

IN THE DISTRICT COURT OF APPEAL FOR THE FIRST
DISTRICT, STATE OF FLORIDA

Publix Super Markets, Inc.,
Normandy Insurance Company,
Zenith Insurance Company,
Bridgefield Employers Insurance
Company, Bridgefield Casualty
Insurance Company, BusinessFirst
Insurance Company and RetailFirst
Insurance Company,

Case No.: 1D23-0941
L.T. No.: 23-0276RP

Appellants,

v.

Department of Financial Services,
Division of Workers' Compensation,
Prescription Partners, LLC, Florida
Medical Association, Florida
Osteopathic Medical Association,
and Florida Orthopaedic Society,

Appellees.

**ANSWER BRIEF OF APPELLEES (PRESCRIPTION PARTNERS,
LLC, AND FLORIDA MEDICAL ASSOCIATION, INC., FLORIDA
OSTEOPATHIC MEDICAL ASSOCIATION, AND FLORIDA
ORTHOPAEDIC SOCIETY)**

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PRELIMINARY STATEMENT

In this brief, Appellants Publix Super Markets, Inc., Normandy Insurance Company, Zenith Insurance Company, Bridgefield Employers Insurance Company, Bridgefield Casualty Insurance Company, BusinessFirst Insurance Company, and RetailFirst Insurance Company, will be referred to as “Appellants”. Appellees Prescription Partners, LLC, and the Florida Medical Association, Inc., Florida Osteopathic Medical Association, and Florida Orthopaedic Society, will be referred to as “Appellees.” Appellee Department of Financial Services will be referred to as “the Department.” The American Property and Casualty Insurance Association and Florida Insurance Council will be referred to as “Amici” or “APCIA and FIC.”

Appellees agree with and adopt the designations of the Record, ALJ, OJCC, JCC and Department identified in the Preliminary Statement of the Appellants’ Initial Brief.

STATEMENT OF THE CASE AND FACTS

There has been a long-standing dispute between health care providers and insurance carriers in workers' compensation relating to physician-dispensing of medication to injured workers. This issue has been the subject of multiple reimbursement disputes and litigation between health care providers and insurance carriers since at least 2008. RI. 944-954. While the workers' compensation system is intended to be a self-executing system pursuant to Section 440.015, this issue has been a sticking point in the system.

It is worth noting at the outset that physician-dispensing of medication is wholly within the insurance carriers' control. The carrier has the choice to send the injured worker to any provider of the carrier's choice. The carrier is free to send the injured worker to a provider who is not a dispensing practitioner. RI. 701.

Further, physician-dispensing of medication is subject to regulations specific to that practice, pursuant to Chapter 465. Section 465.0276 provides that dispensing practitioners must (1) register with their professional licensing board as a dispensing practitioner, (2) comply with and be subject to all laws and rules applicable to pharmacies and pharmacists, and (3) before dispensing

any drug, give the patient a written prescription and orally or in writing advise the patient that the prescription may be filled in the practitioner's office or at any pharmacy. § 465.0276(2), Fla. Stat. (2022); RI. 547; RI. 91.

In February 2020, the Department issued Reimbursement Dispute Determinations in three reimbursement disputes indicating its policy that carriers could not prohibit all physician-dispensing and that injured workers could choose to obtain their medications from their doctor's office. These determinations were admitted as Joint Exhibit 19 in the underlying DOAH rule challenge proceeding (RI. 955-975). The Determinations stated:

prior to the injured employee's initial visit with [the health care practitioner], Memic Indemnity Company notified [the health care practitioner] that he/she was authorized to treat the injured employee. The letter also advised that physician in-house dispensing/repackaging was not authorized.... The [] letters from Memic Indemnity Company interfere with the full, free, and absolute choice of the sick or injured employee and, therefore, are contrary to section 440.13(3)(j), Florida Statutes. Based on review of the submitted documentation and the above analysis, the MSS has determined that the carrier improperly disallowed payment to [the health care practitioner] for the medication dispensed to the above-reference patient....

RI. 960. No party challenged these Determinations, setting forth the Department's legal analysis and policy with respect to practitioner-dispensed medications. Thus, the Department issued Final Orders adopting these Determinations. These Final Orders were not appealed.

These Determinations and Final Orders reflected a change in Department policy. Prior to these 2020 Determinations and Final Orders, the Department took the opposite position: that subsection 440.13(3)(j) gave injured workers the right to choose to obtain their medications from a pharmacist, but not from a dispensing practitioner. See *In the Matter of Todd Alea, M.D.*, DFS Case No. 121698-11 WC (Final Order, Aug. 31, 2012); *Phillip Bonanno v. Diocese of Venice Epiphany Cathedral Catholic Church and Gallagher Bassett Services, Inc.*, OJCC Case No. 03-042789DBB, 2009 WL 1753792 (Final Compensation Order, June 16, 2009). While neither the Department's previous interpretation of the statute, nor the 2020 interpretations of the statute are binding on this Court, they are helpful to demonstrate the longevity of the dispute.

In March 2020, at the same time as the Final Orders in the *Memic* cases, the Department issued an Informational Bulletin

informing carriers that they could not deny reimbursement solely because medications were dispensed by a dispensing practitioner. RI. 997. This bulletin was later challenged as an unadopted rule and, in settling the unadopted rule challenge, the Department agreed to initiate rulemaking – which rulemaking led to New Rules 69L-7.730 and 69L-7.740. RI. 760.

