FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-1927

CITY OF BARTOW and
COMMERCIAL RISK
MANAGEMENT,

Appellants,

v.

ISIDRO FLORES,

Appellee.

On appeal from an order of the Judge of Compensation Claims.
Robert A. Arthur, Judge.

Date of Accident: April 28, 2015.

May 29, 2020

M.K. THOMAS, J.

We review an order of the Judge of Compensation Claims, (JCC) finding the Employer/Carrier (E/C) failed to comply with section 440.13(2)(f), Florida Statutes (2015), the "one-time change provision," and awarding authorization of a claimant-selected alternate physician. We write only to address a matter of first impression—what satisfies the E/C's obligation under section 440.13(2)(f) to "provide" an alternate physician or forfeit its right of selection. We affirm as to all issues, though we certify a question

of great public importance asking the supreme court to clarify the issue.

Facts

Following a compensable work injury in 2015, Claimant was authorized to treat with Dr. Henkel, a neurologist. On June 20, 2017, Claimant's counsel requested, via letter, a change in physician within the same specialty. A response providing the date and time of an appointment was requested from the carrier within five days. The following day, the E/C's attorney acknowledged the request and advised Claimant's counsel that the E/C "is authorizing Dr. Mary Ellen Shriver, and Dr. Henkel is no longer authorized. . . ." The E/C further informed that "[d]etails regarding the appointment will be forthcoming under separate cover."

Between June 28 and July 19, multiple communications occurred between the parties as a result of Claimant inquiring about the status of the appointment with Dr. Shriver. Claimant's counsel filed a Petition for Benefits on July 19, requesting "a one-time change as requested on June 20, 2017" and designating Dr. Koebbe as Claimant's alternate physician selection, as the "E/C has not provided the response requested within 5 days from the request for the change." On August 16, 56 days after the E/C's receipt of the one-time change request, Claimant was advised of an appointment with Dr. Shriver for September 11 (63 days from date of the request). Claimant's counsel responded that Claimant would not attend the appointment with Dr. Shriver and advised the E/C to refrain from any resetting until after the issues raised in the petition were addressed at final hearing. The E/C defended the petition by asserting the one-time change provision was satisfied, as it named Dr. Shriver and notified Claimant of the authorization within one day of receiving the request for the one-time change.

The E/C filed a motion for summary final order. Claimant objected asserting that, prior to an adjudication of the claim, there were multiple issues of fact to be considered by the JCC, including the timeliness of the E/C's actions and "the implied statutory standard of reasonableness." Claimant emphasized that during his two-month wait for notification of an appointment date with Dr.

Shriver, he was without an authorized medical provider due to the automatic deauthorization of Dr. Henkel. The JCC denied the E/C's motion, finding the matter required resolution of mixed questions of law and fact.

At hearing on the petition, Claimant stipulated that the E/C timely responded within five days to his request for a one-time change. No witnesses were called by either party to testify; however, during legal argument, the E/C's attorney asserted that "as an officer of the court," she could establish that her office contacted Dr. Shriver's office on June 23 regarding acquisition of an appointment date, and numerous calls were made on June 24 and 25 to acquire an appointment date. The defense attorney further stated that "there [were] calls made, calls that came back [and] that missed each other. And then there, was, having to send over the records, there was having to wait for review by the doctor, and then ultimately an appointment was made." Claimant's attorney countered that he was entitled to authorization of Dr. Koebbe, his choice of alternate physician, as the E/C did not "provide" an appointment date with Dr. Shriver as required by section 440.13(2)(f).

The JCC entered a final order granting Claimant's request for a one-time change of his choice. In response to the E/C's subsequent motion for rehearing and to vacate the final order, a second hearing occurred to address due process arguments.[1] Subsequently, the JCC entered the Amended Final Order that is the subject of this appeal. The JCC again ruled in Claimant's favor for authorization of Dr. Koebbe.

In the amended final order, the JCC made the following findings of fact concerning the acquisition of an appointment with Dr. Shriver:

> On July 20, 2017 counsel for the [E/C's] staff, responded to Claimant's inquiries advising that she had been trying to get through to *them*, and that Claimant counsel would

[1] We affirm the issues on appeal related to alleged due process violations. Accordingly, these facts are not further developed.

