

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RING POWER CORPORATION AND
UNITED SELF INSURED SERVICES,

Petitioners,

Case No. 13-0717

vs.

JEFFREY R. BAXTER AND
DEPARTMENT OF FINANCIAL
SERVICES,

Respondents.

_____ /

RECOMMENDED ORDER

Pursuant to notice, this case was heard on May 24, 2013, by video teleconference at sites in Tallahassee, Florida and Jacksonville, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Heather E. Sosnowski, Esquire
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For Respondent Department of Financial Services:

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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Jeffrey R. Baxter (Mr. Baxter) is eligible for vocational training and education at Petitioners' expense to allow for him to return to suitable gainful employment.

PRELIMINARY STATEMENT

Mr. Baxter was employed by Petitioner, Ring Power Corporation (Ring Power), as an engine mechanic when he suffered a compensable work-related injury. After a period of treatment, Mr. Baxter's authorized treating physician assigned him a personal impairment rating (PIR) of seven percent and assigned work restrictions that prevented him from lifting more than 10 pounds. Ring Power was unable to provide employment to Mr. Baxter under the assigned restrictions, and terminated him from employment.

Mr. Baxter requested that the Department of Education, Bureau of Rehabilitation and Reemployment Services (DOE), perform an evaluation to determine if he qualified for vocational training and education to assist him in returning to

suitable gainful employment consistent with his post-injury condition.

The DOE received Mr. Baxter's request and related information, and obtained additional records from USIS. The application was placed on an informal hold due to uncertainty regarding the future of the vocational training and education program.

As a result of action taken during the 2012 legislative session, responsibility for the administration of the vocational training and education program was transferred from DOE to the Department of Financial Services, Division of Workers' Compensation (Department). Thereafter, the Department determined that the best outcome that would allow for Mr. Baxter to return to suitable gainful employment was through the Computer Information Technology, A.S.-degree program at Florida Gateway College. Petitioners, Ring Power Corporation (Ring Power) and United Self Insured Services (USIS), would be financially responsible for the retraining program.

Petitioners timely filed a Petition for Review that challenged the Department's decision, and asserted that Mr. Baxter is not eligible for vocational training and education because he has no permanent, physical limitations that are related to his workplace injury.

The petition was forwarded to the Division of Administrative Hearings for a formal hearing. The final hearing was scheduled for May 24, 2013, and was held as scheduled.

At the final hearing, Joint Exhibits 1 through 4 were received in evidence. Petitioners' Exhibit 1, consisting of the deposition testimony of Dr. Troy Lowell, was received in evidence without objection, and has been accepted and considered as though Dr. Lowell testified in person. The Department called Mary Cilek, program administrator for the Department's Reemployment Services Section, and Mr. Baxter to testify. Respondents' Exhibits 1 and 2 were received in evidence. Respondents' Exhibit 2, consisting of the deposition testimony of Dr. Phil Riddlehoover was received in evidence without objection, and has been accepted and considered as though Dr. Riddlehoover testified in person.

The hearing was not transcribed. Each party timely submitted proposed findings of fact and conclusions of law which have been duly considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2012) unless otherwise noted.

FINDINGS OF FACT

1. The Department of Financial Services, Division of Workers' Compensation, is the agency of the state of Florida

charged with administration of medical care coordination and reemployment services that are necessary to assist employees injured in the workplace to return to suitable gainful employment.

2. Mr. Baxter was, at the time of the hearing, 45 years of age. During the periods relevant to this proceeding, he was five feet, seven inches in height, and his weight ranged from 285 to 307 pounds. Mr. Baxter was employed by Ring Power as a mechanic from June 2006 until July 2011.

3. In July, 2008, Mr. Baxter suffered a non-compensable injury while at home. He was seen by Dr. Phil Riddlehoover, a primary-care orthopedist practicing with The Orthopaedic Institute, who noted that Mr. Baxter complained of a sudden onset of lower-back, left buttock, and left hip pain. Dr. Riddlehoover related that Mr. Baxter had experienced similar back pain problems on several occasions over the past "couple of years," for which he received chiropractic treatment. Mr. Baxter related to Dr. Riddlehoover that he had some lessening of pain with the chiropractic treatments, but still had significant limitation of range of motion and spasm.