The Department published the Notice of Rule Development for the Proposed Rules on July 12, 2022, and held a workshop on November 1, 2022, and a public hearing on January 13, 2023. RI. 764. The Department received both written and oral feedback from carriers, workers' compensation patients, and health care providers during the rulemaking process. The Notice of the Hearing, the Agenda for the Hearing and the Transcript of the Hearing were all admitted as Joint Exhibits in the underlying proceeding. *See* RI. 762-781. The Appellants participated in these hearings and were provided an opportunity to be heard by the Department.

On January 23, 2023, appellants timely filed a Petition to

Determine Invalidity of Proposed Rules 69L-7.730(2)(l)1.b.¹ & 69L-7.740(2)(c). On February 21, 2023, the parties filed their Joint Pre-Hearing Stipulation, wherein Appellants withdrew their allegations in the Petition that the rules are arbitrary or capricious. RI. 538. The case proceeded to final hearing on February 23, 2023.

During the final hearing, the Department made it clear that, under the New Rules, carriers can still authorize medication. RII. 110. The Department's representative also explained that the New Rules do not affect the ability of carriers and providers to enter into private contracts that govern prescription medication prices. RII. 91-92. At the final hearing, the Department's witness Ms. Brittany O'Neil testified that all of the reasons for which a carrier can decline authorization for medication still remain available to the carrier, including, but not limited to, medical necessity and utilization review, and are unaltered by the Proposed Rules. RII. 115. She also confirmed that the Proposed Rules do not inhibit carriers' right to deny authorization for care that is not medically necessary. RII. 116.

¹ In their petition, Petitioners identified the proposed rule language as "69L-7.730(2)(b)," however the proposed amendment is to add 69L-7.730(2)(l)1.b.

Further, the Proposed Rules do not inhibit a carrier's right to disallow reimbursement for medications that are not medically necessary. RII. 129. The ALJ made Findings of Fact based on this testimony. RI. 704-705.

On March 27, 2023, ALJ Darren Schwartz issued a Final Order upholding the validity of the New Rules on three grounds: 1) the Department did not exceed its grant of rulemaking authority, 2) the Rules do not enlarge, modify or contravene specific provisions of law implemented, and 3) the Rules are not vague, do not fail to establish adequate standards for Department decisions, and do not vest unbridled discretion in the Department. RI. 556. The Final Order confirms that the Appellants withdrew their allegations that the rules are arbitrary and capricious. RI. 712 n. 5. Appellants thereafter timely sought this appeal.

Since the Final Order was issued, the New Rules were filed for adoption with the Secretary of State. They were also ratified by the Legislature, and they took effect on July 1, 2023. Ch. 23-144, § 76, at 67-68, Laws of Fla.

SUMMARY OF ARGUMENT

It is worth noting at the outset that this dispute is entirely avoidable and within the control of the insurance carriers. In the workers' compensation system, a carrier has the choice to send the injured worker to any provider of the carrier's choice, including a provider who is not a dispensing practitioner, and thereby avoid any practitioner-dispensing of medications at all.

The sole legal issue properly before this Court is whether the New Rules modify, enlarge or contravene any provisions of Chapter 440. The plain language of chapters 440 and 465 demonstrates that an injured worker has the right to choose to obtain his or her medications from either a pharmacist or from the practitioner chosen by the carrier. This is because dispensing practitioners are authorized/licensed to dispense medicinal drugs to their patients, and for this purpose, dispensing practitioners are within the injured worker's choice of where to obtain his or her medications because the carrier chose to refer the injured worker to the dispensing practitioner.

Appellants' arguments regarding the invalidity of the New Rules ignore the plain language of the definitions in chapter 465, and would

make all physician-dispensing of medication unlawful in clear contravention of section 465.0276.

Appellants also argue that the New Rules will interfere with insurance carriers' authorization of providers or treatment or medical care. This argument is contrary to the competent, substantial record evidence from the Department's representative and the Findings of Fact of the ALJ. The ALJ found that the New Rules do not interfere with a carrier's authority to approve or deny **who** can provide the care, or **what** care can be provided, but only **where** the injured worker may choose to obtain her medication. The ALJ weighed the credibility of the evidence and made factual findings rejecting these arguments of the Appellants. These Findings of Fact should not be disturbed on appeal.

In addition, the Appellants bring multiple arguments that are outside the scope of this appeal and not properly before this Court. The Appellants include arguments that the New Rules are arbitrary and capricious. These arguments are out-of-bounds in this appeal because the Appellants expressly stipulated in the Pre-Hearing Stipulation that they were not challenging the Proposed Rules on these grounds. No evidence or argument was presented on whether

the Rules are arbitrary and capricious, and the Final Order contains no Findings of Fact or Conclusions of Law addressing same. Thus, this Court should not address these arguments in this appeal.

Further, the Appellants and Amici bring arguments about various policy questions about physician-dispensing of medication – including that physician-dispensed medication may cost more or cause patient safety concerns. These arguments are also out-of-bounds in this appeal. The issue of regulatory costs was addressed in the Petition by the Appellants, but the Appellants then withdrew that issue in the Pre-Hearing Stipulation. Further, the statute provides the conditions under which practitioners can dispense medications and provides the pricing of physician-dispensed medication is set by statute in 440.13(12)(c). Thus, the arguments about the policy implications of physician-dispensing are beyond the scope of this appeal, and are matters for the Legislature.

In conclusion, the New Rules are fully consistent with chapters 440 and 465, and will be useful in addressing the significant number of workers' compensation reimbursement disputes between providers and insurance carriers.