> be notified when a date/time had been obtained. Although it is not entirely clear to whom E/C staff was referring as "them," the context surrounding the e-mail, the request for information about an appointment with Dr. Shriver, and the fact that all communication on this issue originated directly from counsel for the [E/C] I accept that the e-mail refers to attempts to get through to Dr. Shriver. When the attempts to contact Dr. Shriver were initiated is not entirely clear from the evidence. What the evidence shows is that [E/C] did not "get through" to Dr. Shriver until August 16, 2017 which is the date the [E/C's] counsel sent notice of a September 11, 2017 appointment with Dr. Shriver to counsel for the Claimant.

(Emphasis in original.) The JCC further determined, "[f]rom the limited evidence submitted it can be reasonably inferred that attempts to contact Dr. Shriver were not initiated until a month following the request for the change and multiple requests for status from the claimant's counsel." The JCC found no evidence Claimant had waived the right to select his one-time change of physician as he did not attend the appointment with Dr. Shriver.

Legal Analysis

A JCC's factual findings will be upheld if supported by competent substantial evidence (CSE), regardless of whether "*other* persuasive evidence, if accepted by the JCC, might have supported a contrary ruling." *Pinnacle Benefits, Inc. v. Alby*, 913 So. 2d 756, 757 (Fla. 1st DCA 2005). However, to the extent the issues raised on appeal concern statutory construction, a question of law is presented, and our review is de novo. *Palm Beach Cty. Sch. Dist. v. Ferrer*, 990 So. 2d 13, 14 (Fla. 1st DCA 2008); *Matrix Emp. Leasing v. Hernandez*, 975 So. 2d 1217, 1218 (Fla. 1st DCA 2008); *Mylock v. Champion Int'l*, 906 So. 2d 363, 365 (Fla. 1st DCA 2005).

The JCC defined the issue before him as "what constitutes the authorization and provision of a change of physician as indicated in [section 440.13(2)(f)]." Because this Court has previously addressed the meaning of "authorization" in this context, we

rephrase the issue on appeal as what satisfies the E/C's obligation under section 440.13(2)(f) to "provide" an alternate physician or forfeit its right of selection.

"The substantive benefit provided in paragraph 440.13(2)(f) is a claimant-initiated, one-time change of physician, without regard to medical necessity." *Gadol v. Masoret Yehudit, Inc.,* 132 So. 3d 939, 940 (Fla. 1st DCA 2014) *(*citing *Sunbelt Health Care v. Galva*, 7 So. 3d 556, 561 (Fla. 1st DCA 2009)). The one-time change provision states:

> Upon the written request of the employee, the carrier shall give the employee the opportunity for one change of physician during the course of treatment for any one accident. Upon the granting of a change of physician, the originally authorized physician in the same specialty as the changed physician shall become deauthorized upon written notification by the employer or carrier. The carrier shall *authorize* an alternative physician who shall not be professionally affiliated with the previous physician within 5 days after receipt of the request. If the carrier fails to *provide* a change of physician as requested by the employee, the employee may select the physician and such physician shall be considered authorized if the treatment being provided is compensable and medically necessary.

§ 440.13(2)(f), Fla. Stat. (emphasis added).

The third sentence of section 440.13(2)(f) requires that the carrier "shall authorize" an alternative physician within five days. This Court has defined the necessary steps required of an E/C to satisfy authorization in this context.[2] *See Gadol,* 132 So. 3d at 940 (holding an E/C timely responds by informing claimant of new doctor's name within five days and "does not require the E/C to actually contact or schedule an appointment with the new doctor");

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[2] Neither section 440.13(2)(f) nor any other provision of section 440.13, Florida Statutes, defines the terms "authorize" or "provide."

Bustamante v. Amber Constr. Co., 118 So. 3d 921, 922 (Fla. 1st DCA 2013) (holding E/C timely response to one-time change of physician request requires notice to claimant of authorization—the "flip side" of *Frederic*); *Hinzman v. Winter Haven Facility Operations LLC*, 109 So. 3d 256, 257 (Fla. 1st DCA 2013) (holding the five-day response period refers to calendar days, not business days); *HMSHost Corp. v. Frederic*, 102 So. 3d 668, 668 (Fla. 1st DCA 2012) ("E/C's informing Claimant of a particular doctor's name within five days of receiving the request satisfied section 440.13(2)(f), even though the E/C did not contact the doctor."); *Harrell v. Citrus Cty. Sch. Bd.*, 25 So. 3d 675, 678 (Fla. 1st DCA 2010) (noting that "[t]o timely respond to a claimant's request, an E/C is not required to schedule an appointment with the newly authorized physician"); *Dorsch, Inc. v. Hunt*, 15 So. 3d 836, 837 (Fla. 1st DCA 2009) (holding authorization in the context of section 440.13(2)(f), does not "mean that an appointment with a specific physician was 'actually scheduled. . . .' It requires merely that the appointment be timely authorized").

