

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

First District Court of Appeal Case No. 1D23-0941

Appeal from the State of Florida Division of Administrative Hearings
2023-0276-RP

PUBLIX SUPERMARKETS, ET AL.,

Appellants,

v.

DEPARTMENT OF FINANCIAL SERVICES,
DIVISION OF WORKERS' COMPENSATION, ET AL.,

Appellees.

ANSWER BRIEF

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PRELIMINARY STATEMENT

The letter “R” followed by the applicable volume and page number refers to the Record of Proceedings. Volume I refers to the Record on Appeal, while Volume II refers to the Transcript of Proceedings.

The Division of Administrative Hearings is referred to as “DOAH.” Administrative Law Judge Darren A. Schwartz is referred to as “ALJ.” The Office of the Judges of Compensation Claims is referred to as “OJCC.” Judge of Compensation Claims is referred to as “JCC.” 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 are collectively referred to as “Appellants.” The Department of Financial Services, Division of Workers’ Compensation, is referred to as the “Department.”

STATEMENT OF THE CASE

The Department is the state agency responsible for administering the provisions of the workers’ compensation system

under chapter 440, Florida Statutes,¹ and the rules promulgated thereunder.

On January 23, 2023, Appellants filed a petition (“Petition”) challenging the Department’s Proposed Rules 69L-7.730(2)(b) and 69L-7.740(2)(c), *Florida Administrative Code* (the “Rules”). (R. I 19). Thereafter, Prescription Partners, LLC., the Florida Medical Association, Inc., the Florida Osteopathic Medical Association, and the Florida Orthopedic Society were granted intervenor status. The parties filed competing motions for summary final order. On February 10, 2023, the ALJ entered an order denying the motions. (R. I 396).

On February 21, 2023, the parties filed their Joint Pre-Hearing Stipulation, wherein Appellants withdrew the allegations in their Petition that the Rules are arbitrary or capricious. (R. I 538). The Final Order confirms that in “the parties’ Joint Pre-Hearing Stipulation, Petitioners withdrew their allegations that the Proposed Rules are an invalid exercise of delegated legislative authority because they are arbitrary and capricious in violation of section

¹ All references to the Florida Statutes are to the 2022 version unless otherwise specified.

120.52(8)(e) . . .” (R. I 712, n. 5). Appellants proceeded to hearing solely on the following alleged grounds: 1) the Department exceeded its grant of rulemaking authority; 2) the Rules enlarge, modify, or contravene the specific provisions of law implemented; and 3) the Rules are vague, fail to establish adequate standards for Department decisions, or vest unbridled discretion in the agency. (R. I 556, ¶ 66-68).

On February 23, 2023, DOAH held the final hearing. The parties presented the testimony of Brittany O’Neil, Assistant Director of the Division of Workers’ Compensation. After hearing, the parties filed proposed final orders. On March 27, 2023, the ALJ issued a Final Order concluding that the Department met its burden in demonstrating that the Rules are not an invalid exercise of delegated legislative authority as to the objections raised. (R. I 693). This appeal timely followed.²

In their Initial Brief, Appellants do not address whether the Rules are vague, fail to establish adequate standards for agency

² The Legislature ratified the Rules during the 2023 Session, and the Rules became effective on July 1, 2023. Ch. 23-144, § 76, at 67-68, Laws of Fla.

decisions, or vest unbridled discretion in the agency. Appellants also do not address whether the Department exceeded its grant of rulemaking authority. The only argument that Appellants raised both at DOAH and in the Initial Brief is that the Rules enlarge, modify, or contravene the specific provisions of the law implemented.

STATEMENT OF THE FACTS

Florida Workers' Compensation System

The workers' compensation system in Florida is based on a mutual renunciation of common-law rights. § 440.015, Fla. Stat. The employee gives up the right to sue the employer for injuries arising out of and in the course of employment, and, in exchange, the employer/carrier is required to pay for medically necessary treatment and care, including prescription medication. (R. II 86-87); § 440.13(2)(a), Fla. Stat.

The system is intended to be a self-executing. § 440.015, Fla. Stat. There should not be any barriers to the injured worker receiving treatment, and both the employer/carrier and health care provider should be able to navigate the system smoothly and without issue. (R. II 87-88).

With limited exceptions, the employer/carrier controls

treatment authorization. The employer/carrier selects or authorizes the health care provider who will treat the injured worker. (R. I 547; R. II 96). Except for emergency treatment, the employer/carrier also controls authorization of the types of medical treatment the employee may receive for the workplace injury. (R. II 87). § 440.13(3)(a), (b), (d), (13)(a), Fla. Stat.; (R. II 36). Medication is treatment requiring employer/carrier authorization. (R. I 1008).

This case focuses on one notable aspect of the injured worker's care that cannot be interfered with by the employer/carrier, *viz.*, **where** an injured worker chooses to have their authorized prescription medications dispensed. While the employer/carrier must authorize prescription medications prior to dispensing, after authorization the injured worker has free, full, and absolute choice in where to fill the prescription. Section 440.13(3)(j) provides:

Notwithstanding anything in this chapter to the contrary, a sick or injured employee shall be 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 this chapter. It is expressly forbidden for the division, an employer or a carrier, or any agent or representative of the division, an employer, or a carrier to select the pharmacy or pharmacist which the sick or injured employee must use;

condition coverage or payment on the basis of the pharmacy or pharmacist utilized; or to otherwise interfere in the selection by the sick or injured employee of a pharmacy or pharmacist.

