and procedural summary:

> The record reveals Hayes sustained a low back injury on June 4, 1993, and her claim was resolved by a settlement agreement. On February 14, 2017, Yellow Services filed a Form 112 medical fee dispute, motion to join Dr. Murphy, and a motion to reopen.
>
> Yellow Services' Form 112 described the nature of the dispute as follows:
>
>> Respondent is a 54 year old individual with a date of injury of June 4, 1993. Respondent had left L1-L2 discectomy on December 21, 1999 by Dr. Petruska. Subsequently, Respondent underwent L3 laminectomy, bilateral, neural foraminal decompression L3-4 with transforamanial lumbar interbody fusion using PEEK allograft at L3-4 with facet fusion using graft on L3-L4 and with the assistance of back fix spinal concepts pedicle screw instrumentation with microsurgical technique in November 2005, again by Dr. Petruska. On December 12, 2016, the Respondent was seen at Murphy Pain

> Clinic and prescribed Lidoderm 5% topical patch, one patch up to three times 12 hours on and 12 hours off, Tizanidine 4 mg, Nabumetone twice daily, Opana ER 40 mg twice a day, Opana 5 mg three times daily, Lyrica 100 mg, Alprazolam 0.5 mg, and Treximet 85/500 mg. This is a prospective medical fee dispute concerning the aforementioned prescriptions. This was submitted for utilization Review on January 24, 2017. Physician Reviewer, Dr. Paul Loubser, found that continued use was not supported and weaning was recommended for Lyrica, Tizanidine, Alprazolam, Opana ER, and Oxymorphone. Weaning should occur under direct ongoing medical supervision as a slow taper. The Respondent should not be abandoned during this process.
>
> Therefore, the Movant is seeking to be relieved from responsibility for payment of Opana ER tablet 40 mg, Lyrica capsule 100 mg, Oxymorphone tablet 5 mg, Lidocaine patch 5%, Tizanidine tablet 4 mg, Nabumetone 750 mg, Alprazolam 0.5 mg, and Treximet 85/100 mg only after appropriate weaning has occurred. (emphasis added).

Attached to the medical fee dispute is the January 24, 2017, report of Dr. Paul Loubser generated as a result of Utilization Review in which he did not recommend continued use of the medications in question. Dr. Loubser recommended that Hayes be weaned from these medications.

By Order dated March 27, 2017, Hon. Robert Swisher, former Chief Administrative Law Judge ("CALJ"), sustained Yellow Services' motion to reopen to the extent the dispute would be assigned to an Administrative Law Judge. The CALJ also joined Dr. Murphy as a party to the dispute. The matter was subsequently assigned to the ALJ.

In addition to the report of Dr. Loubser, Yellow Services filed the August 24, 2017, Independent Medical

Examination report of Dr. Matthew Price and two supplemental reports from him. Hayes introduced the September 18, 2017, deposition of Dr. Murphy. Hayes testified at the April 4, 2018, Hearing. [footnote omitted]

The April 4, 2018, BRC Order and Memorandum lists the following contested issues: "Medical expenses unpaid or contested." Under Other Contested Matters was listed: "Medical Dispute re: Percocet/OxyContin, Nabumetone, Tizanidine, and Lyrica."

In the May 31, 2018, Opinion and Order, after summarizing the lay and medical evidence, the ALJ entered the following findings of fact and conclusions of law regarding the compensability of Percocet/ OxyContin:

> I note, initially, there is no question that the Plaintiff continues to have work-related low back pain. Her claim was originally settled. Since then she has had two Opinions and Orders finding her to have a compensable low back injury. She has testified to this. Dr. Murphy supports this. The Defendant's expert, Dr. Price, thinks she has real pain related to her low back injury and surgeries and she is not exaggerating or magnifying it. Therefore, the only question is what medicines are reasonable and necessary for the treatment of that pain.
>
> Dr. Price has also noted that Dr. Murphy is a well-respected pain management physician. An opinion with which I agree.
>
> As noted in the briefs the Plaintiff has waived all medicines, at this time, other than those discussed herein.
>
> **Percocet/OxyContin**
>
> I do accept and believe the Plaintiff has on-going low back pain. Dr. Murphy believes that this medicine is helpful and it allow [sic] the Plaintiff to continue to function. He conducts pill counts and KASPAR

> reports. He is prescribing the lowest possible dose.
>
> Dr. Price believes that the long-term use of this medicine is harmful, even with the less dangerous type of opioid. I also note that the Plaintiff is receiving other forms of medications designed to help with pain, such as Tizanidine, Lyrica and Nabumetone.
>
> I do not believe that even with her on-going pain it is in the Plaintiff's best interest to continue to take this medicine without even attempting a weaning. As such, Dr. Murphy is requested and directed to, within 30 days; submit a weaning plan of no more than 90 days duration. If Dr. Murphy does not submit said weaning plan the Percocet/OxyContin will automatically become non-compensable at the end of thirty days. It will be [sic] become non-compensable no later than at the end of said 90-day period.
>
> Unfortunately for both parties nothing in the law or the facts of this case allow me to say that in the future the Defendant cannot file more Medical Disputes nor that after the weaning period Dr. Murphy and the Plaintiff still thinks she needs the medicine.