ARGUMENT

1. Standard of Review

The Department has the burden to prove by a preponderance of the evidence that the proposed rules are not an invalid exercise of delegated legislative authority “as to the objections raised” by the Appellants, pursuant to Section 120.56(2)(a), Fla. Stat.

In the underlying rule challenge, the ALJ was tasked with making the determination of whether the New Rules were an invalid exercise of delegated legislative authority, based on the allegations of invalidity set forth by the Appellants. §120.56(2), Fla. Stat. (2022). The Appellants had the burden of going forward by establishing a basis for their objections to the New Rules. *See St. Johns River Water Mgmt. Dist. v. Consol.-Tomoka Land Co.*, 717 So. 2d 72, 76 (Fla. 1st DCA 1998) (superseded on other grounds by ch. 99-379, §§ 2, 3, Laws of Fla.); *SW Fla. Water Mgmt. Dist. v. Charlotte County*, 774 So. 2d 903, 908 (Fla. 2d DCA 2001).

In the Pre-Hearing Stipulation, the Appellants argued that the New Rules were invalid because the Department exceeded its grant of rulemaking authority, the New Rules enlarged, modified, or contravened the specific provisions of law implemented, and the New Rules were vague, or failed to establish adequate standards for

agency decisions, or vested unbridled discretion in the Department. (RI. 542) The ALJ did not have the authority to assess the validity of the New Rules as to issues not raised by the Appellants in the proceeding below. § 120.56(1)(b), §(2022); *see also Batista v. Bd. of Prof'l Engineers*, Case No. 20-3075RX (Fla. DOAH Nov. 19, 2020) (“However, Petitioner did not raise this alleged invalidity basis in the Rule Challenge Petition, so he is foreclosed from raising and litigating it at the final hearing”).

In the ALJ’s Final Order, the ALJ made conclusions of law that supported his ultimate legal conclusion that the New Rules are not an invalid exercise of delegated legislative authority on the three grounds asserted by the Appellants. Because these legal conclusions are questions of law, this Court reviews such conclusions of law by the ALJ on a *de novo* basis. *Batista v. Bd. of Prof'l Engineers*, Case No. 20-3075RX (Fla. DOAH Nov. 19, 2020)) (*citing SW Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 597 (Fla. 1st DCA 2000)); *accord MB Doral, LLC v. Dep’t of Bus. & Prof’l Reg.*, 295 So. 3d 850, 853 (Fla. 1st DCA 2020) (while conclusions of law and statutory interpretation are reviewed *de novo*, findings of fact are reviewed for competent, substantial evidence).

The Appellants point to Department's and the OJCC's previous decisions addressing physician-dispensing and whether it is encompassed within the injured worker's free, full, and absolute choice of "pharmacist or pharmacy" in subsection 440.13(3)(j).² Similarly, Appellees pointed to more recent Department decisions on the same point in the underlying rule challenge.³ However, because this Court addresses this issue on a *de novo* basis, those previous decisions are not binding on this Court in this proceeding.

2. The New Rules do not enlarge, modify, or contravene Section 440.13(3)(j).

² *In the Matter of Todd Alea, M.D.*, DFS Case No. 121698-11 WC (Final Order, Aug. 31, 2012); *Phillip Bonanno v. Diocese of Venice Epiphany Cathedral Catholic Church and Gallagher Bassett Services, Inc.*, OJCC Case No. 03-042789DBB, 2009 WL 1753792 (Final Compensation Order, June 16, 2009).

³ *Prescription Partners, LLC vs. Memic Indemnity Company*, DFS Case No. 20180824-006-WC, MSS Case No. 201808240-006 (Final Order 3/31/2020) (Reimbursement Dispute Determination 2/17/2020); *Prescription Partners, LLC vs. Memic Indemnity Company*, DFS Case No. 20180824-007-WC, MSS Case No. 201808240-007 (Final Order 3/31/2020) (Reimbursement Dispute Determination 2/17/2020); *Prescription Partners, LLC vs. Memic Indemnity Company*, DFS Case No. 20180910-012-WC, MSS Case No. 20180910-012 (Final Order 3/31/2020) (Reimbursement Dispute Determination 2/17/2020); *Prescription Partners, LLC vs. Illinois National Insurance Company*, DFS Case No. 20181029-012-WC, MSS Case No. 20181029-012 (Final Order 6/3/2020) (Reimbursement Dispute Determination 4/17/2020).

(a)Section 440.13(3)(j) must be read together with Chapter 465, which clearly includes any licensed person dispensing medicinal drugs within the definition of “pharmacy” or “pharmacist”.

Section 440.13(3)(j), Fla. Stat., provides that injured workers are

entitled, at all times, to free, full, and absolute choice in the selection of the pharmacy or pharmacist dispensing and filling prescriptions for medicines required under [Chapter 440].

Chapter 440 does not define the terms “pharmacy” or “pharmacist”. Because Chapter 440 does not include a definition of those terms, this Court must look to Chapter 465 (the Florida Pharmacy Act) which does include definitions of these terms. Chapters 465 and 440 are sufficiently related such that Chapter 465 should be used to define the undefined term “pharmacist” in Chapter 440. *See generally County v. Watson*, 333 So. 3d 162, 169-170 (Fla. 2022) (“consider[ing] chapters 129 and 30 in concert to ascertain the plain meaning of the specific provisions on which this dispute turns”); *see also Debaun v. State*, 213 So. 3d 747, 753 (Fla. 2017) (“[W]hen a court looks to other statutory provisions to define a term that lacks its own statutory definition, the provision to which a court looks must be related to the provision lacking a definition.”). Section

440.13 and Chapter 465 are sufficiently related because they both deal with dispensing of medications, pharmacies and pharmacists.