§ 440.13(3)(j), Fla. Stat. (emphasis added).

Dispensing Practitioners

Chapter 465 allows certain authorized health care practitioners in Florida to dispense medications directly to their patients. These providers are known as dispensing practitioners. § 465.0276(1)(a), Fla. Stat. Dispensing practitioners are expressly referred to in section 440.13. For example, section 440.13(12)(c) expressly addresses the reimbursement schedule for medications dispensed by dispensing practitioners “as provided in s. 465.0276.” Section 440.13(12)(e)4. requires dispensing practitioners to make payment for medications within 60 days of receipt.

Chapter 465 imposes additional obligations on dispensing practitioners. 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 pharmacists and pharmacies, 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.; (R. I 547 ¶ 10; R. II 91).

A health care practitioner's status as a dispensing practitioner is publicly available information that can easily be accessed. (R. I 547). The employer/carrier is able to review a health care provider's status as a dispensing practitioner prior to authorizing the health care practitioner to evaluate and treat the injured worker. (R. I 547, ¶ 11). The employer/carrier is free to send the injured worker to a provider who is not dispensing practitioner. (R. I 701, ¶ 11). Employer/carriers may also enter into contracts that govern prices and other terms of their relationship with these providers. (R. I 548, ¶ 16).

At hearing, Appellants agreed and expressly stipulated that chapter 465 authorizes dispensing practitioners to dispense prescription medications directly to their own patients in the regular course of their practice. (R. I 547, ¶ 9). Therefore, at hearing, Appellants did not take issue generally with dispensing practitioners; they only challenged a dispensing practitioner's ability to dispense authorized medications to workers' compensation patients over the

objection of the employer/carrier. *See generally* Initial Brief. Now, for the first time on appeal and with different counsel, Appellants argue that dispensing practitioners who engage in the practice of the profession of pharmacy by dispensing to their own patients do so unlawfully.

Reimbursement Disputes

When an employer/carrier denies a benefit that the injured worker believes they are due, the injured worker files a petition for benefits directly with the OJCC. § 440.192(1), Fla. Stat. In contrast, when a service has been provided and a subsequent reimbursement dispute arises between an employer/carrier and provider, the Department has jurisdiction to resolve the dispute. (R. II 89). Parties to Department reimbursement dispute determinations have the right to challenge the agency action through a chapter 120.569 and/or 120.57 proceeding. (R. I 553; R. II 90).

The Department previously and incorrectly considered dispensing practitioners to be outside the “free, full, and absolute” language of 440.13(3)(j).³ (R. II 99-102). However, in 2020, a set of

³ The record refers specifically to the Bonanno (OJCC) and Alea (DFS) Final Orders, which the parties stipulated are not binding precedent.

Department reimbursement dispute cases, referred to as the “*Memic*” cases, in which the employer/carrier issued letters to authorized providers containing blanket prohibitions on practitioner dispensing, resulted in the Department reviewing and reversing its previous interpretation of 440.13(3)(j). (R. II 101-105; R. I 955-975). On March 31, 2020, the Department issued final orders in the *Memic* cases, along with Informational Bulletin DWC-01-2020. (R. I. 955-975, 997).

Consistent with the *Memic* orders, the Informational Bulletin explained that 440.13(3)(j) prohibits the employer/carrier from denying authorization or reimbursement for prescription medication **solely** because the medication is dispensed by a dispensing practitioner authorized under chapter 465 and employees have the right to choose to have their prescriptions dispensed by a dispensing practitioner. (R. I 550, 955-975, 997; R. II 105-107).

After the Department issued the Informational Bulletin, the Department continued to receive a large volume of reimbursement dispute petitions in which the employer/carrier, at the time of

(R. I. 553 ¶ 14).

treatment authorization, sent the provider a blanket practitioner dispensing prohibition letter. (R. II 107, 1089-90). There are now thousands of pending reimbursement disputes related to this issue. (R. II 107).

Rulemaking History

On May 18, 2022, the Appellants – excluding Publix – filed a rule challenge at DOAH alleging the Informational Bulletin was an unadopted rule. (R. I 547; R. II 108). On July 6, 2022, the parties signed a settlement agreement wherein the Division agreed to rescind the Informational Bulletin and publish a Notice of Rule Development for Rules 69L-7.730 (“Health Care Provider Medical Billing and Reporting Responsibilities”) and 69L-7.740 (“Insurer Authorization and Medical Bill Review Responsibilities”). (R. I 550, 984-990; R. II 108). In accordance with the settlement agreement, the Department rescinded the Informational Bulletin and began the rule development process. (R. I 550, 719-727, 984-990, 997; R. II 109).