4. During his examination, Dr. Riddlehoover noted that Mr. Baxter had "marked limitation of range of motion in flexion and extension as well as side-to-side rotary movements." An X-ray was taken, which showed minimal osteophyte formation in the

lumbar spine, with well-maintained vertebral body heights and normal disk spaces. Dr. Riddlehoover's assessment was low back pain, for which he recommended physical therapy for three weeks, prescribed medications, and "encouraged . . . light duty activity."

5. Based on stipulated facts submitted by the parties, the following findings are made:

A. Mr. Baxter was involved in a compensable work-related accident while employed with the employer, Ring Power, on or about September 18, 2008.

B. Petitioners accepted the September 18, 2008, work-related accident as compensable and provided medical treatment for same.

C. Mr. Baxter was treated by Dr. Edward Samby, an authorized treating physician, for the September 18, 2008, work-related accident.

D. On October 7, 2008, Dr. Samby opined that Mr. Baxter had reached MMI as a result of the September 18, 2008, workplace accident with a zero percent PIR. At that time, Dr. Samby released Mr. Baxter to full duty with no restrictions.

6. Despite the foregoing stipulated facts, there is not an iota of competent substantial evidence in the record of this proceeding of the nature of the September 18, 2008, work-related accident, whether it involved or affected Mr. Baxter's back, or

whether it has any bearing whatsoever on any issue in this proceeding. Therefore, other than the bare stipulations, no findings regarding that purported accident are or can be made.

7. On August 24, 2010, Mr. Baxter suffered a workplace injury that was determined to be compensable under the Florida Workers' Compensation Act. Mr. Baxter's injury was to his lower back.

8. On September 16, 2010, Mr. Baxter was again seen by Dr. Riddlehoover. Dr. Riddlehoover related that Mr. Baxter experienced a sudden onset of lower-back discomfort while lifting and twisting a heavy object that was exacerbated when he twisted. Dr. Riddlehoover noted that Mr. Baxter "has a significant history of low back pain complaints within the last two to three-year time frame."^{1/}

9. Dr. Riddlehoover noted limitation to Mr. Baxter's range of motion and tenderness to palpation. X-rays of Mr. Baxter's back were taken in the office, and compared to previous X-rays. Dr. Riddlehoover noted that there was "a transitional vertebra at L5," and in comparison with previous X-rays, there was "some loss of disk space height at L5-S1 with some scoliosis of the endplates. There are also some small posterior osteophytes that seem to have developed at L4-5 and L5-S1 as well." Mr. Baxter was thereupon placed on light-duty status, and referred for physical therapy.

10. On October 7, 2010, Mr. Baxter had a follow-up visit with Dr. Riddlehoover. Mr. Baxter stated that he had no improvement from his physical therapy, though Dr. Riddlehoover noted that "[i]t seems as though the physical therapy note that accompanies him from Health Works indicates to the contrary." Since Mr. Baxter continued to complain of intermittent sharp pains, Dr. Riddlehoover ordered a MRI "as there seems to be a discrepancy as far as what the patient is reporting with his low back pain and what the physical therapist is reporting." Physical therapy was discontinued.

11. On October 8, 2010, Mr. Baxter underwent a MRI of his lumbar spine. The MRI, as interpreted by Dr. Riddlehoover, showed a disk herniation at L4-5, and a disk bulge at L5-S1. He determined the most significant problem was related to the disk bulge at L5-S1. Dr. Riddlehoover referred Mr. Baxter for a series of epidural steroid injections.

12. By November 9, 2010, Mr. Baxter reported modest improvement from the epidural injections. Dr. Riddlehoover decided to wait three to four weeks in order to determine whether Mr. Baxter was responding to treatment. Mr. Baxter was provided with a note reiterating his work limitations.

13. On December 2, 2010, Mr. Baxter reported to Dr. Riddlehoover that he continued to show improvement.

Dr. Riddlehoover referred him for a repeat epidural injection, and refilled his medication prescription.

14. On February 2, 2011, Dr. Riddlehoover reported that Mr. Baxter continued to have ongoing discomfort in his back that required continued use of narcotic analgesics. Dr. Riddlehoover further reported that Mr. Baxter was "unable to do a hard days labor and place high demands on his back without serious discomfort." He refilled Mr. Baxter's medication prescription, and referred Mr. Baxter to Dr. Troy Trimble, an orthopedic surgeon practicing with The Orthopaedic Institute, to determine his suitability for surgical relief.