This Court must consider the context within which the terms are used. *Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) (“It would be a mistake to think that our law of statutory interpretation requires interpreters to make a threshold determination of whether a term has a ‘plain’ or ‘clear’ meaning in isolation, without considering the statutory context . . .”). This Court must “tak[e] into consideration the context in which the word appears.” *B&A Gourmet Foods, LLC v. Mora-Abreu*, 352 So. 3d 29, 31 (Fla. 1st DCA 2022). In *B&A Gourmet Foods*, when determining the meaning of the term “specialty,” the court considered “the term in the context in which it is used in the statute and the broader context of the Workers’ Compensation Law.” *Id.* at 32.

Section 465.003 defines “pharmacist” as “any person licensed⁴ pursuant to” chapter 465 to “practice the profession of pharmacy.” § 465.003(19), Fla. Stat. (2022). The “practice of the profession of

⁴ Section 120.52(10) defines a license to include a permit, certification, registration, or “similar form of authorization required by law.” §120.52(10), Fla. Stat. (2022).

pharmacy” includes dispensing any medicinal drug. §§ 465.003(13), (22), Fla. Stat. (2022).

Section 465.0276 governs health care practitioners authorized by law in Florida to dispense medicinal drugs to their patients. These health care practitioners must *register* with the Department of Health, through their applicable licensing board, to be considered a dispensing practitioner authorized by law to engage in the practice of pharmacy. §§ 465.0276(1)(a), (2)(a), Fla. Stat. (2022).

Registered dispensing practitioners must “comply with and be subject to all laws and rules applicable to pharmacists and pharmacies including, but not limited to, [chapter 465] and chapters 499 and 893 and all federal laws and federal regulations.” § 465.0276(2)(a), Fla. Stat. (2022). Registered dispensing practitioners engage in the practice of the profession of pharmacy by dispensing medicinal drugs to their patients under the authority of Florida law.

This Court must look to the context of the term for its definition. In this instance, the most useful and relevant context is the Florida Pharmacy Act, Chapter 465, Florida Statutes. Looking to the definitions laid out in Chapter 465 and the requirements for dispensing practitioners, dispensing practitioners are considered

pharmacies or pharmacists for the purposes of the injured worker's free and full choice provision of subsection 440.13(3)(j).

(b)Section 440.13(3)(j) must be reviewed in the context of the persons affected by the statute, including injured workers.

Words contained in statutory law may be construed “according to the meaning assigned to the terms by the class of persons within the purview of the statute.” *Fla. E. Coast Indus., Inc. v. Dep’t of Cmty. Aff.*, 677 So.2d 357, 362 (Fla. 1st DCA 1996) (citing *State v. Hoyt*, 609 So.2d 744 (Fla. 1st DCA 1992)). Because dispensing practitioners are required to be specifically licensed as such and to comply with and be subject to all laws and rules applicable to pharmacists and pharmacies, dispensing practitioners necessarily fall within the scope of the terms “pharmacy” and “pharmacist” as they are used in Section 440.13(3)(j).

When considering the meaning assigned to the terms “pharmacist” or “pharmacy” by the injured workers (the key class of persons within the purview of subsection 440.13(3)(j)), the terms refer to where those persons can choose to obtain their medication, including from their doctor's office if their doctor is licensed as a dispensing practitioner.

In evaluating the meaning of words in statutes, one must “tak[e] into consideration the context in which the word appears.” *B&A Gourmet Foods*, 352 So. 2d at 31; accord *SW Fla. Water Mgmt. Dist.*, 774 So. 2d at 916 (“the meaning of terms . . . ought to be determined . . . on the basis of which meaning is . . . most compatible with the surrounding body of law into which the provision must be integrated.” (quoting *Sneed v. State*, 736 So. 2d 1274, 1276 (Fla. 4th DCA 1999)). “Consideration must be accorded not only to the literal and usual meaning of the words, but also to their meaning and effect on the objectives and purposes of the statute’s enactment.” *Fla. Birth-Related Neurological Inj. Comp. Ass’n v. Div. of Admin. Hearings*, 686 So. 2d 1349, 1354 (Fla. 1997). The “court may not construe an unambiguous statute in a way that would . . . limit . . . its reasonable and obvious implications.” *Herman v. Bennett*, 278 So. 3d 178, 180 (Fla. 1st DCA 2019) (internal citation omitted).

Here, when looking at the word “pharmacist,” it must be viewed in light of the Legislature’s mandate that the injured worker have free, full, and absolute choice in where his or her medicine is dispensed. Following that logic, the plain meaning of “pharmacist” in section 440.13(3)(j) encompasses dispensing practitioners.

Appellants contend that the omission of the term “dispensing practitioners” from section 440.13(3)(j) must have been intentional because the term is used elsewhere in section 440.13, specifically in section 440.13(12)(c). However, the specific reference to dispensing practitioner in subsection 440.13(12)(c) is needed because there is a reason to draw a distinction in that subsection between a dispensing practitioner and a pharmacist. The specific reference to dispensing practitioners distinguishes the reimbursement amount for prescription medication dispensed by a dispensing practitioner and other dispensed medications (such as those dispensed by a pharmacist). In subsection 440.13(3)(j), there is no reason to draw such a distinction.