On December 29, 2022, the Department published the Rules. Proposed Rule 69L-7.730(2)(l)1.b. stated:

Physicians (including oral surgeons), physician assistants, ARNPs, and any other recognized practitioners registered to dispense medications

pursuant to section 465.0276, F.S., may dispense medications to the injured worker. Medication is treatment and must be authorized prior to dispensing, pursuant to section 440.13(3)(a), F.S., and must be medically necessary to treat the compensable injury. Dispensing such medication may not be denied, absent a contrary contractual provision, and reimbursement may not be disallowed or adjusted for the sole reason that the injured worker has chosen to receive such medication from a practitioner registered to dispense medications under Chapter 465, F.S. All requests for authorization of medications to be dispensed must specify drug name, dosage, and strength, must be documented in the injured worker's file, and must be sent in a manner prescribed by the carrier pursuant to section 440.13(3)(e), F.S. A carrier's failure to timely respond to a written request for authorization shall be governed by section 440.13(3)(d), F.S.

(R. I 760).

Proposed Rule 69L-7.740(2)(c) stated:

Medication is treatment. When physicians (including oral surgeons), physician assistants, ARNPs, and any other recognized practitioners registered to dispense medications pursuant to section 465.0276, F.S., submit a medical bill for reimbursement of dispensed medication, the insurer, claim administrator, or entity acting on behalf of the insurer may disallow payment for dispensed medication if the medication is not authorized prior to dispensing, pursuant to section 440.13(3)(a), F.S., and is not medically necessary to treat the compensable injury. Dispensing such medications may not be

denied, absent a contrary contractual provision, and reimbursement may not be disallowed or adjusted for the sole reason that the injured worker chooses to receive such medications from a practitioner registered to dispense medications under chapter 465, F.S. Any response to a request for authorization must be communicated electronically or by telephone to the health care provider and must be documented in the claims administration system. Failure to timely respond to the written request for authorization shall be governed by section 440.13(3)(d), F.S.

(R. I 760).

Proposed Rule 69L-7.730 addresses the billing and reporting responsibilities of health care providers in the workers' compensation system, along with their responsibility to request authorization. (R. II 97). Proposed Rule 69L-7.740 addresses the authorization and medical bill review responsibilities applicable to the employer/carrier. (R. II 98). Under the Rules, all the reasons for which an employer/carrier could adjust, disallow, or deny payment for medication remain available to the employer/carrier (*e.g.*, lack of authorization, medical necessity, and utilization review).⁴ See Fla. Admin. Code R. 69L-7.740 (13),(14) (2016). The EOBR codes are not

⁴ Such reasons are referred to as "EOBR Codes" (Explanation of Bill Review).

altered in the Rules and are not the subject of this rule challenge. Again, this challenge is simply about whether employers/carriers can prohibit authorized medications from being dispensed by a dispensing practitioner (*i.e.*, whether they can dictate **where** medications are dispensed).

The Department held a rule workshop prior to publication of the Rules and a rule hearing after publication. The Department received extensive verbal and written comments. The views of providers, patients, and employer/carriers were polarized. Comments by providers and patients extolled the benefits of physician dispensing, including increased medication compliance and patient convenience, and employer/carriers voiced concerns about medication cost and patient safety. Notably, each of the comments opposing physician dispensing cited in the Initial Brief relate to the price of dispensed medications. (R. I 723-759, 762-781, 787-933; R. II 109-110, 112; Initial Brief p. 3-4).

The Department considered all comments. (R. II 110, 112). However, in drafting these Rules, the Department did not make any value judgments regarding physician dispensing, which is a practice that has long been authorized by law. (R. II 110). Nor did the

Department make any value judgments regarding the price of medications, which is determined either by private contract or by statute.⁵ (R. II 91-94, 111). Instead, in promulgating these Rules, the Department simply confirmed that 440.13(3)(j) ensures that injured workers have the full, free, and absolute choice as to where they get their medications, including from a dispensing practitioner. (R. II 97-98, 105-106).

STANDARD OF REVIEW

Final administrative orders are subject to judicial review. An ALJ's findings of fact in a final order are reviewed for competent substantial evidence, while the conclusions of law are generally reviewed de novo. § 120.68(7)(b), Fla. Stat.; *Goodman v. Fla. Dep't of Law Enf't*, 238 So. 3d 102, 108 (Fla. 2018) (“If an administrative law judge's final order depends on any fact found by the ALJ, the court shall not substitute its judgment for that of the administrative law

⁵ § 440.13(12)(c), Fla. Stat. (“As to reimbursement for a prescription medication, the reimbursement amount for a prescription shall be the average wholesale price plus \$4.18 for the dispensing fee. For repackaged or relabeled prescription medications **dispensed by a dispensing practitioner as provided in s. 465.0276**, the fee schedule for reimbursement shall be 112.5 percent of the average wholesale price, plus \$8.00 for the dispensing fee.”) (emphasis added).

judge as to the weight of the evidence on any disputed finding of fact.”). Accordingly, the ALJ's factual findings must be accepted if they are supported by competent, substantial evidence. *Dep't of Health v. Bayfront Med. Ctr., Inc.*, 134 So. 3d 1017, 1018 (Fla. 1st DCA 2012).