The ALJ found Nabumetone, Tizanidine, and Lyrica are compensable.

Hayes filed a petition for reconsideration arguing the ALJ erred by serving as the doctor because he ordered the weaning period of Percocet/OxyContin to commence within thirty days or the prescription becomes non-compensable and also ordering that at the end of ninety days after commencing the weaning plan the prescription becomes non-compensable. Hayes noted Dr. Loubser did not recommend or provide any timelines for weaning off of Percocet/OxyContin. Hayes also cited to page six of Dr. Price's report regarding the appropriate weaning program. Hayes argued the ALJ erred by failing to make his order interlocutory, thereby retaining jurisdiction of the claim in order to determine whether the weaning

efforts were successful. Thus, the ALJ needed to retain jurisdiction.

In the July 2, 2018, Order, the ALJ sustained the petition for reconsideration "to the extent that until the weaning plan is attempted and completed the 90 day time frame will not be used." However, the remainder of the petition for reconsideration was overruled. Dr. Murphy was directed to "submit his weaning plan within thirty days." The ALJ noted Yellow Services retained the right to contest the plan as not reasonable and necessary.

Following this order, neither party filed a petition for reconsideration nor a notice of appeal. On July 24, 2018, Hayes filed a Notice of Filing the report of the Murphy Pain Center which contains the following on the first page:

> Dear Mr. Jennings,
>
> I am faxing a portion of Teresa Hayes's office visit note from 7/10/18 that indicates a weaning "plan" for her opioid medication. Please let my office know if you require additional information.

The second page of the report contains the following:

> On 6/12/18- Reviewed the opinion and order statement regarding ordering Dr. Murphy to wean patient off opioid medications within a ninety day period.
>
> Plan to discuss with Dr. Murphy an appropriate weaning schedule for Teresa. Medically I do not feel that Teresa can be totally opioid free due to her chronic pain associated with her back injury.
>
> Over the next 90 days will attempt to wean Teresa's opioids by 10-15% each visit. The opioid weaning process will be dependent on Teresa's clinical response to the medication changes.
>
> Greater than 60 minutes spent with patient discussing diagnosis and potential plan of treatment as it pertains to weaning of

> opioid medication. 60 minutes spent face to face with patient.

On August 16, 2018, Yellow Services filed a Notice of Filing Independent Pharmaceutical Evaluation and attached the July 12, 2017, report of Dr. Daryl Caringi. That report did not discuss a weaning plan for Hayes' use of Percocet/OxyContin. Rather, it provided a weaning schedule for Opana, Oxymorphone, Lyrica, Tizanidine, Nabumetone, and Lidocaine patches. In short, the plan provided no guidance with respect to the ALJ's decision.

On August 27, 2018, Hayes filed an objection and motion to strike noting she timely complied with the July 2, 2018, Order by filing the weaning plan of Dr. Murphy, her treating physician. Hayes requested the report of Dr. Caringi be stricken from the record.

On September 6, 2018, Yellow Services filed a response noting the ALJ had given it the right to contest any weaning plan submitted by Dr. Murphy. Yellow Services acknowledged:

> Dr. Murphy subsequently submitted a professed 'weaning plan' where he stated he would attempt to reduce the claimant's opioids by 10-15% over the next 90 days, but whether the plan would be implemented would depend on how the claimant responded to the medication changes. Dr. Murphy also stated he continued to believe the claimant could not be weaned completely.

Yellow Services stated the report of Dr. Caringi and his opinions were relevant to the weaning process of Hayes by Dr. Murphy, as Dr. Caringi had offered an alternative weaning plan.

On September 7, 2018, Yellow Services filed the September 6, 2018, five-page treatment note of Dr. Murphy. Page four of the report contains the following:

> Do not anticipate that Teresa can be totally opioid free due to her chronic pain associated with her back injury.

> Over the next 90 days will attempt to wean Teresa's opioids by 10-15% each visit. The opioid weaning process will be dependent on Teresa's clinical response to the medication changes- will remain stable today as she looks good and she wants to stay at the current dose (halting taper for now).

On September 7, 2018, the ALJ entered the following order:

> This matter comes before the undersigned on the Plaintiff's Motion to Strike the Pharmaceutical Report filed by the Defendant, the Defendant's Response to the Motion to Strike and the ALJ on his own Motion. The ALJ notes, however, that the phrase "on his own Motion" is taken broadly as I am only responding to the parties Motion and Response and incorporating my prior Order into this Order. Specifically, Dr. Murphy, through Plaintiff, has submitted what he terms a "plan" that will wean the Plaintiff by 10-15% per dosage over the next few visits but he does not see the Plaintiff ever being weaned from narcotics entirely. However, my Opinion and Order of May 31, 2018 stated that, "As such, Dr. Murphy is requested and directed to, within 30 days; submit a weaning plan of no more than 90 days duration . . . [narcotics] will be become (sic) non-compensable no later than at the end of the said 90-day period." (05/31/18 O&O, p. 7). Leaving aside the fact that the weaning "plan" was submitted 54 days, not 30 days, after the Opinion, this dispute is Moot. As of October 22, 2018, 90 days after the "plan" from Dr. Murphy was submitted, all of the narcotics will be non-compensable. To the extent relevant the Act most likely requires me to SUSTAIN the Motion. This Order is FINAL AND APPEALABLE.

