FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-427

JACE ANDREWS,

Appellant,

v.

MCKIM & CREED and TRAVELERS PROPERTY CASUALTY,

Appellees.

On appeal from an order of the Office of the Judges of Compensation Claims.
Jack Adam Weiss, Judge.

Date of Accident: August 21, 2018.

February 1, 2023

M.K. THOMAS, J.

Jace Andrews (Claimant) appeals an order of the Judge of Compensation Claims (JCC) denying his claim for authorization of Dr. Roush, a physician he selected following the Employer/Carrier's (E/C) disregard of his request for a one-time change under section 440.13(2)(f), Florida Statutes (2018), and finding the E/C's waiver defense was tried by consent. We reverse on both issues as detailed below.

I. *Facts*

Claimant suffered a compensable accident on August 21, 2018, and benefits under Chapter 440, Florida Statutes, were initiated. On June 20, 2019, Claimant sent a written request to the E/C exercising his right to a one-time change under section 440.13(2)(f). The E/C failed to respond. On July 2, 2019, Claimant filed a Petition for Benefits (first PFB) asserting his entitlement to the one-time change and requesting an enforcement of that right. Twenty-seven days later, the E/C filed a Response acquiescing to the one-time change and naming Dr. Feiertag as the alternate physician, providing Claimant with an appointment date and time. Claimant did not attend the appointment. Subsequently, Claimant voluntarily dismissed the first PFB, explaining later that he did so to avoid litigation because he had concerns about "rocking the boat" with his Employer and missing work. On July 28, 2020, Claimant filed a second PFB (second PFB) requesting authorization, payment, and scheduling of an appointment for evaluation and treatment with Dr. Roush, his chosen alternate physician. Three days later, the E/C wrote to Claimant advising that treatment with Dr. Roush was denied as Dr. Feiertag was the "current authorized one-time change doctor," referencing the prior Response to the first PFB. Before the hearing on the second PFB, Claimant sought an evaluation from Dr. Roush on his own.

At the hearing, Claimant argued that the E/C forfeited its right of selection of the one-time change physician when it failed to respond to his June 20, 2019, written request. Claimant averred that the second PFB merely requested enforcement of his previously accrued right of selection, and that he selected Dr. Roush as his physician. In response, the E/C argued Claimant's voluntary dismissal of the first PFB waived or extinguished his right of selection, and the filing of the second PFB equated to a new request for a one-time change, to which it responded timely (within 5 days).[1]

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[1] Section 440.13(2)(f) provides that upon receipt of a written request by a claimant for a one-time change, the carrier "shall authorize an alternative physician . . . within 5 days after receipt of the request."

The JCC concluded that because Claimant did not attend the E/C scheduled appointment with Dr. Feiertag, he did not acquiesce to his authorization. Further, the JCC rejected the E/C's argument that Claimant forfeited his right of selection because of the length of time that elapsed between the written request for a one-time change and his selection of Dr. Roush as his alternate doctor. Notwithstanding, the JCC ultimately denied Claimant's request for authorization of Dr. Roush, finding: (1) "Claimant withdrew his request for a one-time change on September 18, 2019, when he voluntarily dismissed his PFB 'in its entirety'"; (2) the second-filed PFB constituted a "new request" for a one-time change and the E/C responded timely; and (3) even if the JCChad agreed with Claimant that he retained the right of selection, Claimant failed to satisfy his burden of proof that the treatment he received from Dr. Roush was both "compensable" and "medically necessary."

Claimant timely filed a motion for rehearing, asserting the JCC erred by: (1) allowing the E/C to raise and argue waiver defenses that were not included in the pretrial stipulation; (2) creating an erroneous additional burden of proof on Claimant to prove medical necessity consistent with a "self-help provision"; and (3) misapplying section 440.13(2)(f) and ignoring precedent set by *City of Bartow v. Flores*, 301 So. 3d 1091 (Fla. 1st DCA 2020). The JCC denied Claimant's request for rehearing, and Claimant then filed thistimely appeal.

II. *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.'" *Flores*, 301 So. 3d at 1094 (quoting *Pinnacle Benefits, Inc. v. Alby*, 913 So. 2d 756, 757 (Fla. 1st DCA 2005)). However, to the extent an issue of statutory construction is raised on appeal, a question of law is presented, making this Court's review *de novo*. *Id*. (citing *Palm Beach Cnty. Sch. Dist. v. Ferrer*, 990 So. 2d 13, 14 (Fla. 1st DCA 2008)).