In the context of an injured worker’s right to choose where to get his/her medication under subsection 440.13(3)(j), there is no difference between a dispensing practitioner and a pharmacist. Subsection 440.13(3)(j) unambiguously encompasses dispensing practitioners. The New Rules restricting a carrier’s ability to deny or disallow reimbursement to dispensing practitioners based solely on the reason that the injured worker chose to receive his/her authorized medications from a dispensing practitioner are consistent

with Chapter 440, and do not enlarge, modify or contravene Chapter 440.

Amici's argument that *MB Doral* requires reversal in this appeal fails. Amici Proposed Brief at 8-9. In *MB Doral*, this Court found a rule invalid because it modified, contravened or enlarged a statute. 295 So.3d at 855. In that case, the statute prohibits storing alcoholic beverages in locations with only three specific exceptions. One exception is for a location(s) identified in the vendor's license application; another exception is a location approved by the agency and used with catered events; and another exception is a location approved by the agency any located in the vendor's home county. See § 562.03, Fla. Stat. (2022). Two statutory exceptions do not include county-based limitations, while one does. The agency's rule included a county-based limitation restrictions on all of the exceptions. This Court found that the rule expanded and contravened the statute by including a restriction that was not found in the statute. 295 So. 3d at 855. *MB Doral* is clearly distinguishable from this case because the New Rules simply clarify and implement the existing statutory language in chapters 440 and 465. Accepting the Amici's arguments

would render language in chapters 440 and 465 meaningless, which is not an acceptable statutory construction.

(c) The New Rules simply clarify who can “dispense and fill” the prescriptions for medicines for injured workers.

Section 440.13(3)(j) specifies that an injured worker has the free and full choice of who will *dispense and fill* his or her prescriptions for medicines. This Court very recently defined the term “dispensing” in a medical context to mean “to prepare and distribute medication.” *See Dep’t of Health v. Leafly Holdings, Inc.*, 1D21-3501, Order, 2023 WL 5091028 at *3 (Fla. 1st DCA Aug. 9, 2023) (affirming a Final Order invalidating an agency memorandum as an unpromulgated rule because the memorandum went beyond restating or reiterating the statute by defining terms that were not defined in the statute). This Court’s definition of the term “dispensing” in *Leafly* lines up with the ALJ’s reading of subsection 440.13(3)(j) as defining the persons who can “prepare and distribute medication” to the injured workers. 2023 WL 50910298 at *3.

Similarly, dictionary definitions of “pharmacist” refer to a healthcare professional licensed to dispense medicines, which encompasses dispensing practitioners. *See* § 465.0276(1)(a), Fla.

Stat.; *Pharmacist*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/pharmacist> (last accessed Aug. 25, 2023) (“a health-care professional licensed to engage in pharmacy with duties including dispensing prescription drugs . . .”); *Pharmacist*, Dictionary.com, <https://www.dictionary.com/browse/pharmacist> (last accessed Aug. 25, 2023) (“a person licensed to prepare and dispense drugs and medicines . . .”). These definitions support the Department’s interpretation of Section 440.13(3)(j) and the New Rules.

3. The New Rules do not enlarge, modify or contravene any other provisions of Chapter 440, specifically those involving the carrier’s authorization of services.

Contrary to Appellants’ assertions, the New Rules do not compel a carrier’s authorization of any treatment or medication, nor do they narrow the carriers’ ability to review proposed courses of treatment submitted by the authorized health care practitioner. Carriers maintain the same statutory authority to decline or narrow authorization as they have always had.

The ALJ made specific findings of fact addressing the Appellants’ assertions regarding authorization:

23. The Proposed Rules do not infringe on a carrier's current authority to deny authorization to health care providers. A health care provider must still request authorization of medication to be prescribed.

24. All of the reasons for which a carrier can decline authorization for medication still remain available to the carrier (i.e., medical necessity and utilization review). If a dispute regarding authorization for treatment arises, a JCC will determine whether an injured worker is entitled to treatment. If a dispute regarding payment arises, that dispute will be resolved through a reimbursement dispute determination and, if requested, a section 120.57 proceeding.

25. The carrier retains the right to authorize a medication under the Proposed Rules, but once the medication is authorized, a carrier cannot disallow reimbursement solely because the injured worker chose to receive it from a dispensing practitioner, regardless of whether the authorized medication may cost less elsewhere. The act of dispensing, either by a pharmacist or a dispensing practitioner, does not require carrier authorization. The only conduct forbidden by the Proposed Rules is a carrier's authorization or reimbursement decision that interferes with an injured worker's choice where to have the medication dispensed.

(RI. 704-705.)

This Court reviews the ALJ's Findings of Fact for competent, substantial evidence. *See Florida Prepaid College Board v. Intuition College Savings Solutions, LLC*, 330 So. 3d 93, 94 (Fla. 1st DCA 2021).

“[T]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact.” § 120.68(7)(b), Fla. Stat. Appellants have not identified any specific challenge to Findings of Fact ##23-25, and have not asserted that these findings lack evidentiary basis. The ALJ made these Findings of Fact based on the evidentiary record, and this Court has no basis to set those aside. (RII. 88-89, 110-111, 114-117, 128, 135-136.)

The New Rules state: “Medication is treatment and must be authorized prior to dispensing . . .,” and a carrier “may disallow payment for dispensed medication if the medication is not authorized prior to dispensing . . .” At most, the New Rules are recognizing that, unlike the medications themselves, *the act of dispensing* is not subject to authorization by the carriers – because subsection 440.13(3)(j) gives the injured worker, not the carrier, the choice in selecting which individual authorized by Florida law to dispense medications will dispense to the injured worker.