On September 17, 2018, Hayes filed a petition for reconsideration asserting she had timely filed Dr. Murphy's weaning plan on July 24, 2018. Thus, the September 7, 2018, Order contains a patent error as the ALJ found the weaning plan was not timely filed. Hayes requested the ALJ correct the patent error. Hayes again asserted the ALJ erred by serving as the doctor by ordering the compensability of Percocet/OxyContin end on October 22, 2018. Hayes also argued the ALJ's opinion should have been interlocutory allowing the ALJ to retain jurisdiction in order to oversee the weaning plan.

On September 25, 2018, Yellow Services filed a response to Hayes' petition for reconsideration agreeing the July 2, 2018, Order granted Dr. Murphy thirty days to submit a weaning plan, and Hayes had filed the notes of Dr. Murphy within that period. Yellow Services also stated it did not agree the notes of Dr. Murphy constituted a weaning plan, but if the note did constitute a weaning plan, it would have been timely. That aside, Yellow Services asserted the ALJ did not rely upon the timeliness of Dr. Murphy's filing as the basis for his decision. It also responded to Hayes' argument that the ALJ was serving as a doctor and asserted the September 7, 2018, Order is final and appealable, as opposed to being interlocutory in nature, as it constituted a final determination of the rights of the parties.

The ALJ entered the October 4, 2018, Order which reads as follows:

> This matter comes before the undersigned on various pleadings filed by the parties and erroneously coded Petitions for Reconsideration and Responses thereto. The ALJ issued an Opinion and Order on this matter on May 31, 2018 and an Order on Reconsideration on July 2, 2018. Any subsequent pleadings by the parties, regardless of what they have termed or coded them, are not, as a matter of law, Petitions for Reconsiderations as they do not address any patent errors appearing in the first Order on Reconsideration. Rather the second alleged Petition seeks to define "weaning" and appropriate reliance on medical experts. Both issues which could

> have been addressed in the first Petition as they were discussed in the May 31, 2018 Opinion. *Tube Turns Division of Chemetron v. Quiggins*, 574 S.W.2d 901 (Ky. App. 1978); *Stewart v. Kentucky Lottery Corp.,* 986 S.W.2d 918 (Ky. App 1998). Further, the September 7, 2018 Order issued in response to various pleadings was neither an Opinion nor an Order on Reconsideration but rather an Order clarifying already made and appealable Orders. The Litigation Management System provides only so many options to "code" a document. What controls is the content of the pleading and its chronological place. As for the Plaintiff's contention that the ALJ is acting as a "doctor" that lacks merit. The underlying Order that Plaintiff be weaned from OxyContin is supported by Dr. Price. Merriam-Webster dictionary defines wean (2): "to detach from a source of dependence" An alleged plan to "wean" by "10-15%" is not undertaken in good faith. Again any pleadings filed since July 2, 2018 are not asking for new relief or addressing subjects that have arisen since May 31, 2018. The Order finding the OxyContin non-compensable is supported by substantial evidence from Dr. Price. This is not an Order on Reconsideration. Attorney fee motions are due within 30 days.

Our January 25, 2019, Opinion details the nature of Hayes' first appeal to this Board as follows:

> Teresa Hayes ("Hayes") seeks review of the May 31, 2018, Opinion and Order of Hon. Chris Davis, Administrative Law Judge ("ALJ") resolving a medical dispute concerning the prescription drugs Percocet/ OxyContin [footnote omitted], Nabumetone, Tizanidine, and Lyrica filed by Yellow Services. In the Opinion and Order, the ALJ determined Percocet/OxyContin is non-compensable but found Nabumetone, Tizanidine, and

Lyrica are compensable. The ALJ also determined a weaning plan for Percocet/OxyContin was appropriate and directed as follows:

> I do not believe that even with her on-going pain it is in the Plaintiff's best interest to continue to take this medicine without even attempting a weaning. As such, Dr. Murphy is requested and directed to, within 30 days; submit a weaning plan of no more than 90 days duration. If Dr. Murphy does not submit said weaning plan the Percocet/OxyContin will automatically become non-compensable at the end of thirty days. It will be [sic] become non-compensable no later than at the end of said 90-day period.

Hayes also appeals from the July 2, 2018, Order ruling on her petition for reconsideration and an October 4, 2018, Order ruling on her subsequent petition for reconsideration filed September 17, 2018.

On appeal, Hayes asserts the ALJ committed reversible error in finding Dr. James Patrick Murphy's [footnote omitted] weaning plan was not timely filed. Hayes argues the July 2, 2018, Order ruling on her petition for reconsideration directed Dr. Murphy to file a weaning plan within thirty days of that date, and pursuant to that order, Dr. Murphy's plan was timely filed on July 24, 2018. Hayes argues the matter should be remanded to the ALJ to correct the finding and to consider the weaning plan.