Here, Claimant concedes that the E/C named an alternative physician and notified him of the physician's name within five calendar days of receipt of the written request. Thus, the third sentence of section 440.13(2)(f), requiring the carrier to timely "authorize," was satisfied. However, Claimant argues that he is nonetheless entitled to select the change of physician because although the E/C timely named and authorized an alternative physician, it did not "provide" that named physician as required by the fourth sentence of the statute. Specifically, after acknowledging Claimant's written request and timely "authorizing" Dr. Shriver, the E/C sat on its hands and did not notify Claimant of an appointment date for 56 days.[3] During this unreasonably long waiting period, Claimant was without authorized medical care due to the automatic de-authorization of the treating physician. Because the E/C failed to "provide" the alternate physician within a reasonable time, Claimant argues the

[3] The JCC's order refers to a delay of 58 days and the party's reference 56 days between the request for an alternate and notice of an appointment date. This discrepancy is not relevant to our statutory interpretation.

JCC correctly determined the E/C forfeited its control, and he was entitled to select the change of physician.

Conversely, the E/C interprets the third and fourth sentences of section 440.13(2)(f) as jointly requiring but one obligation of an E/C; that is, to name an alternate physician and notify the claimant within five calendar days of receipt of the written request. It further argues that the length of time between authorization of an alternate physician and acquisition of an appointment date is of no relevance. In support, the E/C cites to this Court's opinion in *Frederic*, which held "[t]he E/C's informing Claimant of a particular doctor's name within five days of receiving the request satisfied section 440.13(2)(f), even though the E/C did not contact the doctor." 102 So. 3d at 668. However, we are not persuaded by *Frederic* as the limited issue presented there was timely "authorization" of an alternate physician upon receipt of a written request—a petition. Likewise, we decline to recognize *Harrell* and *Gadol* as controlling for the same reason. Until now, this Court has not addressed the specific meaning "provide" in the context of section 440.13(2)(f).

Here, the issue derives from the fourth sentence of section 440.13(2)(f), which instructs, "[i]f the carrier fails to *provide* a change of physician as requested by the employee, the employee may select the physician and such physician shall be considered *authorized* if the treatment being provided is compensable and medically necessary." (emphasis added). While the third sentence addresses authorization, the fourth sentence addresses both actions—provision and authorization. In the context of section 440.13(2)(f), "authorize" connotes an administrative function while "provide" encompasses affirmative action.

"'When the language of the statute is clear and unambiguous and conveys a clear and definite meaning . . . the statute must be given its plain and obvious meaning.'" *Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954, 960 (Fla. 2005) (quoting *A.R. Douglas, Inc. v. McRainey*, 137 So. 157, 159 (Fla. 1931)). In construing a statute, we presume that the Legislature knows the meaning of the words it uses and that it intends to employ those meanings in the statute. *Overstreet v. State*, 629 So. 2d 125, 126 (Fla. 1993); *see also State v. Bryant*, 953 So. 2d 585, 587 (Fla. 1st

DCA 2007) ("Common understanding and reason must be used when analyzing a statute, and words of common usage not specifically defined must be given their plain and ordinary meaning."). Critical to our interpretation of the third and fourth sentences of section 440.13(2)(f), the Legislature's use of differing language in the same statute is a sign the Legislature intended varied meanings. *Carlson v. State*, 227 So. 3d 1261, 1267 (Fla. 1st DCA 2017) ("The legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended.") (citing *DPRB v. Durrani*, 455 So.2d 515, 518 (Fla. 1st DCA 1984)); *see also* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 170 (2012) ("[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea."). We must not ignore here that in the same statutory section, the Legislature chose two separate and distinct terms: "authorize" and "provide." We must avoid statutory interpretations that render meaningless any words the Legislature chose. *See Fla. Police Benevolent Ass'n v. Dep't of Agric. & Consumer Servs.*, 574 So.2d 120, 122 (Fla. 1991). Here, we regard the Legislature's use of different terms in the same and contiguous sentences as further bolstering its intent for a variation in meaning.