SUMMARY OF THE ARGUMENT

As a threshold matter, the issues properly before this Court are narrower in scope than the issues set forth in Appellants’ Initial Brief. Specifically, this Court should decline to address Appellants’ argument that the challenged rules are arbitrary and capricious because Appellants expressly stipulated in a pre-hearing joint stipulation filed with DOAH that they were not challenging the rules on those grounds. (R. I 554 ¶ 53). Even if those grounds were not expressly stipulated out of the litigation, the contention was never raised in the DOAH hearing.

Additionally, although not captioned as arguments, Appellants insert policy comments about medication price and patient safety in their Initial Brief. *See, e.g.*, Initial Brief p. 4, 24. Because the Legislature has already 1) granted dispensing practitioners the authority to dispense prescription medications to their patients and,

absent a contract, 2) set the reimbursement prices for those medications,⁶ Appellants' policy arguments regarding costs and patient safety are inappropriately raised in this this rule challenge appeal.

The only argument that was raised both at the trial court level and in the Initial Brief, and that is properly before this Court, is Appellants' argument that the Rules enlarge, modify, or contravene the specific provisions of the law implemented. As to that argument, the plain language of chapters 440 and 465 make readily apparent that because registered dispensing practitioners are authorized by law to dispense medicinal drugs directly to their own patients, they are engaged in the practice of the profession of pharmacy and fall squarely within the definition of pharmacist under chapter 465.

Additionally, the provisions of chapter 465 make clear that dispensing practitioners are "licensed" to dispense to the practitioner's patients. Therefore, dispensing practitioners are pharmacists for the purposes of the free, full, and absolute choice provision of section 440.13(3)(j).

⁶ See §§ 440.13(12)(c), 465.0276, Fla. Stat.

In addition to ignoring the statutory language that includes dispensing practitioners within the free, full, and absolute choice language of section 440.13(3)(j), Appellants make additional flawed arguments that the Rules compel carrier authorization, interfere with employer/carrier control, and usurp the jurisdiction of the OJCC. These arguments are unsupported by the law and the record evidence and are contrary to the ALJ's findings. (R. I 710 ¶ 48; R. I 711 ¶ 50). The Rules do not change anything about the right of the employer/carrier to choose the doctor who treats the injured worker or determine what treatment is authorized because the employer/carrier still authorizes (or does not authorize) the medication. The Rules simply confirm for the purposes of billing and reimbursement that Florida law does not permit the employer/carrier to interfere with an injured worker's right to choose where to obtain their medication. Therefore, the Rules do not improperly enlarge, modify, or contravene the plain language of the statutes upon which the Rules are based.

ARGUMENT

I. APPELLANTS' ARGUMENT THAT THE RULES ARE ARBITRARY AND CAPRICIOUS CANNOT BE A BASIS FOR OVERTURNING THE FINAL ORDER BECAUSE

APPELLANTS EXPRESSLY STIPULATED THAT THEY ARE NOT CHALLENGING THE RULES ON THOSE GROUNDS AND DID NOT OTHERWISE RAISE THIS ARGUMENT AT HEARING.

Pursuant to the Joint Pre-hearing Stipulation, Appellants expressly agreed not to pursue the allegations in their Petition that the Rules are arbitrary or capricious. (R. I 554 ¶ 53). Yet, Appellants inexplicably spend six pages of their Initial Brief arguing that the Rules are arbitrary and capricious. The Stipulation could not be more explicit and reads as follows: “Petitioners are not challenging in this proceeding whether the Proposed Rules are arbitrary or capricious under section 120.52(8)(e).” (R. I 554 ¶ 53). Moreover, the Final Order confirms that in “the parties’ Joint Pre-Hearing Stipulation, Petitioners withdrew their allegations that the Proposed Rules are an invalid exercise of delegated legislative authority because they are arbitrary and capricious in violation of section 120.52(8)(e). . . .” (R. I 712, n. 5).

Accordingly, no evidence was presented nor was any argument made at hearing regarding whether the Rules are arbitrary and capricious. Therefore, not only are these arguments entirely inappropriate, but the Final Order contains no findings of fact or

conclusions of law on these grounds that can be reviewed by this Court.

Even if Appellants had not stipulated this issue out of the proceeding at DOAH it is well-established that for an issue to be preserved for appeal, it must be raised in the administrative proceeding below. *Heart of Live Oak, Inc. v. State*, 196 So. 3d 1290, 1291 (Fla. 1st DCA 2016) (citing *Dep't of Bus. & Prof'l Regulation, Constr. Indus. Licensing Bd. v. Harden*, 10 So. 3d 647, 649 (Fla. 1st DCA 2009)); *see also Pullen v. State*, 818 So. 2d 601, 602 (Fla. 1st DCA 2002) (holding that “a party cannot argue on appeal matters which were not properly excepted to or challenged in the administrative tribunal.”). Therefore, this Court need not and should not address these arguments for the first time on appeal.⁷

II. THE RULES DO NOT ENLARGE, MODIFY, OR CONTRAVENE THE PLAIN MEANING OF THE STATUTORY LANGUAGE.

The Department agrees with Appellants that this case presents

⁷ The Rules are, in any event and for reasons set forth below, not arbitrary and capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational. § 120.57(1)(e)2.d., Fla. Stat. The Rules are rational, supported by logic, and were adopted with thought and reason. *See infra* Section II.