15. On March 9, 2011, Dr. Trimble diagnosed Mr. Baxter with low back pain to the left leg, lower thoracic right side back pain, and morbid obesity. He recommended physical therapy, medication refills, and possibly a L3 selective nerve block. He suggested that Mr. Baxter's symptoms would improve with aggressive physical therapy and weight loss, and concluded that Mr. Baxter was not a surgical candidate. Dr. Riddlehoover relied upon Dr. Trimble's report in the development of his opinions.

16. At some time prior to March 25, 2011, Mr. Baxter suffered a separate back injury that occurred while he was getting out of a truck. It resulted in a sudden onset of discomfort that caused him to go to an emergency room. The

emergency room referred Mr. Baxter back to Dr. Riddlehoover for further evaluation and management. By the time of his visit with Dr. Riddlehoover on March 25, 2011, the discomfort from that injury was completely gone. Dr. Riddlehoover placed Mr. Baxter at MMI with a PIR of zero percent for that claim, but noted that Mr. Baxter was to follow up with him to assess his consultation with Dr. Trimble.

17. On April 26, 2011, Mr. Baxter followed up with Dr. Riddlehoover, continuing to complain of lower-back discomfort from time-to-time. Dr. Riddlehoover extended physical therapy for an additional period of four weeks, and refilled Mr. Baxter's medication prescription.

18. On June 1, 2011, Mr. Baxter returned to Dr. Riddlehoover, and indicated no improvement with his lower-back and spine pain after six weeks of physical therapy. Dr. Riddlehoover referred Mr. Baxter back to Dr. Trimble for further assessment as to whether he was an operative candidate, and refilled Mr. Baxter's medication prescriptions.

19. On June 9, 2011, Ring Power determined it was no longer able to employ Mr. Baxter within the light duty restrictions assigned by Dr. Riddlehoover, and therefore terminated his employment.

20. On June 20, 2011, Dr. Trimble reevaluated Mr. Baxter. He again diagnosed Mr. Baxter with lower-back pain to the left

leg, and noted evidence of L5-S1 disc degeneration. Dr. Trimble reiterated that Mr. Baxter was not a surgical candidate, and recommended pain management and weight loss.

21. On June 29, 2011, Mr. Baxter returned to Dr. Riddlehoover, who thereupon placed Mr. Baxter at MMI and assigned a seven percent PIR. Dr. Riddlehoover assigned permanent work restrictions that allowed Mr. Baxter to lift no more than 10 pounds, and instructed Mr. Baxter to follow up as needed.

22. As to the cause of the disk abnormalities, Dr. Riddlehoover testified that "I can only assume that [the herniation and bulge] were related to the workplace accident because I had no prior MRIs." Dr. Riddlehoover concluded that the workplace injury was the major contributing cause of the PIR, based upon the history of the injury; his reading of the October 2010, MRI results; and subsequent treatment.

23. The PIR and work restrictions were not based on a functional-capacity examination or other objective measure, but relied entirely on Mr. Baxter's relation of his subjective impression as to what he could withstand without discomfort.

24. On August 31, 2011, Mr. Baxter requested vocational screening from DOE. In mid-2011, DOE vocational rehabilitation funding was cut. Thereafter, processing of applications for

vocational training and education, including that of Mr. Baxter, was slowed.

25. In the Medical Update Questionnaire that accompanied his request for vocational screening, Mr. Baxter noted that he had completed all medical treatment, but requested a second opinion.

26. On January 5, 2012, at Mr. Baxter's request, he was evaluated by Dr. Troy Lowell, a board-certified orthopedic surgeon. Dr. Lowell reviewed Mr. Baxter's 2010 X-ray and MRI, and performed a physical examination. Although Dr. Lowell testified that he did not recall having seen any X-ray other than that taken in 2010, his office visit report indicates that Mr. Baxter "presents with x-rays from that time," and that "[c]ompared to 2008 films there is no significant change."

27. Mr. Baxter told Dr. Lowell that he had experienced back pain since 2008. However, Dr. Lowell was unaware of the accident that occurred in 2008 or, seemingly, of the earlier incidents of lower-back pain previously related by Mr. Baxter to Dr. Riddlehoover.