Once again, we are called to address the "one-time change provision" of section 440.13(2)(f). This analysis encompasses the viability or duration of a claimant's right of selection, once vested.

As required, we look to the statutory language. The "one-time change provision" provides:

> 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. (2018).

Grounded by the plain language of the statute, we first review the JCC's determination that Claimant waived his right of selection of the alternate physician by voluntarily dismissing the first PFB and by delaying litigation of the issue. "Waiver and estoppel are affirmative defenses which must be plead carefully or forever waived." *Teco Energy, Inc. v. Williams*, 234 So. 3d 816, 823 (Fla. 1st DCA 2017) (citing *McKenzie Tank Lines, Inc. v. McCauley*, 418 So. 2d 1177, 1180 (Fla. 1st DCA 1982)). Affirmative defenses must also be timely raised by the party seeking to avoid responsibility or consequence. *See* Fla. Admin. Code R. 60Q-6.113(2)(a). "The party raising affirmative defenses has the burden of pleading and proving them." *Williams*, 234 So. 3d at 823.

Here, the E/C failed to list any affirmative defenses in the Pre-Trial Stipulation. The E/C did not assert its "waiver/estoppel" defense until the filing of its trial memoranda, just days before the hearing. We agree with Claimant that allowing the affirmative defense of waiver to be raised just prior to hearing was improper and equates to a denial of procedural due process safeguards,

including notice and an opportunity to be heard. *See Isaac v. Green Iguana, Inc.*, 871 So. 2d 1004, 1006 (Fla. 1st DCA 2004).

We reject the E/C's argument that waiver was tried by consent due to inferences made during argument at hearing. During opening statements, Claimant asserted it was "equally important in this claim if we turn to the Pretrial Stipulation, there is no defense of waiver. There is no defense of the right reverting back. There is no discussion of that at all until the Employer/Carrier's Trial Memorandum." Claimant's counsel further objected as follows: "[s]o again, our first position would be that those defenses really should not be formally entertained by this court because they weren't listed on the Pretrial." Claimant counsel's presentation of an alternative argument, post-objection, to address the E/C's waiver defense did not eviscerate his prior objection as to untimeliness nor equate to acquiescence or consent.

Next, the JCC found that Claimant's act of voluntarily dismissing the first PFB signified his withdrawal of the request for a one-time change. This was error. Section 440.13(2)(f) is void of any reference to the filing and/or maintenance of a PFB to trigger a claimant's right to a one-time change or the E/C's duty to provide one. The plain and unambiguous language of the statute instructs that the five-day window for response is initiated upon the E/C's receipt of a written request for a one-time change. This written request may take many forms such as a letter, a PFB, or other pleading.[2] Here, the written request via letter activated the

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[2] This Court has cautioned as follows:

> Consistent with these requirements and the stated intent of the workers' compensation statutory scheme, a claimant's request for a one-time change of physician under section 440.13(2)(f) should not be inserted into a document that appears on its face to have exclusively another purpose. Rather, the request should be readily apparent, unobscured, and unambiguous, to advance the purpose of placing the E/C on notice that such a request is being made in that document.

provisions of section 440.13(2)(f) and the window for response. Subsequently, Claimant filed the first PFB to seek enforcement of his right to a one-time change. He withdrew the first PFB and later filed the second PFB naming Dr. Roush as his physician of choice.

The first PFB was not dismissed with prejudice nor was it a second voluntary dismissal of a PFB requesting the benefit. *See* Fla. Admin. Code R. 60Q-6.116(2) (the "two-dismissal rule"); *Moreno v. Palm Beach Cnty. Sch. Bd.*, 146 So. 3d 530 (Fla. 1st DCA 2014). The voluntary dismissal of a PFB does not necessarily equate to an abandonment of the claims.