a simple issue: whether a practitioner licensed to dispense drugs under the Pharmacy Act is encompassed within the injured workers' free, full, and absolute choice of pharmacy or pharmacist under chapter 440. However, Appellants' conclusion that the answer is "plainly in the negative" (Initial Brief p. 12) is incomplete, contrary to the ALJ's factual findings and conclusions of law, and incorrect as a matter of law. The Final Order at paragraph 46 concludes, after a careful and logical examination of the plain statutory language of chapters 440 and 465, that, "In the context of an injured workers' right to choose where to get his or her medicine under section 440.13(3)(j), there is no difference between a dispensing practitioner and a pharmacist." (R. I 710 ¶ 46). This conclusion is correct and should not be disturbed.

This Court recently held that where an agency "merely reiterates a law or restates what is 'readily apparent' from the text of a law, the statement is not considered a rule." *Dep't of Health v. Leafly Holdings, Inc.*, 2023 WL 5091028 (Fla. 1st DCA Aug. 9, 2023). Because the plain language of chapters 440 and 465 encompasses dispensing practitioners within the free, full, and absolute choice set forth in section 440.13(3)(j), the Department is merely reiterating or restating

what is readily apparent in statute and has therefore not enlarged, modified, or contravened the law implemented in the Rules.

A. The Plain Meaning of “Pharmacy or Pharmacist” in Section 440.13(3)(j) Necessarily Encompasses Dispensing Practitioners.

1. Statutory Definitions

Appellants argue that the Department and the Final Order ignore the plain language of section 440.13(3)(j), Florida Statutes, arguing that neither the definition of “pharmacy” nor “pharmacist” includes a dispensing practitioner. Appellants’ position is based on the untenable argument that, although dispensing practitioners are authorized by chapter 465 to dispense medications to their patients, dispensing practitioners are not “licensed” unless they are able to hang a pharmacist diploma on their wall. *See* Initial Brief p. 34.

It is well accepted that “the polestar of statutory interpretation is legislative intent, which is to be determined by first looking at the actual language used in the statute.” *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1189 (Fla. 2017). “If the statutory language is clear and unambiguous, the court may not resort to the rules of statutory construction, and the statute must be given its plain and unambiguous meaning.” *Id.* at 1185.

The words “pharmacy” and “pharmacist” are undefined in chapter 440. Therefore, it is necessary to look to how section 440.13 fits with the definitions set forth in the Pharmacy Act because the provisions are integrally related, both logically and by express reference. *See generally Alachua Cty. v. Watson*, 333 So. 3d 162, 169–70 (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 integrally related because they both deal with pharmacies and pharmacists, chapter 465 regulates and defines pharmacies and pharmacists, and chapter 440 expressly refers to dispensing practitioners authorized to dispense medications pursuant to chapter 465. *See* §§ 440.13(12)(c), 440.13(12)(e)4., Fla. Stat.; (R. I 709 ¶ 42).⁸

Section 465.003 defines “[p]harmacist” as “any person licensed

⁸ Appellants do not dispute that the controlling definition is contained in chapter 465. *See* Initial Brief at p. 33.

pursuant to [chapter 465] to practice the profession of pharmacy.” § 465.003(19), Fla. Stat. This definition is the crux of this dispute. Appellants almost entirely tie the success of their appeal on the superficial argument that a dispensing practitioner is not a “licensed pharmacist.” If Appellants’ argument is incorrect, they lose this appeal. Unfortunately for Appellants, their position fails on numerous levels, but primarily because Appellants overlook the breadth of the express language of the definitions in chapter 465.

The Final Order concludes that, in the context of 440.13(3)(j), “there is no difference between a dispensing practitioner and a pharmacist.” (R. I 710 ¶ 46). The Final Order is correct because dispensing practitioners who meet the requirements of chapter 465 in fact have a limited “pharmacist” license that allows them to not just write prescriptions for their patients but also to dispense those medications if desired by the injured worker. This is true regardless of whether “licensure” is viewed from the standpoint of ordinary usage, express usage, or the logical and necessary consequences of the language and structure of chapter 465.

As acknowledged in Appellants’ Initial Brief at p. 33, the “[p]ractice of the profession of pharmacy” is defined to “**include**

compounding, **dispensing**, and consulting concerning contents, therapeutic values, and uses of any medicinal drug.” § 465.003(22), Fla. Stat. (emphasis added). Dispensing practitioners, among other things, “dispense” medicinal drugs. § 465.0276(1)(a), Fla. Stat. (“a practitioner authorized by law to prescribe drugs may dispense such drugs to her or his patients in the regular course of her or his practice in compliance with this section.”).

Therefore, dispensing practitioners are necessarily engaged in the practice of pharmacy when dispensing medications to their patients. The only remaining question is if they are “licensed.”