Each sentence of section 440.13(2)(f), standing alone grants a right and/or announces a duty and ramification for noncompliance. The first sentence of section 440.13(2)(f) grants to injured workers a right to a one-time change of physician. The second sentence instructs that upon a claimant's exercise of that right, the authorized treating physician is automatically deauthorized. The third sentence details that if an E/C "authorizes" the physician within five days of receipt of the written request by a claimant, the E/C retains its right of selection of the alternative physician. Inherently, if an E/C does not timely respond, the right of selection defaults to the claimant. Lastly, the fourth sentence instructs that despite timely authorization of an alternative physician, the E/C may still forfeit its right of selection by failing to "provide" that alternate physician. The Legislature's deliberate use of different terms in the third and fourth sentences clearly indicates an intent for a two-fold duty on the part of the E/C to retain its right of selection—to timely authorize (defined by this Court as naming

the alternate physician and informing the claimant, s*ee Gadol,* 132 So. 3d at 940; *Bustamante*, 118 So. 3d at 922), and to provide the physician by acquiring an appointment date and informing the claimant.

Interpretation of section 440.13(2)(f) as proposed by the E/C would be in stark contrast to the overall purpose of Chapter 440, Florida Statutes—to efficiently deliver benefits to the injured worker. *See* § 440.015, Fla. Stat. (2015) ("The department, agency, the Office of Insurance Regulation, the Department of Education, and the Division of Administrative Hearings shall administer the Workers' Compensation Law in a manner which facilitates the self-execution of the system and the process of ensuring a prompt and cost-effective delivery of payments."). "Statutory interpretation that renders statutory provisions superfluous 'are, and should be, disfavored.'" *Johnson v. Feder*, 485 So. 2d 409, 411 (Fla. 1986) (quoting *Patagonia Corp. v. Bd. of Governors of the Fed. Reserve Sys.*, 517 F.2d 803, 813 (9th Cir. 1975)). The interpretation favored by the E/C would provide no ramification for an E/C's unreasonable delay in acquisition of an appointment date with the alternate physician while an injured worker is indefinitely without authorized medical care.[4] As this Court has consistently emphasized, "[a]n employer's right to select and/or '*authorize*' doctors from whom an employee may receive treatment is concomitant with its affirmative duty to *provide* appropriate care at the appropriate time." *Parodi v. Fla. Contracting Co.,* 16 So. 3d 958, 961 (Fla. 1st DCA 2009) (citing *Butler v. Bay Ctr.*, 947 So. 2d 570, 572 (Fla. 1st DCA 2006)); (emphasis added).

The Legislature has constructed other portions of section 440.13 in a similar manner to the one-time change provision.

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[4] We note the last sentence of section 440.13(2)(f) provides that failure of a carrier to comply with the subsection "shall be a violation of this chapter and the carrier shall be subject to penalties as provided for in s. 440.525." Such an audit of carrier performance is critical to ensure compliance but does not provide an available expeditious remedy when an injured worker is unreasonably denied compensable and medically necessary medical care.

Regarding provision of *initial* medical treatment, section 440.13(2)(c), Florida Statutes, requires that the carrier "shall furnish" to the employee such medically necessary remedial treatment, care, and attendance for such period as the nature of the injury requires. This subsection, also known as the "self-help provision," dictates that if the employer fails to "provide" the initial treatment within a reasonable time period, the employee may select a physician and obtain the care at the expense of the employer. § 440.13(2)(c), Fla. Stat. Notably, this Court has previously recognized the distinction between "authorization" and "provision" in other statutory sections of Chapter 440. In *Osceola County School Board v. Arace*, 884 So. 2d 1003, 1006 (Fla. 1st DCA 2004), the plain meaning of "initial provision of benefits" in section 440.20(4), Florida Statutes, the "120-day provision," was determined to be "[t]he first authorized doctor's visit by a claimant.'" In *Tomaskovich v. Lapointe*, 904 So. 2d 538 (Fla. 1st DCA 2005), in determining whether an E/C was estopped from asserting a denial of compensability under the "120-day" provision, this Court held that a benefit that triggers a time period "must actually be provided, not merely authorized." *Id.* at 540 (quoting *Arace*, 884 So. 2d at 1006).