Hayes next argues the ALJ committed "reversible error by inappropriately answering medical questions and prospectively ending the compensability of [Hayes'] medication regimen on 10/22/18." Hayes argues the ALJ "made findings and rulings as a doctor or medical expert by ordering the prospective termination of compensability of [her] OxyContin/Percocet prescriptions." Hayes contends whether she can be successfully weaned or whether addiction therapy will become necessary "are medical issues which cannot be prospectively addressed or simply terminated" by the ALJ. Hayes argues these are medical decisions, not legal or judicial decisions.

> Finally, Hayes asserts the ALJ committed reversible error by failing to declare his May 31, 2018, Opinion and Order interlocutory. Hayes contends the ALJ should have retained jurisdiction of the claim until her medication weaning had concluded or failed. As such, the ALJ inappropriately entered a final order since additional orders would become necessary as her pain management specialist weans her off the one medication.

Our decision contains the following analysis and instructions to the ALJ:

> Because the ALJ's May 31, 2018, Opinion and Order and the July 2, 2018, Order ruling on the petition for reconsideration were not timely appealed, we dismiss Hayes' appeal from those orders. The May 31, 2018, Opinion and Order resolved all contested issues as defined in the April 4, 2018, BRC by determining the compensability of each contested medication. An order of an ALJ is appealable only if: 1) it terminates the action itself; 2) acts to decide all matters litigated by the parties; and, 3) operates to determine all the rights of the parties so as to divest the ALJ of authority. *Cf.* KI USA Corp. v. Hall, 3 S.W.3d 355 (Ky. 1999); Ramada Inn v. Thomas, 892 S.W.2d 593 (Ky. 1995); Transit Authority of River City v. Saling, 774 S.W.2d 468 (Ky. App. 1980).
>
> The ALJ's opinion meets the above criteria. The May 31, 2018, Opinion and Order requested Dr. Murphy to submit a weaning plan within thirty days of no more than ninety days duration. That fact did not affect the finality of the ALJ's decision. Further, we note the BRC Order did not list a proposed weaning period from the drugs in question as a contested issue. Since no appeal was filed within thirty days of the July 2, 2018, Order, the ALJ's May 31, 2018, Opinion and Order as amended by the July 2, 2018, Order became final, enforceable, and no longer appealable. In order to timely appeal from the May 31, 2018, Opinion and Order and the July 2, 2018, Order ruling on the petition for reconsideration, a Notice of Appeal must have been filed on or before August 1, 2018. That did not occur. Thus, we find no error in the ALJ's refusal to order the May 31, 2018, Opinion and Order to be interlocutory.

However, the ALJ may enter subsequent orders enforcing the terms of his decision which is what occurred in this case. In accordance with the ALJ's July 2, 2018, Order, Hayes filed what she contended was a weaning plan on July 24, 2018. Notably, Yellow Services argued it had filed Dr. Caringi's evaluation report in response to Dr. Murphy's weaning plan. It questioned whether the document filed by Hayes was a weaning plan, but it was offering the evaluation of Dr. Caringi as an alternative to the weaning plan.

The above aside, we believe Hayes timely appealed from the September 7, 2018, and October 4, 2018, Orders. Although Hayes' Notice of Appeal did not state she was appealing from the September 7, 2018, Order but was appealing from the October 4, 2018, Order, the Notice of Appeal, filed October 5, 2018, was filed within thirty days of the ALJ's September 7, 2018, Order and subsequent order of October 4, 2018, affirming the contents of the earlier order. Moreover, we conclude the October 4, 2018, Order merely incorporated by reference the contents of the September 7, 2018, Order. Significantly, the ALJ stated in the October 4, 2018, Order that the September 7, 2018, Order was not an opinion or an order on reconsideration, but clarified his previous orders. However, in the October 4, 2018, Order, the ALJ stated he was relying on Dr. Price in setting the weaning schedule. That purported weaning schedule is the subject of the current appeal which we are resolving. We know of nothing which prohibited Hayes from appealing from the ALJ's orders regarding the weaning plan he ordered Dr. Murphy to submit. Consequently, we will resolve that portion of Hayes' appeal pertaining to the September 7, 2018, and October 4, 2018, Orders.

We begin by noting Hayes timely complied with the ALJ's July 2, 2018, Order by filing what she contended was Dr. Murphy's weaning plan. Yellow Services agreed that the plan, although scant, was timely filed. The ALJ's September 7, 2018, Order finding the weaning plan was submitted 54 days, and not 30 days, after the opinion is correct. However, the ALJ overlooked the fact that his July 2, 2018, Order directed Dr. Murphy to submit a weaning plan within thirty days of July 2, 2018. Hayes timely complied with the order by filing the two-page report of Dr. Murphy. As previously noted,

Yellow Services agreed Hayes' filing was timely. Thus, the ALJ's September 7, 2018, Order fails to note his subsequent July 2, 2018, Order, directing Dr. Murphy to file the weaning plan within 30 days. Consequently, we believe the ALJ erred in directing that, as of October 22, 2018, all the narcotics were non-compensable.