Appellees agree with Appellants that a health care provider must always receive authorization from a carrier prior to providing treatment to an injured worker, except in emergency situations. § 440.13(3)(a), Fla. Stat. (2022). There is no reading of the New Rules

that would interfere with the carriers' authority to authorize the health care provider and the treatment provided by the health care provider. Chapter 440 requires that *medications* or *treatments* must be authorized by the carrier, not the *act of dispensing* those medications or treatments.

The New Rules do not restrict the carriers' authority to authorize providers or treatments, or to establish procedures for same. The carrier has the sole authority to select and authorize the health care provider, with certain exceptions not relevant here. § 440.13(2), Fla. Stat. (2022). Indeed, a carrier can avoid physician-dispensing of medication altogether by referring its injured workers only to physicians who are not registered dispensing practitioners. (RII. 701, FOF #11)

The provider must still obtain authorization for the treatment he or she wishes to provide, including medications. § 440.13(3)(a), Fla. Stat. (2022). Carriers have the right to adopt their own procedures for reviewing, receiving, documenting and responding to requests for authorization. § 440.13(3)(e), Fla. Stat. (2022).

However, there are some statutorily-defined limits to the carriers' powers of authorization:

[E]ach insurer shall review, *in accordance with the requirements of this chapter*, the proposed course of treatment, to determine whether such treatment would be recognized as reasonably prudent. The review must be in accord with all applicable workers' compensation practice parameters and protocols of treatment established in accordance with this chapter. The insurer must accept any such proposed course of treatment unless the insurer notifies the physician of its specific objections to the proposed course of treatment.

§ 440.13(2)(e), Fla. Stat. (2022) (emphasis added).

[I]nsurer *shall authorize such consultation or procedure unless* the health care provider or facility is not authorized, unless such treatment is not in accordance with practice parameters and protocols of treatment established in this chapter, or unless a judge of compensation claims has determined that the consultation or procedure is not medically necessary, not in accordance with the practice parameters and protocols of treatment established in this chapter, or otherwise not compensable under this chapter.

§ 440.13(3)(i), Fla. Stat. (2022) (emphasis added).

While the carrier has the right to conduct “utilization review” of all bills for payment, this includes review of the appropriateness of treatment based on Chapter 440’s practice parameters and protocols.

§§ 440.13(1)(s), 440.13(6), Fla. Stat. (2022). The carrier’s right of utilization review is limited to compliance with other provisions of

Chapter 440. *Id.* (carrier may disallow or adjust payment if the carrier has complied with section 440.13(7) and Department rules).

The Department has the authority (and exclusive jurisdiction) to decide reimbursement disputes, i.e., “whether a carrier properly adjusted or disallowed payment.” § 440.13(7), Fla. Stat. (2022). One of the permissible reasons a carrier may cite for disallowing or adjusting payment is lack of authorization pursuant to section 440.13(3).

30 – Payment disallowed: lack of authorization:
no authorization given for service rendered or
notice provided for emergency treatment
pursuant to Section 440.13(3), F.S.

Rule 69L-7.740(13)(b), Fla. Admin. Code. Carriers have the right to authorize who will provide the care, and what care or treatment will be provided, but not where injured workers receive their medications. It would be improper for a carrier to disallow reimbursement if the only basis for such disallowance was because the medication was dispensed by a dispensing practitioner. RII. 135-136.

Determining whether there was “no authorization given for [the] service” falls within the Department’s duty to determine whether a “carrier properly adjusted or disallowed payment” in reimbursement

disputes. § 440.13(7), Fla. Stat. (2022). The Department has broad power to decide “any matters concerning reimbursement.” § 440.13(11)(c), Fla. Stat. (2022) (“The department has exclusive jurisdiction to decide any matters concerning reimbursement, to resolve any overutilization dispute under subsection (7) . . .”). Subsection 440.13(1)(q) defines “reimbursement dispute” as “any disagreement between a health care provider or health care facility and carrier concerning payment for medical treatment.” § 440.13(1)(q), Fla. Stat. (2022); *see also Lab Corp. of Am. v. Davis*, 339 So. 3d 318, 325 (Fla. 2022) (“it is most reasonable to understand the ‘exclusive jurisdiction’ provision as covering ‘any matters concerning’ payments by a carrier to a provider”). Disagreements about whether there was a lack of authorization when the carrier authorized the medication but denied dispensing of the authorized medication falls squarely within the category of “matter[s] concerning reimbursement” that the Department *alone* is duty-bound to determine. § 440.13(7), Fla. Stat. (2022).

The provisions of the Workers’ Compensation Law giving carriers the authority to control authorization expressly recognize that the carriers’ authority is limited by other provisions in Chapter

440, including subsection 440.13(3)(j) prohibiting carriers from interfering with an injured worker's choice of where to obtain his or her medications. This is made clear by the language of subsection 440.13(3)(j), which provides that an injured worker is entitled to free, full and absolute choice "[n]otwithstanding anything in this chapter to the contrary." § 440.13(3)(j), Fla. Stat. (2022) (emphasis added).

4. The New Rules are not arbitrary or capricious by finding dispensing practitioners to be "engaged in the practice of pharmacy."