Our interpretation is further supported by prior applications of Chapter 440, which distinguished between an E/C authorization of a benefit and its actual provision of it. *See Lord v. Santa Rosa Corr. Inst.*, 135 So. 3d 1170 (Fla. 1st DCA 2014) (Determined that hours included in an attorney's fee to claimant's attorney, agreement to authorize a doctor at mediation did not stop fee clock as attorney had to file a motion to enforce afterwards to actually acquire a named physician); *Amerimark, Inc. v. Hutchinson*, 882 So. 2d 1114, 1115 (Fla. 1st DCA 2004) ("[T]imeliness of payment of benefits is determined not by the date of which the E/C notifies a claimant's attorney that the claim is accepted and benefits will be paid, but by 'the date checks of payment are placed in the mail.'"); *Smith v. AMS Staff Leasing*, 29 So. 3d 1142, 1144 (Fla. 1st DCA 2009) (An employer would suffer no negative consequences for delaying compliance with a compensation order until the last possible moment, even though the claimant's petition for rule nisi–and the associated costs and fees he incurred–may have been the direct cause of the employer's compliance); *Jennings v. Nat'l Linen Servs.*, 995 So. 2d 1153, 1155 (Fla. 1st DCA 2008) ("Had the JCC

found the E/C unreasonably delayed appointment of a physiatrist, or if, because of the E/C's actions, Claimant was not receiving treatment for his condition, it would be appropriate to award attorney's fees. *See* § 440.34(3)(a), Fla. Stat. (1997).”). Whether the E/C timely “provides” the alternate physician and retains the right of selection is a fact-based question to be determined by the JCC.[5]

In keeping with the spirit of section 440.015 to ensure a quick and efficient delivery of disability and medical benefits to an injured worker, the parties are under an implied duty to act reasonably and fairly. *See Zekanovic v. Am. II, Corp.*, 208 So. 3d 851 (Fla. 1st DCA 2017); *Gonzalez v. Quinco Elec. Inc.*, 171 So. 3d 153 (Fla. 1st DCA 2015). Here, the JCC determined that as a result of its unreasonable delay, the E/C failed to provide the alternate physician. CSE exists to support this factual finding.

In light of the importance of the timely provision of medical treatment and the question of statutory interpretation presented, we certify to the Florida Supreme Court the following as a question of great public importance:

> WHETHER AN E/C'S DUTY TO TIMELY FURNISH MEDICAL TREATMENT UNDER SECTION 440.13(2), WHICH INCLUDES A CLAIMANT'S RIGHT TO A ONE-TIME CHANGE OF PHYSICIAN DURING THE COURSE OF SUCH TREATMENT PURSUANT TO SUBSECTION (2)(f), IS FULFILLED SOLELY BY TIMELY AUTHORIZING AN ALTERNATE PHYSICIAN TO TREAT THE CLAIMANT OR WHETHER—IN ORDER TO RETAIN ITS RIGHT OF SELECTION AFTER TIMELY AUTHORIZING THE ALTERNATE PHYSICIAN TO TREAT THE CLAIMANT—THE E/C

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[5] We acknowledge that multiple factors will be relevant in a JCC's determination of whether the E/C “failed to provide” the alternate physician such as: geographical availability of physicians; office policies of individual physicians; requirement of medical record review by physician before acceptance of new patients; efforts of the carrier; exigency of injured workers' medical condition; and treatment needs, among others.

MUST ACTUALLY PROVIDE THE CLAIMANT AN APPOINTMENT DATE WITH THE AUTHORIZED ALTERNATE PHYSICIAN?

Conclusion

Upon a written request to the E/C, section 440.13(2)(f) entitles an injured worker to a one-time change of physician. The E/C controls selection if the alternate physician is authorized within five days of receipt of the request. However, the E/C forfeits the right of selection if it subsequently fails to provide the alternate physician by unreasonable delay in acquisition of an appointment date. Thus, we AFFIRM but CERTIFY a question of great public importance.

MAKAR, J., concurs; WINOKUR, J., concurs in part and dissents in part with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

WINOKUR, J., concurring in part, dissenting in part.[1]

The majority makes a compelling argument that its interpretation promotes the "spirit" of the workers' compensation law, which requires expeditious provision of medical services for injured workers, by preventing a carrier from "[sitting] on its hands" when it should be attempting to secure medical care for an injured worker. But I find that neither the applicable statute nor controlling case law supports the majority's interpretation,

[1] I concur in the majority's decision to certify a question of great public importance. I otherwise dissent.

irrespective of its value as good public policy. As such, I believe we must reverse the order under review.