In the October 4, 2018, Order, the ALJ stated his May 31, 2018, Opinion and Order that Hayes be weaned from OxyContin is supported by Dr. Price. Even though Dr. Price believed a weaning program was necessary, his report does not support the ALJ's September 7, 2018, Order directing that as of October 22, 2018, 90 days after the plan from Dr. Murphy was submitted, all the narcotics would be non-compensable.

On the last page of Dr. Price's August 24, 2017, report he stated:

> In your opinion, would the Plaintiff require a weaning program in order to stop taking any of her prescribed medications? If so, what weaning program would you recommend for the Plaintiff?
>
> Answer: I do believe the weaning program is going to be needed for several of the medications including the Opana, Oxymorphone, Lyrica, and Tizanidine. **In terms of what weaning program would be most appropriate, I would defer to medication addiction specialist. There can be rebound effects as well as withdrawal effects from several of these medications. I think she should be followed closely for any of the withdrawal effects.** (emphasis added).

In his supplemental report of November 9, 2017, regarding the prescription for Percocet/OxyContin, Dr. Price stated as follows:

> Question #1: Apparently, the plaintiff is no longer taking Opana or oxymorphone, but has been switched to OxyContin. In your opinion, is the plaintiff's OxyContin

> reasonable and necessary for the cure or relief of her low back symptoms?
>
> Answer: While the deposition does show that she is taking less morphine derivative narcotic in the OxyContin as opposed to the Opana and the oxymorphone, I do not believe that is a good choice for cure of her low back symptoms. In regard to the relief of her low back symptoms, it is certainly possible that as Dr. Murphy has stated, that it keeps her at a steady state of comfort; however, her discomfort on her physical exam was stated as sometimes unbearable. In addition, her exam findings, correlated with her radiographic findings suggest that she has adjacent level multiple level disease from previous back intervention as well as chronic degenerative changes that continue in her lumbar region. Taking this into account, it would be difficult to opine that a narcotic regimen is going to relieve this adjacent level disease.

Regarding the need for a weaning plan, Dr. Price stated:

> Question #4: Dr. Murphy also suggested it is not appropriate to wean a patient from medication unless the patient is willing to be weaned. Is the weaning process unlikely to be successful unless the patient is agreeable? In your opinion, is this sufficient justification for continuing the patient's medication regimen?
>
> Answer: I certainly would defer to pain management specialists in regard to the weaning program. I would certainly agree with Dr. Murphy that patient compliance and 'buying in' to the plan is essential to a successful program, whether it is weaning from pharmacologic agents or intervening in a surgical manner. While there is a level of compassion and concern for the patient's pain, there also is a level of compassion and concern for continued

> narcotic use, especially in the climate of narcotic abuse in today's economy and society. **Certainly, best case scenario would be able to wean a patient over a specified program off of all narcotic medications; however, I would also defer to more pain management specialists in regard to implementation of that plan and following that program.** (emphasis added).

In light of Dr. Price's opinions and the ALJ's stated reliance upon Dr. Price's opinions as set forth in his October 4, 2018, Order, we believe the ALJ committed an abuse of discretion by unilaterally finding the Percocet/OxyContin non-compensable as of October 22, 2018, which is ninety days after Dr. Murphy's plan was submitted. Clearly, a weaning plan was needed which Dr. Murphy timely submitted. However, there is no medical testimony supporting the ALJ's October 22, 2018, deadline. Further, the order states "all" narcotics shall be non-compensable. The May 31, 2018, Opinion and Order only directed Percocet/OxyContin were non-compensable and did not address any other narcotics; thus, the September 7, 2018, Order is overly broad. More importantly, the ALJ's determination of October 22, 2018, as the date all narcotics are non-compensable based on the opinion of Dr. Price, is an abuse of discretion and not supported by Dr. Price's reports. In his August 24, 2017, report and subsequent addendum of November 9, 2017, Dr. Price unequivocally stated he would defer to the pain management specialists regarding the weaning program. In the August 24, 2017, report, he pointed out there can be rebound effects as well as withdrawal effects from several of the medications. Thus, Hayes should be followed closely for any withdrawal effects. In the November 9, 2017, addendum, Dr. Price emphasized a level of compassion and concern for the patient's pain as well as her continued narcotics use. This is consistent with Yellow Services' own representations in its Form 112 in which it stated, "weaning should occur under direct ongoing medical supervision as a slow taper," and "[Hayes] should not be abandoned during this process." In his view, the best case scenario would be to wean a patient off of all narcotic medication through a specialized plan formulated and implemented by pain

management specialists. Both parties questioned Dr. Murphy, during his September 8, 2017, deposition, about the need for and complexity of a weaning plan. The following exchange occurred between Hayes' counsel and Dr. Murphy:

> Q: Doctor, when you wean patients, what is the normal process that it is? Is there a time frame? Do you try to do it over a six-month period of time, a year period of time?
>
> A: Well, I try to do it as – as quick as I can. That minimizes the discomfort for the patient, because if you wean too fast, they have withdrawal symptoms, and they don't do well, and it's not going to be successful. They'll want more medication. They'll think you're doing it to punish them, for example. And weaning should be therapeutic. It should be in their best interest, not because a – not because a insurance company's not paying for it -
>
> Q: Okay.
>
> A: -- or something of that nature. So I like to make it, you know, a 'something that we're working together on,' and everyone's different. But generally speaking, most drugs can be weaned adequately in a three-to-six month period.
>
> Q: I think Dr. Laubster [sic] said, in his report, 'Weaning should occur under direct, on-going medical supervision as a slow taper. The patient should not be abandoned during this process.'
>
> A: I would agree with that statement.

The following exchange took place between Yellow Services' counsel and Dr. Murphy:

> Q: Okay. Now, would you be willing to try to – or would you be able to reduce that further and see how she does, and if she

doesn't report doing well, to increase it back up, or …?

A: I can definitely do that.

Q: I don't know. But we were talking about weaning process earlier, and I'm just trying to get some idea of how that process would be initiated, and then once it started, how you would figure out whether it's being successful, or whether her medications would need to be increased once that process is started.

A: Well, I actually recommend a good reference for the judge, or whoever would look at this, would be the new CDC guidelines. In these guidelines, they specifically address tapering and weaning these medications, and it talks about; you should be in agreement with the patient. If the patient's willing to do it, so it needs to be something that is a collaborative effort with the patient. So when I say I can wean these medications, I'd like to have a real indication, or a reason to. For example, when they stopped making OPANA ER, the manufacturer, I took that opportunity to ask Teresa – or to basically advise her, or tell her, that we can change the medication, and I was able to, actually, put her on less opioid as a result, but we had a reason. It wasn't simply, Teresa, you need to be on less medication. Because a lot of patients that are still hurting are not going to be very receptive to that, so this whole weaning process with somebody you've known for a long period of time; you've got to get their confidence, and the patient must understand that you're doing this in their best interest, and they have to buy into that. Now, I think we can all say that long-term use of opiates are going to have some long-term side effects. But in our industry, in our – in our field, we're still trying to figure out what these long-term problems are, such as; did – are there hormonal

issues? Are there issues with your resistance to certain infections, for example, that are less because of chronic opioid therapy. One of the things we really worry about is, will somebody become addicted? And that's one of the reasons we monitor people like Teresa on an ongoing basis. The judge needs to understand that my practices is unique in the fact that I am both an addiction specialist, as well as a pain specialist. So while I'm treating her pain, I'm also assessing her for these signs and symptoms of addiction. Simply the fact that I'm seeing her as – because I have addiction training, is a [sic] extremely high level of care for her, and I would like to have her on less medication, and that is my goal. And I believe that as we go forward through this and we learn more techniques and more thing – more things come available, I'm fairly confident, and certainly optimistic, that I can have her on less medication, overall. I can't tell you right now exactly what that will be, but that – I share the concern, and I agree with the goals of doing that.

Q: Okay. So if I understand you correctly, a weaning process is something that the patient needs to be willing to consider in order for it to have a good likelihood of success; is that correct?

A: I think it's best if they – if they agree with it. If they're going to be – there's going to be pushback. You can wean somebody just by writing a lower number on the next prescription, and they're going to be on less medicine, but will they be angry about it? Will they be not motivated? Will they be laying on the couch and not doing anything? We want our patients to be motivated to – to see that there's a real positive reason to be on less medication, and that comes with – with time and bringing it up, and making sure that we –

> that she's confident that I'm doing this in her best interest, not because some judge or some insurance company somewhere said that you have to be on less medicine – or certainly some doctor who she doesn't even know, looked at her records, and who looked at an incomplete copy of her records, at that.
>
> Q: Yeah. So if you were to start [sic] weaning process, would you recommend telling the patient that as the drugs are slowly tapered off, if she has an increase in symptoms, then those drugs can be increased as a result of her increased pain, or something along those lines?
>
> A: I think something along those lines. What I usually tell them is that we'll reevaluate, because sometimes they'll have increased pain and that's okay for a while. We'll say, 'Let's just ride this out. Maybe you can still come down.' Or maybe I'll try something else, but I don't want them to suffer needlessly.
>
> Q: Yeah.
>
> A: But I don't necessarily promise that, you know, if we – it doesn't work, you go back up, because pain oftentimes is subjective, and I've had people tell me their pain is a 12 out of 10, and that can't be. They – they're nervous that they're not going to get their medicines, and I can see that anxiety. So what I want is, like everyone wants, is the best function for the least amount of medication and the least risk to the patient. So I tend to not promise them exactly what I'm going to do, but I say, 'We're going to assess what's going on, and we'll make a good decision together on what will happen next.'