In *Gadol v. Masoret Yehudit, Inc.*, 132 So. 3d 939 (Fla. 1st DCA 2014), this Court rejected the notion that a Claimant waives the right to pick his doctor by doing anything other than acceding to the E/C's choice by seeing that doctor. Noting that a claimant may waive his or her right to select the physician if he or she subsequently accedes to the E/C's choice, this Court explained that once the claimant has the vested right of selection, the E/C's selection of or declaration of an alternate physician before or even simultaneously with the claimant making his or her selection, does not constitute a waiver by the claimant so long as the claimant has not attended an appointment with the E/C's selected physician. *Id.* at 941; *see also Harrell v. Citrus Cnty. Sch. Bd.*, 25 So. 3d 675, 677 (Fla. 1st DCA 2010) (holding that where response to request was untimely, claimant remained entitled to select her own physician even though the E/C advised claimant of specific authorization nineteen days after request).

Thus, Claimant's voluntary dismissal of the first PFB did not automatically extinguish his request for an alternate physician nor waive the request. The one-time change provision of section 440.13(2)(f) is triggered by a claimant's "written request" for this benefit. The filing of a PFB is not required to initiate the window for response, although it does satisfy the definition of a written request. Claimant initiated his request here for a one-time change via correspondence, not by PFB. He later filed a PFB for

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Gonzalez v. Quinco Elec., Inc., 171 So. 3d 153, 155 (Fla. 1st DCA 2015).

enforcement purposes. A PFB is required to secure jurisdiction with the JCC if the E/C does not timely respond and provide the benefit and a claimant wishes to seek enforcement of his right. *Souza v. Truly Nolan, Inc.*, 199 So. 3d 531, 532–33 (Fla. 1st DCA 2016).

Lastly, we address the JCC's refusal to adhere to our decision in *Flores*. In *Flores*, this Court held that the E/C forfeits the right of selection under section 440.13(2)(f) if it fails to timely respond and provide the authorized alternate physician by "unreasonable delay in acquisition of an appointment date." *Flores*, 301 So. 2d at 1099; *see also Harman v. Merch. Transp.*, 326 So. 3d 100, 104 (Fla. 1st DCA 2021). This Court explained that upon a written request to the E/C, section 440.13(2)(f) entitles an injured worker to a one-time change of physician. *Flores*, 301 So. 2d at 1099. The E/C controls selection if the alternate physician is authorized within five days of receipt of the request. *Id.* However, this right of selection is lost if the E/C subsequently fails to provide the alternate physician by unreasonable delay in acquisition of an appointment date. *Id.*

The second PFB requested the following: "Authorization, payment, and scheduling of evaluation with Dr. Roush." Claimant sought an appointment with Dr. Roush after filing the second PFB and before the final hearing. At hearing, Claimant requested that the E/C authorize and schedule an appointment with Dr. Roush. Claimant did not raise claims for reimbursement for treatment. Regardless, in the final order, the JCC reasoned as follows:

> I am aware of the First DCA's recent pronouncement on the one-time change statute in *City of Bartow v. Flores*, 301 So. 3d 1091 (Fla. 1st DCA 2020). Respectfully, I do not believe the court has properly construed the plain meaning of the fourth sentence of section 440.13(2)(f). The *Flores* court disagreed on whether the fourth sentence provided further obligation on an employer/carrier to provide a one-time change versus merely authorizing the physician. The fourth sentence does not place an obligation on the employer/carrier. Rather, it is a self-help provision for an injured worker.

As an initial matter, a JCC's disagreement, respectful or otherwise, with a decision of this Court does not usurp its precedential value nor does it relieve a lower tribunal of its duty to apply its holding. Although a lower tribunal or court may bring its concerns regarding the application of specific case law to the appellate courts, it is nonetheless bound to follow precedent. *See Hoffman v. Jones,* 280 So. 2d 431, 434 (Fla. 1973); *Putnam Cnty. Sch. Bd. v. Debose*, 667 So. 2d 447, 449 (Fla. 1st DCA 1996) ("Under the doctrine of stare decisis, lower courts are bound to adhere to the rulings of higher courts when considering similar issues even though the lower court might believe the law should be otherwise.").

The JCC improperly infused, contrary to *Flores*, a "self-help" context into his application of section 440.13(2)(f). In doing so, the JCC erred in concluding that because Claimant previously saw Dr. Roush on his own despite the E/C's refusal to authorize him as the one-time change physician, Claimant carried the burden at final hearing to present evidence that the treatment received from Dr. Roush was both "compensable" and "medically necessary." That is not, however, the determinative issue.