The statutory provision under review states as follows:

> Upon the written request of the employee, the carrier shall give the employee the opportunity for one change of physician during the course of treatment for any one accident. Upon the granting of a change of physician, the originally authorized physician in the same specialty as the changed physician shall become deauthorized upon written notification by the employer or carrier. The carrier shall *authorize* an alternative physician who shall not be professionally affiliated with the previous physician within 5 days after receipt of the request. If the carrier fails to *provide* a change of physician as requested by the employee, the employee may select the physician and such physician shall be considered authorized if the treatment being provided is compensable and medically necessary.

§ 440.13(2)(f), Fla. Stat. (emphasis added). The dispute here involves the third sentence, which requires a carrier to "authorize" an alternative physician, and the fourth sentence, which gives the employee the right to select his or her own physician if the carrier fails to "provide" a change of physician. The majority, consistent with this Court's case law, reads the third sentence as placing an obligation on the carrier to identify a new physician and inform the employee of its authorization within five days after receipt of the request for change of physician. But the majority goes on to read the next sentence as setting a separate, additional obligation on the carrier to "provide" the change of physician to the employee. According to the majority, this additional obligation requires the carrier to obtain an appointment for the employee with the new physician, and to do so within a "reasonable" time. I find that neither the structure of the statutory provision, nor the case law applying it, supports this interpretation.

I. The structure of section 440.13(2)(f)

Sentences three and four, read reasonably, do not place separate obligations on carriers. The third sentence does place an

obligation on carriers: the carrier "shall authorize" an alternate physician within five days after receipt of a change-of-physician request.[2] Case law, discussed below, already establishes contours of this requirement. However, the fourth sentence does *not* place a requirement on carriers. Instead, it places a *sanction* on a carrier that fails to meet its obligations under the third sentence: *if* the carrier does not comply with the third sentence, *then* it loses the right to name an alternate physician.

If the Legislature wished to place an additional obligation on carriers in the fourth sentence, it stands to reason that it would have used the same type of mandatory language, such as "the carrier shall provide a change of physician."[3] Instead, the fourth sentence is negative: if the carrier *fails* to provide a change of physician, then the employee may select his or her own. In other words, the structure of the third and fourth sentences shows that it creates an obligation, and then creates a sanction for failure to meet that obligation. I submit that an interpretation creating separate obligations disregards the structure of the paragraph.

The majority reasons that the third and fourth sentence cannot refer to the same obligation because it uses different words—*authorize* an alternative physician versus *provide* a

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[2] The word "shall" is generally interpreted to "impose a mandatory duty." *Johnson v. Johnson*, 88 So. 3d 335, 338 (Fla. 2d DCA 2012). *See also Dawson v. Clerk of Circuit Court-Hillsborough Cty.*, 991 So. 2d 407, 409 (Fla. 1st DCA 2008) ("The use of the word 'shall' in . . . section 440.13(2)(f) means that this one-time change is mandatory[.]").

[3] It also stands to reason that the Legislature would have placed a specific time limitation on this requirement. The majority's interpretation requires judges to divine a "reasonable time period" in which the carrier is required to set an appointment with the alternate physician. Considering that the statute sets forth a specific time period in which the carrier is required to authorize an alternate physician, it seems problematic that it implied a separate obligation without establishing a time period, leaving it to judges to determine whether the amount of time was "reasonable."

change of physician—because "[t]he Legislature's use of different terms in different sections of the same statute is strong evidence that different meanings were intended." This maxim of statutory interpretation is generally known as the presumption of consistent usage. *See In re Failla*, 838 F.3d 1170, 1176-77 (11th Cir. 2016) ("The presumption of consistent usage instructs that '[a] word or phrase is presumed to bear the same meaning throughout a text' and that 'a material variation in terms suggests a variation in meaning.'" (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012))). *See also Carlson v. State*, 227 So. 3d 1261, 1267 (Fla. 1st DCA 2017) (holding that "[w]e typically view the Legislature's use of varied language in the same statute as a sign the Legislature intended varied things"). I disagree that this maxim should apply here.