In short, Dr. Price's August 24, 2017, report and the November 9, 2017, addendum do not lend any support for a ninety-day weaning period as required by

the ALJ. Therefore, there is no medical evidence supporting the ALJ's September 7, 2018, Order directing that, as of October 22, 2018, ninety days after the plan was submitted, all narcotics would be non-compensable. In light of his stated reliance upon Dr. Price, the ALJ committed a clear abuse of discretion.

In his July 24, 2017, office note, Dr. Murphy stated he would attempt to wean Hayes at a rate of 10% to 15% per visit. He did not provide the frequency of the visits needed to accomplish this weaning attempt. By our count, the weaning could possibly be accomplished within seven to ten visits depending on the percentage of reduction. However, the period of time during which these visits would occur is not mentioned. Thus, Dr. Murphy's report does not establish a specific time period during which Hayes could potentially be weaned from the drug Percocet/OxyContin. Consequently, Dr. Murphy's July 24, 2017, office note provides no support for the ALJ's deadline of October 22, 2018.

Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky Nat. Park Commission, ex rel. Comm., v. Russell, 191 S.W.2d 214 (Ky. 1945). In light of Dr. Price's statements, Dr. Murphy's testimony, and Dr. Murphy's July 24, 2018, report, we believe the ALJ erred in finding all narcotics became non-compensable as of October 22, 2018, as there is no medical evidence in the record supporting the imposition of that deadline by the ALJ. Dr. Price was very clear in that he would defer to Dr. Murphy "in regard to implementation of that plan and following that program."

In reaching his decision, the ALJ must provide sufficient findings to inform the parties of the basis for his decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

> ***In the summary, the ALJ's September 7, 2018, Order, reaffirmed by his October 4, 2018, Order, merely provides conclusory pronouncements rather than findings. Dr. Price's report does not support the ALJ's determination that all narcotics become non-compensable on October 22, 2018. Making conclusory findings without citing to supporting medical evidence amounts to an abuse of discretion. Thus, the matter must be remanded to the ALJ to determine the appropriate weaning schedule based on the medical evidence in the record or any subsequent medical evidence he may deem appropriate in resolving this issue.*** **(emphasis added).**

In the June 14, 2019, Order, the ALJ held as follows:

> This matter comes before the undersigned on the Medical Payment Obligor's Motion for a Telephonic Conference. This matter is on Remand from the Workers' Compensation Board. The Board has Ordered the ALJ to institute a weaning schedule in accordance with the May 31, 2018 Opinion and Order. The Opinion did not contain a weaning schedule. It Ordered the treating physician to provide a weaning schedule. The Opinion did state that at the end of 90 days the opioid would be non-compensable and that was supported by substantial evidence, from Dr. Price. The "weaning" schedule as provided by Dr. Murphy specifically stated that the patient could not be weaned from the opioid. The Board has Ordered me to implement the "weaning" schedule in accordance with the Opinion, and has Ordered me to not find the medicine as non-compensable, but rather to allow Ms. Hayes to be weaned. The only interpretation that I can make of this is that Ms. Hayes will be allowed to continue to take the opioid as she and Dr. Murphy see fit, pending any further dispute. No appeal was taken. That is the law of the case. Dr. Murphy will be allowed to prescribe as he sees fit pending any new medical dispute. The Motion for a Telephonic Conference is OVERRULED. This Medical Dispute is FINAL. Any Motion for Attorneys' Fees are due within 30 days of this Order. This Order is FINAL AND APPEALABLE.

Yellow Services filed a petition for reconsideration contending the ALJ committed patent error by holding Dr. Murphy should be allowed to prescribe opioids as he sees fit, by failing to consider all of the medical evidence in the record, and by

failing to make additional findings as to whether additional proof regarding a weaning schedule was needed.

In the July 11, 2019, Order, overruling Yellow Services' petition for reconsideration, the ALJ stated he believes he has "complied with the Board's directives as I have understood them."

ANALYSIS

We vacate the June 14, 2019, and July 11, 2019, Orders in full, including the ALJ's determination Dr. Murphy can prescribe opioids as he sees fit, and remand for the ALJ to, as instructed in our January 25, 2019, Opinion, choose an appropriate weaning schedule for Hayes to be weaned from Percocet/OxyContin. Further, there are misstatements in the June 14, 2019, Order that evince a lack of understanding of the Board's remand instructions as well as certain aspects of the record. We will discuss the misstatements as well as clarify our instructions.

First, the June 14, 2019, Order reads as follows: "The Board has Ordered the ALJ to institute a weaning schedule in accordance with the May 31, 2018 Opinion and Order. The Opinion did not contain a weaning schedule. It ordered the treating physician to provide a weaning schedule."