First, Appellants have raised the argument in the Initial Brief (pp. 31-36) that the New Rules are invalid because they are "arbitrary" or "capricious" in violation of Section 120.52(8)(e), Fla. Stat. However, Appellants did not preserve this issue in the underlying proceeding. While the Appellants made this argument in their Petition (R. 33), the Appellants then narrowed their arguments in the Pre-Hearing Stipulation to only subsections 120.52(8)(b), (c), and (d). In the Pre-Hearing Stipulation, the Appellants withdrew their arguments as to the invalidity of the New Rules vis-à-vis 120.52(8)(e) and (f). (R. 542.) Thus, the ALJ did not have the authority to assess the validity of the New Rules as to 120.52(8)(a) (e), or (f), which were not argued by the Appellants in the proceeding below. § 120.56(2)(a), Fla. Stat. (2022).

“Where the issues have been narrowed by stipulation, the Court must consider only the issues remaining in dispute. *See Gandy v. Dep’t of Offender Rehabilitation*, 351 So. 2d 1133, 1134 (Fla. 1st DCA 1977); *Da Cunha v. Mann*, 183 So. 3d 1113, 1115 (Fla. 3d DCA 2015). Thus, this Court should reject the Appellants’ arguments regarding the alleged “arbitrary” or “capricious” nature of the New Rules as not properly before this Court.

Even if this were an issue ripe for consideration, the Appellants’ argument that the New Rules are “arbitrary” or “capricious” fails on its merits. To be arbitrary or capricious, the New Rules must not be supported by logic, facts, or reason or must be irrational. § 120.52(8)(e), Fla. Stat. (2022). As outlined above, the Department has provided sufficient explanation, logic and reason to support the New Rules.

Section 465.003(19) defines the term “pharmacist” to mean “any person licensed pursuant to [Chapter 465] to practice the profession of pharmacy.” Physicians are “licensed pursuant to” Chapter 465 to practice the profession of pharmacy; they are addressed in Section 465.0276 and have licenses from their respective professional licensing boards. Section 465.003(22) goes on to define the term

“practice of the profession of pharmacy” to include “... dispensing ... any medicinal drug.” Under the clear terms of Chapter 465, any person “licensed pursuant to Chapter 465” to dispense medicines is encompassed within the definition of the term “pharmacist”.

When the Department seeks to understand the meaning of the term “pharmacist” in subsection 440.13(3)(j), it must do so in the context of that term as it is used in Chapter 465, the Florida Pharmacy Act. Thus, the Department’s New Rules, which reflect the Department’s interpretation that subsection 440.13(3)(j) includes dispensing practitioners within the term “pharmacist”, are consistent with chapters 440 and 465. The Department’s definition of “pharmacist” consistent with Chapter 465 is neither arbitrary nor capricious.

5. This Court Cannot Consider Appellants’ Legislative Policy Arguments; Such Arguments Are Proper Before the Legislature, But Not Before This Court.

Appellants and Amici note in their briefs alleged “adverse health outcomes related to physician dispensing...”; Appellants also note alleged additional costs related to physician dispensing.⁵ First, there

⁵ Appellees also filed on August 25, 2023 a Response in Opposition to the APCIA/ FIC’s Motion for Leave to File Amicus Brief, the

is no evidentiary basis for any finding by this Court regarding these assertions. The Appellants and Amici are citing anecdotal and unsworn statements from the rulemaking process, and materials outside the record in this proceeding. None of that information was presented as evidence in the underlying rule challenge and should not be considered in this proceeding.

Second, even if those unsworn statements could be considered, those statements reflect policy arguments about whether and how physician-dispensing of medications is “good” or “bad.” As such, those statements are irrelevant to this Court’s determination of the validity of the New Rules. This Court’s determination of the validity of the New Rules is entirely a matter of whether the New Rules comply with Section 120.52(8), Florida Statutes. The question of whether the physician-dispensing of medication is a wise policy decision is outside this Court’s authority in this proceeding, and must be taken

proposed Amicus Brief, and the Appendix. As stated in that Response, Appellees object to any consideration by this Court of information submitted in the proposed Amicus Brief and Appendix that is outside the record of the proceeding below. Appellees further object to the Amici Motion to Accept a Reply to the Appellees’ Response filed on August 28, 2023.

before the Legislature, the branch of government tasked with making such policy decisions.

Through Section 440.591, Florida Statutes, the Legislature provided the Department with the authority to adopt rules “to implement the provisions of [Chapter 440] conferring duties upon” it. § 440.591, Fla. Stat. Subsection 440.20(6)(b) contains a specific grant of rulemaking authority for the Department to specify in what circumstances carriers may disallow or deny reimbursement for medical care. This Court is tasked with assessing whether the New Rules comply with subsections 120.52(8)(c) and 120.52(8)(e) and not on the respective pros and cons of physician dispensing of medication.

While Appellants attempt to make policy arguments against the New Rules, this Court does not have the authority to make policy decisions that have already been made by the Legislature. This Court must give effect to the Legislature’s policy decisions, as reflected in statute, whether or not it views those as the best public policy. *See, e.g., Fla. Dep’t of Bus. & Prof’l Reg., v. Walmart, Inc.*, 323 So. 3d 786, 790 (Fla. 1st DCA 2021); *Fla. Dep’t of Educ. v. Cooper*, 858 So. 2d 394, 397 (Fla. 1st DCA 2003); *Sebring Airport Auth. v. McIntyre*, 783

So. 2d 238, 244-245 (Fla. 2001). Thus, the arguments by the Appellants and Amici regarding the policy implications of the New Rules go beyond this Court's role in this proceeding; this Court is tasked with assessing whether the New Rules are valid (i.e., whether they are consistent with Chapter 440, and whether they are arbitrary or capricious). Those policy arguments are more properly directed to the Legislature.