In *Carlson*, we noted that "[t]his rule of interpretation is far from absolute" *Id.* The presumption of consistent usage, we explained, "'assumes a perfection of drafting that, as an empirical matter, is not often achieved.' A. Scalia & B. Garner at 170. For whatever reasons, 'drafters more than rarely use the same word to denote different concepts, and often . . . use different words to denote the same concept.'" *Id.* This observation applies here. Again, the most reasonable reading of the paragraph is that the third sentence imposes a requirement on carriers, and the fourth sentence imposes a sanction on the carrier if it does not comply with that requirement. While it used different words to describe the carrier's obligation, the structure of the paragraph shows that the fourth sentence does not impose an additional obligation. *See, e.g., Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991) (stating that "canon[s] do[] not control . . . when the whole context dictates a different conclusion").

This conclusion is supported by the fact that the statute is inexact in other places. For example, the disputed provisions do not even specify the same object: the third sentence requires a carrier to authorize "an alternative physician," while the fourth sentence sanctions the carrier if it fails to provide "a change of physician." In spite of the different language, the majority does not dispute that the statute means the same thing when it refers to an "alternative physician" in one sentence and a "change of physician" in the next. It does not appear that the drafters of this provision

were overly concerned about consistent usage.[4] Finally, it should be noted that the statute appears to misuse the word "alternative" ("alternative physician") when it seems to have meant "alternate." *Compare Alternate*, *The American Heritage College Dictionary* (3d ed. 1993) (defining "alternate" as something or someone that serves in "place of another"), *with Alternative, The American Heritage College Dictionary* (3d ed. 1993) (defining "alternative" as "[t]he choice between two mutually exclusive possibilities[,]" whereby the second option does not replace the first). I submit that we err in attributing excessive scrupulosity to the drafting of this paragraph.

II. Case law interpreting § 440.13(2)(f)

Our cases make it clear that a carrier's obligation under paragraph (2)(f) is to inform the employee of the name of a new physician within five days of the request for a change of physician, and not to schedule an appointment with the physician. *See HMSHost Corp./Gallagher Bassett Servs. Inc. v. Frederic*, 102 So. 3d 668 (Fla. 1st DCA 2012) (holding that the "E/C's informing Claimant of a particular doctor's name within five days of receiving the request satisfied section 440.13(2)(f), even though the E/C did not contact the doctor"). *See also Gadol v. Masoret Yehudit, Inc./U.S. Adm'r Claims*, 132 So. 3d 939, 940 (Fla. 1st DCA 2014) (stating that *Frederic* holds that E/C timely responds by informing claimant of new doctor's name and "does not require the E/C to actually contact or schedule an appointment with the new doctor"); *Harrell v. Citrus Cty. Sch. Bd.*, 25 So. 3d 675, 678 (Fla. 1st DCA 2010) (noting that "[t]o timely respond to a claimant's request, an

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[4] Moreover, other paragraphs of the same subsection provide a similar obligation on the part of the carrier to "furnish" treatment to the employee, which appears synonymous with "provide." *See* § 440.13(2)(a) & (2)(c), Fla. Stat. (requiring the employer to "furnish to the employee such medically necessary remedial treatment . . . ." and prohibiting the employee from recovering certain expenses unless he or she has requested the employer to "furnish that initial treatment or service" and the employer has failed to do so). Again, the subsection appears to use different words when referring to the essentially the same thing.

E/C is not required to schedule an appointment with the newly authorized physician"). In short, we have consistently defined the extent of a carrier's obligations under section 440.13(2)(f), Florida Statutes, which does not include the obligation proposed by the majority.

The majority states that these authorities merely set out the carrier's obligation to "authorize" a change of physician for the employee, whereas the requirement it discusses is a separate obligation to "provide" a change of physician. I disagree for two reasons. First, as stated above, I find that this interpretation is inconsistent with the statute. Second, I believe that each of the case noted above sets forth the entirety of a carrier's obligations under paragraph (2)(f). No case implies that the fourth sentence of the paragraph imposes requirements additional to the ones they set out. As such, I believe the majority opinion is inconsistent with this prior case law.

We must apply the statute as written, regardless of whether we find that it would promote sound policy to interpret it otherwise. Because I believe the judge of compensation claims erred in interpreting section 440.13(2)(f), we should reverse the order under review.

Vanessa J. Johnson and Warren K. Sponsler of Sponsler, Bishop, Koren & Hammer, P.A., Tampa, for Appellants.

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