We note the May 31, 2018, Opinion and Order did not contain a weaning schedule and that the ALJ ordered Dr. Murphy to provide one. The language misconstrued by the ALJ – i.e. "in accordance with the May 31, 2018, Opinion and Order" – refers to the fact that, in the May 31, 2018, Opinion and Order, the ALJ concluded as follows regarding Percocet/OxyContin: "I do not believe that even with her on-going pain it is in the Plaintiff's best interest to continue to take this medicine

without even attempting a weaning." The ALJ subsequently ordered that the OxyContin to be weaned.[1] No appeal was taken from the May 31, 2018, Opinion and Order, and the conclusion reached by the ALJ regarding the need for Hayes to be weaned from Percocet/OxyContin is now the law of the case. *See* Inman v. Inman, 648 S.W.2d 847 (Ky. 1982) and McGuire v. Coal Ventures Holding Company, Inc., 2009-SC-000114-WC, rendered October 29, 2009, Designated Not To Be Published. Therefore, our remand to the ALJ for a determination of the appropriate weaning schedule for Hayes to be weaned from Percocet/OxyContin is "in accordance with the May 31, 2018, Opinion and Order," as it was the ALJ who ordered Hayes to be weaned from Percocet/OxyContin to begin with. The ALJ must enforce his order.

Second, the June 14, 2019, Order reads as follows: "The [May 31, 2018] Opinion did state that at the end of 90 days the opioid would be non-compensable and that was supported by substantial evidence." However, as detailed at length on pages 14-16 of our January 25, 2019, Opinion, substantial evidence does not support a holding that Percocet/OxyContin is non-compensable after 90 days. As we have previously held, neither Dr. Price's medical opinions nor any other medical opinions in the record support such an arbitrary conclusion.

Third, the June 14, 2019, Order reads as follows: "The 'weaning' schedule as provided by Dr. Murphy specifically stated that the patient could not be weaned from the opioid."

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[1] This Board acknowledges the exact wording of the May 31, 2018, Order is as follows: "The OxyContin shall be weaned, as above." This Board also acknowledges that OxyContin and Percocet are two different opioid medications. However, as Percocet and OxyContin, throughout the course of this litigation, have been discussed in tandem and cited as "Percocet/OxyContin," and as the ALJ, earlier in the opinion and order, noted that both OxyContin and Percocet should be weaned, we must assume that the absence of Percocet in the Order is nothing more than a typographical error.

We note that, in the July 10, 2018, office note of Murphy Pain Center, filed by Hayes on July 24, 2018, the following weaning plan is set forth:

> Over the next 90 days will attempt to wean Teresa's opioids by 10-15% each visit. The opioid weaning process will be dependent on Teresa's clinical response to the medication changes. Greater than 60 minutes spent with patient discussing diagnosis and potential plan of treatment as it pertains to weaning of opioid medication. 60 minutes spent face to face with patient.

We acknowledge the following opinion of Karen Doggett, NP-C ("Doggett") is also contained in the office note: "Medically I do not feel that Teresa can be totally opioid free due to her chronic pain associated with her back injury." However, this opinion was rendered by Doggett, a Nurse Practitioner, and not Dr. Murphy. Notably, Doggett did not state Hayes *could not* be weaned from opioids.

Fourth, the June 14, 2019, Order reads as follows: "The only interpretation that I can make of this is that Ms. Hayes will be allowed to continue to take the opioid as she and Dr. Murphy see fit, pending any further dispute."

In the May 31, 2018, Opinion and Order, the ALJ ordered Hayes to be weaned from Percocet/OxyContin. As stated, that is now the law of the case. Consequently, in our January 25, 2019, Opinion, this Board remanded the claim to the ALJ for a determination of the appropriate weaning schedule for Hayes utilizing "the medical evidence in the record or any subsequent medical evidence he may deem appropriate in resolving this issue." The ALJ failed to do so, and must do this in a second remand. Thus, the ALJ erroneously concluded that Hayes can be allowed to take Percocet/OxyContin "as she and Dr. Murphy see fit."

There are other critical rulings in our January 25, 2019, Opinion. The ALJ's determination, as set forth in the September 7, 2018, Order and reaffirmed in the October 4, 2018, Order, that all narcotics are non-compensable as of October 22, 2018, was vacated, as neither Dr. Price's medical opinions nor any other medical opinions in the record support such a determination. Also, this Board concluded Hayes submitted the weaning plan by the Murphy Pain Center in a timely manner, as it was submitted within 30 days of the July 2, 2018, Order directing her to do so.

As the ALJ failed to carry out our instructions on remand, our decision today renders all issues raised on appeal premature and moot.

Accordingly, the June 14, 2019, and July 11, 2019, Orders are **VACATED**. This claim is **REMANDED** to the ALJ for additional findings and entry of an amended order in accordance with the views and instructions set forth within this opinion and the Board's January 25, 2019, Opinion.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

COUNSEL FOR PETITIONER:

HON ROBERT F FERRERI **LMS**
HON MATTHEW J ZANETTI **LMS**
614 W MAIN ST STE 5500
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON CHED JENNINGS **LMS**
401 W MAIN ST STE 1910
LOUISVILLE KY 40202

RESPONDENT:

DR JAMES P MURPHY **USPS**
MURPHY PAIN CENTER
720 ROLLING CREEK DR STE 101
NEW ALBANY IN 47150

ADMINISTRATIVE LAW JUDGE:

HON CHRIS DAVIS **LMS**
MAYO-UNDERWOOD BUILDING
500 MERO ST 3RD FLOOR
FRANKFORT KY 40601