Although in some situations an injured claimant may obtain initial treatment by the physician of his or her choosing at the expense of the E/C, this procedural right attaches only after the E/C fails to provide initial treatment or care within a reasonable time after the claimant's specific request has been made known to the E/C. *See* § 440.13(2)(c), Fla. Stat. However, even then, the E/C is not required to authorize that physician for the claimant. *See id.* The law only requires the E/C to pay the amount personally expended by the claimant for treatment or care that would have been compensable and medically necessary. *See id.*

The issue before the JCC here was whether Claimant established a vested right to select Dr. Roush as his one-time change in physician. We agree with Claimant that the JCC's disposition fails to appreciate that Claimant had already met his burden to prove entitlement to a one-time change, he was not seeking reimbursement under a self-help theory, and the question before the JCC at hearing was confined to whether Claimant retained the right to selection.

A claimant has an absolute right to a one-time change in physician during the course of treatment. *See Pruitt v. Se. Pers. Leasing, Inc.*, 33 So. 3d 112, 114 (Fla. 1st DCA 2010) (citing *Providence Prop. & Cas. v. Wilson*, 990 So. 2d 1224, 1225 (Fla. 1st DCA 2008)). This right does not require a prerequisite showing of medical necessity and/or causation. *See Wilson*, 990 So. 2d at 1225 (holding that provision of a requested one-time change is "mandatory regardless of an E/C's position as to the necessity of . . . the change in physician"). This has been settled law for more than a decade. Indeed, the second half of the fourth sentence of section 440.13(2)(f) does not create a condition precedent for a claimant to satisfy before getting a new physician; nor does it create a "self-help" provision similar to section 440.13(2)(c). Rather, the statute reiterates that once a change of physician is accomplished, such treatment is not without limits but must remain medically necessary and causally related to the compensable accident.

Thus, we conclude that on these facts, neither the pause in litigation nor the voluntary dismissal of the first PFB affected Claimant's vested right to select the alternate physician. Accordingly, the order on appeal is reversed and the case remanded for authorization and scheduling of an appointment with Dr. Roush as Claimant's one-time change physician.

REVERSED and REMANDED.

LEWIS, J., concurs; ROWE, C.J., concurs in result only with opinion.

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

ROWE, C.J., concurring in result only.

Because the E/C failed to timely authorize a one-time change of physician under section 440.13(2)(f), Florida Statutes (2018) in

response to the employee's written request, I concur in reversing the order of the Judge of Compensation Claims.

But in concurring in the result here, I do not rely on our court's decision in *City of Bartow v. Flores*, 301 So. 3d 1091 (Fla. 1st DCA 2020). There, we construed section 440.13(2)(f) to require the E/C to not only authorize a one-time change physician but also to acquire an appointment with the one-time change physician. *See id*. at 1099 ("[T]he 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."). Reliance on *Flores* is unnecessary because the E/C did not respond to the employee's written request for a one-time change physician within the statutory five-day period. And so, the employee had the right to select an alternate physician. *See* 440.13(2)(f), Fla. Stat. ("If the carrier fails to provide a change of physician as requested by the employee, the employee may select the physician.").

But if *Flores* did apply, I have strong reservations about our interpretation of section 440.13(2)(f) and the judicial imposition of obligations on the E/C not expressed in the statute. *See St. Lucie Pub. Schs. v. Alexander*, 322 So. 3d 701 (Fla. 1st DCA 2021) (Nordby, J., concurring) (acknowledging that *Flores* was binding but noting "agreement with Judge Winokur's dissent in that [ ] case") ; *see also City of Bartow v. Flores*, 301 So. 3d 1091, 1102 (Fla. 1st DCA 2020), *reh'g denied* (July 28, 2020), *review granted*, SC20-1126, 2021 WL 1593270 (Fla. Apr. 23, 2021), *review dismissed*, No. SC20-1126, 2022 WL 110459 (Fla. Jan. 12, 2022) (Winokur, J. dissenting) ("The majority states that [our earlier cases] 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 cases noted above sets forth the entirety of a carrier's obligations under [section 440.13(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.").

Without question, the statute requires the E/C to both "authorize" and "provide" a one-time change of physician in response to an employee's written request. *See* § 440.13(2)(f), Fla. Stat. But nothing in the plain language of the statute imposes a duty on the E/C to provide an appointment date with the one-time change physician. Nor does anything in the statute suggest that the Legislature intended to expand the E/C's obligation to timely provide medical treatment beyond providing the employee with the name of the alternate physician.

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