6. The Alleged Regulatory Costs of the New Rules Are Not Before This Court

The Appellants did not raise the alleged regulatory costs of the New Rules in the proceeding below. The Department has the burden to prove by a preponderance of the evidence that the proposed rules are not an invalid exercise of delegated legislative authority only "as to the objections raised" by the Appellants, pursuant to Section 120.56(2)(a), Fla. Stat.

In the underlying rule challenge, the ALJ was tasked with making the determination of whether the New Rules were an invalid exercise of delegated legislative authority, based on the three allegations of invalidity set forth in the Pre-Hearing Stipulation. The Appellants had the burden of going forward by establishing a basis for their

objections to the New Rules. *See Water Mgmt. Dist.*, 717 So. 2d at 76; *SW Fla. Water Mgmt. Dist.*, 774 So. 2d at 908.

In the Petition, the Appellants argued that the New Rules were invalid on all but one of the available statutory bases, including:

- 120.52(8)(b): because the New Rules exceeded the Department's grant of rulemaking authority; and
- 120.52(8)(c): because the New Rules enlarged, modified, or contravened the specific provisions of law implemented; and
- 120.52(8)(d), because the New Rules were vague, or failed to establish adequate standards for agency decisions, or vested unbridled discretion in the Department;
- 120.52(8)(e): because the New Rules were arbitrary or capricious; and
- 120.52(8)(f): because the New Rules imposed regulatory costs which could be reduced through the adoption of less costly regulatory alternatives which substantially accomplished the statutory objectives.

RI. 33. The Appellants then narrowed their arguments in the Pre-Hearing Stipulation to only subsections 120.52(8)(b), (c), and (d).

RI. 542. Appellants could have litigated whether the New Rules impose regulatory costs that could be reduced with the adoption of a less costly regulatory alternative that accomplished the same statutory objectives. In its Petition, the Appellants made this argument. RI. 38; Petition at ¶43. But the Appellants presented no evidence or argument in furtherance of this allegation and withdrew this allegation in the Pre-Hearing Stipulation RI. 542. Thus, the ALJ did not have the authority to assess the validity of the New Rules as to subsections 120.52(8)(a) (e), or (f), which were not argued by the Appellants in the proceeding below. Section 120.56(2)(a), Fla. Stat. *See also Batista*, Case No. 20-3075 (DOAH Nov. 19, 2020).

Like the ALJ, this Court does not have authority to assess the validity of the New Rules as to subsections 120.52(8)(a), (e) or (f); those arguments were not raised or argued as issues by the Appellants in the proceeding below. *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) *citing Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638 (Fla. 1999) (“As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal.”) These issues were not before the ALJ, and are not properly before this Court.

Assertions by the Appellants and the Amici regarding the regulatory costs of the New Rules are outside the scope of the issues litigated in this proceeding and irrelevant to this Court's assessment of the validity of the New Rules. *See, e.g.*, Appellants' Initial Brief at 4, 23-24. *See* Amici Proposed Brief, at 2; 4-5; Count VI, pp. 14-20. In particular, the Amici Proposed Brief and Appendix include documents that were identified as potential exhibits by the Appellants in the proceeding below, subject to multiple objections by the Department and Appellees, but were not offered by Appellants or accepted as evidence in the hearing. RI. 562, Petitioners' Proposed Exhibits 15-19, with multiple objections from Department and Appellees. The Amici Proposed Brief and Appendix also include documents that were never identified at all in the proceeding below, and the Department and Appellees have had no opportunity to test the validity of, rebut or challenge the assertions within these documents, or challenge their application to the legal issues in this proceeding.

It is improper for the Amici to introduce new issues, evidence and arguments that were not raised in the underlying proceeding.⁶ This Court should not consider any arguments as to the regulatory costs of the New Rules because that argument was abandoned by Appellants in this proceeding, and no evidence was timely presented on those issues in this proceeding.

7. The Legislature’s Ratification of Ch. 2023-144 Does Not Affect This Court’s Assessment of the Validity of the New Rules.

APCIA and FIC argue that the Legislature’s ratification of the New Rules “does not shield the rules from challenge as violations of section 120.52(8), Florida Statutes.” Appellees do not dispute this assertion. The Legislature’s ratification of Ch. 2023-144 is not relevant to this Court’s determination of the validity of the New Rules in accordance with section 120.52(8), Fla. Stat.

⁶ Appellees submitted a Response in Opposition to the Amici Brief and Appendix on these grounds on August 25, 2023, and will not repeat those arguments here.

CONCLUSION

In conclusion, the New Rules do not remove or otherwise affect any statutory right of carriers to authorize treatment or medication. The carriers remain in control as to whether they refer injured workers to dispensing physicians.

The New Rules do not enlarge, modify or contravene any statute as contended by Appellants and Amici. While the New Rules are also not arbitrary and capricious, this issue has not been properly preserved for appeal as Appellants stipulated this issue in the Pre-Hearing Stipulation. Policy arguments and allegations regarding regulatory costs are not properly before this Court and are inappropriate to consider in determining whether a proposed rule is invalid. For the reasons stated herein, Prescription Partners respectfully requests that this Court affirm the ALJ's Final Order.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via Florida's e-filing portal this 30th day of August, 2023 all below counsel of record.

SERVICE BY EMAIL & EPORTAL

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that Appellees' Answer Brief is submitted in Bookman Old Style 14-point font, complies with the font requirements of Rule 9.045(b), Florida Rules of Appellate Procedure, and complies with the word count requirements of Rule 9.210(a)((2)(c), Florida Rules of Appellate Procedure.

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