2. Licensure

Appellants argue that the free, full, and absolute choice language of 440.13(3)(j) applies only to a “licensed” pharmacy or pharmacist. While Appellants’ assertion regarding licensure need not be decided by this Court because, as demonstrated below dispensing practitioners are “licensed”, whether an individual is “licensed” to do something simply depends on whether a regulatory body has granted authority to engage in a protected activity. Here, the dictionary definition of “license” and a plain reading of the applicable statutes and rules make clear that dispensing practitioners are not just

registered to dispense medications to their own patients – they are licensed under chapter 465 to do so.

The term “licensed” is not defined in chapter 465, but the dictionary definition of “license” is instructive. Merriam Webster defines a license as “a permission granted by competent authority to engage in a business or occupation or in an activity otherwise unlawful.” *License*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/license> (last visited Aug. 21, 2023). Here, through the registration process and compliance with all laws applicable to pharmacists, *see* section 465.0276(2)(b), Florida Statutes, dispensing practitioners are granted permission by the Legislature to engage in the practice of the profession of pharmacy with respect to their own patients (*e.g.*, by dispensing medication), which would otherwise be unlawful without the authority granted under section 465.0267. Moreover, as noted in the Final Order at paragraph 44, “Section 120.52(10) defines a license to include a ‘permit, certification, *registration*, charter, or *similar form of authorization required by law.*’” (R. I 709 ¶ 44) (emphasis in Final Order).

However, this Court need not rely solely on dictionary or chapter

120 definitions of “license” to reach the conclusion that dispensing practitioners registered under section 465.0267 are “licensed” to engage in the practice of pharmacy – dispensing practitioners are also expressly referred to as “licensed” in both rule and statute.

The Department of Health, which administers the provisions of chapter 465, explicitly recognizes that dispensing practitioners are licensed. Rule 64B8-3.006, *Florida Administrative Code*, provides,

Every practitioner who dispenses medicinal drugs for human consumption to his or her patients in the regular course of practice for fee or remuneration of any kind, whether direct or indirect, must register and pay a fee of \$100.00 at the time of registration and upon renewal of his or her **license**.

(Emphasis added).

The Florida Board of Nursing, which is charged with regulating nursing in Florida,⁹ including Advanced Practitioner Registered Nurse (“APRNs”),¹⁰ also explicitly recognizes on its website that dispensing practitioners are licensed. The website states as follows: “The **dispensing license** must also be renewed when renewing your

⁹ See § 464.004, Fla Stat.

¹⁰ APRN’s are one of the categories of health care practitioners that are authorized by law to dispense medications directly to their patients. § 464.012(3)(a), Fla. Stat.

APRN license.” Florida Board of Nursing, Do I Need a Dispensing License?, <https://floridasnursing.gov/help-center/do-i-need-a-dispensing-license/> (last visited August 25, 2023) (emphasis added).

Further, the Controlled Substances Act,¹¹ which criminalizes unlawful dispensation of controlled substances, explicitly describes authorized dispensing practitioners as being licensed. Section 893.055 provides that “Dispenser” is defined as “a **dispensing health care practitioner**, pharmacy, or pharmacist **licensed to dispense** controlled substances in or into this state.” § 893.055(1)(e), Fla. Stat. (emphasis added). Thus, a dispensing practitioner must be “licensed to dispense” to avoid violation of criminal law. And, as stipulated by Appellants at hearing,¹² dispensing practitioners do engage in a lawful activity.

To reiterate, a dispensing practitioner’s “license” permits that practitioner to engage in the practice of pharmacy by dispensing medications to their own patients, which is the precise statutory definition of a “pharmacist.” Therefore, as correctly concluded by the

¹¹ Chapter 893, Florida Statutes, constitutes the “Florida Comprehensive Drug Abuse Prevention and Control Act.” § 893.01, *et seq.*, Fla. Stat.

¹² (R. I 547 ¶ 9)

ALJ, “In the context of an injured workers’ right to choose where to get his or her medicine under section 440.13(3)(j), there is no difference between a dispensing practitioner and a pharmacist.” (R. I 710 ¶ 46).

While explicit references to the licensed status of dispensing practitioners should be determinative, the contention that dispensing practitioners are licensed under chapter 465 is further confirmed by the absurd statutory consequences of a contrary interpretation.

For example, under chapter 465, “[i]t is **unlawful for any person other than a pharmacist licensed under this chapter to use the title “pharmacist” or “druggist” or otherwise lead the public to believe that she or he is engaged in the practice of pharmacy.”** § 465.015(4)(a), Fla. Stat. (emphasis added). Therefore, unless registered dispensing practitioners, who are engaged in the practice of pharmacy by dispensing medications, are “licensed” under chapter 465, every authorized act of dispensing under that chapter would *illogically* result in a violation of the very same chapter.

Similarly, while practitioners registered under chapter 465 are authorized to dispense medications to their patients, the chapter 465 definition of “dispense” states that “[d]ispense’ means the transfer of

possession of one or more doses of a medicinal drug **by a pharmacist.**” § 465.003(13), Fla. Stat. (emphasis added). The definition of “pharmacist” requires licensure. § 465.003(19), Fla. Stat. Thus, even if there were no express statutory reference to dispensing practitioners being licensed, it is clear that the provisions of chapter 465 consider dispensing practitioners “licensed” to the extent that dispensing is limited to the practitioner’s patients.

Appellants have already expressly stipulated that dispensing practitioners dispense medications to their own patients lawfully. (R. I 547 ¶ 9). Now, despite this explicit stipulation, Appellants argue, citing to section 465.015(4)(a), that only a person who has completed pharmacy school and passed the pharmacy examination can engage in the practice of pharmacy.¹³ Appellants even go as far to say that “a dispensing practitioner who ‘engages in the practice of pharmacy’

¹³ In making these arguments, Appellants cite in part to the Department’s previous and incorrect determination that dispensing practitioners fall outside of the “free, full, and absolute” choice language of 440.13(3)(j). However, an agency is permitted to change its position through rulemaking. *See Cleveland Clinic Fla. Hosp. v. Ag. for Health Care Admin.*, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996) (holding that an administrative agency is not bound by its initial construction of a statute so long as the agency implements its changed interpretation by validly adopting subsequent rule changes).

does so unlawfully.” See Initial Brief at p. 34. This logic is inconsistent with Appellants’ earlier stipulation that dispensing practitioners are engaged in a lawful activity and is not supported by the plain language of chapter 465. Moreover, this logic goes far beyond the narrow free, full, and absolute choice issue presented in this appeal and would effectively nullify the entire dispensing practitioner program established in chapter 465.

3. The Legislature Did Not “Omit” Dispensing Practitioners from 440.13(3)(j).

Appellants additionally argue that significance should be placed on the proposition that the Legislature could have but did not add “dispensing practitioner” to the statute at any time after adding the “free, full, and absolute choice” language to section 440.13(3)(j) in 1993. However, legislative inaction is never a reliable indicator of legislative intent. *State Farm Mut. Auto. Ins. Co. v. Care Wellness Ctr., LLC*, 240 So. 3d 22, 28 (Fla. 4th DCA 2018) (citing *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)) (holding that “[w]hatever the reason the legislature declined to enact the proposed amendment to the statute has no bearing on [the court’s] interpretation of the statute that it did enact.”), quashed on other

grounds, 47 Fla. L. Weekly S98 (Fla. Jan. 21, 2022)). There are myriad reasons for not amending the statute.

Appellants further argue that under the principle of *expressio unius est exclusio alterius*, the inclusion of “pharmacy or pharmacist” reflects the legislative intent to exclude dispensing practitioners from 440.13(3)(j). However, as demonstrated above, the statutory construction principle is inapposite. This statutory scheme makes dispensing practitioners licensed pharmacists to the limited extent that they are authorized to dispense to their own patients. Therefore, the express inclusion of dispensing practitioners in section 440.13(3)(j) would be redundant because as “pharmacists” they are already included in the free, full, and absolute choice provision of section 440.13(3)(j).

B. The Rules Do Not Interfere With the Employer/Carriers Pretreatment Authorization or Control.

Appellants contend, apparently independent of whether practitioner dispensing falls within the terms of section 440.13(3)(j), that the Rules compel authorization of practitioner dispensing and usurp the jurisdiction of the OJCC. These arguments are wholly unsupported in law and the record and seem to rely entirely on

Appellants' blatant misrepresentation of the record testimony of Assistant Director Brittany O'Neil.

1. Pre-Treatment Authorization

Contrary to Appellants' argument, the Final Order correctly concludes that:

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.

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) . . .

. . . 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 workers' choice *where* to have the medications dispensed.

Final Order at ¶¶23, 24, and 25. (R. I 704-705, ¶¶ 23-25) (emphasis in original).

As concluded in the Final Order, the Rules do not alter the requirement that providers (including dispensing practitioners) who render non-emergent services must request authorization from the

employer/carrier prior to rendering services and treatment. Nor do the Rules alter the grounds that are available to the employer/carrier for denying authorization of a medication. Instead, the Rules state: “Medication is treatment and must be authorized prior to dispensing . . .,” and an employer/carrier “may disallow payment for dispensed medication if the medication is not authorized prior to dispensing. . . .” Fla. Admin. Code R. 69L-7.730 (2023) (emphasis added).

In fact, one of the permissible reasons an employer/carrier may cite for disallowing or adjusting payment is lack of authorization pursuant to section 440.13(3). *See* Fla. Admin. Code R. 69L-7.740(13)(b) (“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.”). However, the employer/carrier can only use “lack of authorization” as a reason for disallowing payment if the employer/carrier has the right to authorize.

There is no reasonable reading of these Rules that could conclude that either the employer/carrier authorization of the health care provider *or* the employer/carrier authorization of the treatment is in any way interfered with by the Rules.

Next, Appellants argue that the Rules interfere with employer/carrier control and monitoring responsibilities under chapter 440. However, this entire argument is premised on the mistaken presumption that the Rules mandate authorization. The Rules do not interfere with employer/carrier authorization; therefore, they cannot interfere with employer/carrier control and monitoring responsibilities. If there has been any encroachment on employer/carrier control, that was done by the Legislature in enacting section 440.13(3)(j) and not by the Department in promulgating these valid rules.

2. Testimony of Assistant Director Brittany O'Neil

In support of their interference argument, Appellants blatantly misrepresent the record testimony of Assistant Director Brittany O'Neil. Appellants inaccurately argue that Assistant Director O'Neil's response to one poorly worded compound question in a deposition represented the Department's intent to encroach on employer/carrier authorization. See Initial Brief, p. 28. However, the very next question confirms the Department's position that the employer/carrier controls authorization:

“Q. Can a carrier say you are authorized to treat

this injured worker, but you are not authorized to dispense without specific review and approval of whatever it is you want to dispense?

A. The Rule says that the doctor needs to get authorization for medication prior to dispensing.” (R. I-1052).

Additionally, throughout her lengthy deposition, Assistant Director O’Neil was asked essentially this same question eight times in eight different ways. Each time Assistant Director O’Neil replied, her testimony remained consistent that the Rules do not interfere with employer/carrier authorization. (R. I 1008, 1025, 1027, 1028, 1052). Furthermore, when asked at hearing at least twenty times whether the Rules affect employer/carrier authorization, Ms. O’Neil consistently testified that that the Rules did not change any aspect of employer/carrier authorization. (R. II 89, 96, 98, 110-11, 114, 116-117, 121-122, 126, 130-131, 136, 143, 151-152).

Appellants’ argument that Ms. O’Neil testified that the proposed rules mandate employer/carrier authorization is not only misleading but is almost entirely devoid of support in the record evidence. It was for the ALJ to weigh Ms. O’Neil’s credibility and make factual findings, and the ALJ’s findings were contrary to the conclusion favored by Appellants. (R. I 710 ¶ 48). The ALJ’s factual findings are

supported by competent substantial evidence and should not be disturbed on appeal. *See Dep't of Health v. Bayfront Med. Ctr., Inc.*, 134 So. 3d at 1018.

Notably, while making these arguments about authorization, Appellants continually cite to the “enormous additional costs tied to in-office dispensing.” (Initial Brief pg. 24). That is because this challenge is not truly about employer/carrier authorization (which the Department agrees it cannot interfere with) but, rather, about prescription drug costs. Although Appellants may not like it, the Legislature sets reimbursement rates for physician-dispensed medications by statute. *See* § 440.13(12)(c), Fla. Stat. Therefore, Appellants’ real issue is with the pricing methodology set by the Legislature – not with the validity of the Department’s Rules.

3. The Rules Do Not Usurp the Jurisdiction of the OJCC

Finally, Appellants argue that the Rules usurp the jurisdiction of the OJCC. Because the Rules do not in any way interfere with the employer/carrier’s control over authorization, the Rules cannot intrude on the jurisdiction of the OJCC.

If there is a dispute regarding authorization of a treatment before a service is rendered, an injured worker challenges this by

filing a petition with the OJCC. § 440.192(1), Fla. Stat. If a service has *already been provided* and there is a reimbursement dispute between the provider and the employer/carrier, the provider challenges this by filing a petition with the Department. § 440.13(7)(a), Fla. Stat. Accordingly, both the Department and the OJCC are tasked with administering discrete portions of chapter 440. § 440.015, Fla. Stat. Which entity has jurisdiction depends on where one is in the process.¹⁴ It is impossible for the Department to usurp the jurisdiction of the OJCC because the Department only determines reimbursement disputes after treatment has already been rendered. If authorization has been denied that dispute can only go to the OJCC.

Section 440.13(1)(q) defines “[r]eimbursement dispute” as “any disagreement between a health care provider or health care facility and employer/carrier concerning payment for medical treatment.” § 440.13(1)(q), Fla. Stat.; *see also Lab. Corp. of Am. v. Davis*, 339 So.

¹⁴ *See, e.g., Cook v. Palm Beach Cty. Sch. Bd.*, 51 So. 3d 619 (Fla. 1st DCA 2011) (holding that any disagreement between a provider and an employer/carrier concerning payment for medical treatment is a reimbursement dispute over which the Department has exclusive jurisdiction).

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 employer/carrier authorized the medication but denied dispensing of the authorized medication falls within the broad category of a “matter concerning reimbursement” over which the Department has jurisdiction.

There are situations where authorization is relevant to the Department’s determination of a reimbursement dispute because one of the permissible reasons an employer/carrier may cite for disallowing or adjusting payment is lack of authorization. See Fla. Admin. Code R. 69L-7.740(13)(b). In other words, determining whether there was “no authorization given for [the] service” (as opposed to determining whether the employer/carrier denied authorization for a proper reason, which would fall to the OJCC) falls within the Department’s duty to determine whether a “carrier properly adjusted or disallowed payment” in reimbursement disputes. Appellants improperly conflate authorization and reimbursement. However, the Rules do not disturb employer/carrier pre-treatment authorization and control. Therefore, they also cannot

usurp the jurisdiction of the OJCC.

CONCLUSION

In conclusion, the Department respectfully requests that this Court affirm the ALJ's Final Order on appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by the E-filing Portal to all parties of record this 29th day of August, 2023.

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CERTIFICATION OF TYPEFACE AND PAGE LIMIT COMPLIANCE

I HEREBY CERTIFY that the type and style of this document complies with the requirements of Florida Rules of Appellate Procedure 9.045 and 9.210 and that the final word count is 7,117.

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