28. Dr. Lowell analyzed the 2010 MRI, and saw no evidence of the disk herniation noted by Dr. Riddlehoover. Rather, his reading of the MRI showed a slight degenerative bulge at L4-5, and severe degenerative disk disease at L5-S1. Dr. Lowell

concluded that the severe degenerative disk disease at L5-S1 was the cause of Mr. Baxter's ongoing symptoms.

29. Dr. Lowell testified that that it was possible that an injury occurring prior to 2010 could have led to the observed degree of degenerative disk disease in 2012, but that he did not have sufficient information to draw a conclusion as to whether the 2008 injury in particular was the cause. However, he was confident that the level of degeneration could not have resulted from a 2010 traumatic injury.

30. Based on his office examination and review of the X-ray and MRI, Dr. Lowell placed Mr. Baxter at MMI and assigned a zero percent PIR. His assignment of a zero percent PIR was based on his understanding that Mr. Baxter may have had "an exacerbation of symptoms as a result of his work injury," but that there was no objective evidence of any worsening or aggravation of the preexisting condition, nor was there any evidence of any new injury resulting from the August 24, 2010, workplace accident. In Dr. Lowell's opinion, it is Mr. Baxter's preexisting, severe degenerative disk disease that prevents his ability to work at his previous position and duties.

31. At about the time that Dr. Lowell's report was received, DOE staff was advised that section 440.491 was likely to be repealed during the 2012 legislative session. In

response, DOE did nothing to advance any training and education screenings or referrals.

32. Section 440.491 was not repealed during the 2012 legislative session. Rather, duties and responsibilities for the administration of training and education screenings, reemployment assessments, vocational evaluations, and reemployment services that had been the responsibility of the DOE were transferred to the Department.

33. The transfer of duties from DOE to the Department was approved on April 20, 2012, but did not become effective until July 1, 2012. DOE personnel did not act on requests for retraining in the interim because they did not want to obligate funds to be applied to the Department's budget after the transfer of responsibilities. Given the disruption that resulted from the transfer of duties and staff to the Department, a vocational evaluation for Mr. Baxter was not arranged until October 2012.

34. The vocational assessment of Mr. Baxter was performed on November 2, 2012, by Karla Wooten, pursuant to a contract with the Department. The evaluation resulted in the submission of a Vocational Evaluation Final Report to the Department on November 20, 2012. The Final Report recommended that Mr. Baxter be afforded the opportunity to continue his education through

the Computer Information Technology, A.S.-degree program at Florida Gateway College.

35. On December 3, 2012, the Department issued its notice approving vocational education, which determined that the best way to return Mr. Baxter to suitable gainful employment was through the Computer Information Technology, A.S.-degree program at Florida Gateway College.

36. When it made its decision, the Department had the office-visit evaluation reports from Dr. Riddlehoover and Dr. Lowell, along with the information submitted with the Request for Screening and the completed forms and file materials from USIS. The Department accepted Dr. Riddlehoover's assessment of Mr. Baxter's injury as carrying more weight because he had seen Mr. Baxter on 10 occasions going back to his 2008 injury, and had authorized treatments over an eight to ten-month period.

37. Ring Power and USIS filed a petition disputing the Department's notice of approval on the basis that Mr. Baxter does not meet the qualifications for retraining. The vocational education program itself was not disputed.

38. On December 18, 2012, Mr. Baxter was again seen by Dr. Lowell. The visit was apparently non-eventful, as Dr. Lowell had no memory of it until presented with his report at his April 16, 2013, deposition. However, the report

indicated no change in Mr. Baxter's symptoms, and resulted in no change of his diagnosis or opinion.

39. There is no question but that Dr. Riddlehoover was more familiar with Mr. Baxter's symptoms as a result of his multiple office visits. However, testimony of Dr. Riddlehoover and Dr. Lowell regarding the cause of those symptoms, i.e., disk herniation versus disk degeneration, was based entirely on their reviews of the same MRI and X-rays.

40. Dr. Riddlehoover had been practicing orthopedics for six years at the time of his May 7, 2013, deposition testimony. He is not board certified in any area. His residency was in family practice, and his professional experience prior to his October 2007, association with The Orthopaedic Institute in Lake City, Florida, was exclusively as an Emergency Department Physician.

41. Dr. Lowell has specialized in orthopedics for the entirety of his professional career. He has been certified since 1996 in orthopedic surgery by the American Board of Orthopaedic Surgery. Dr. Lowell has published and presented on topics directly related to issues relevant to this proceeding, including disk herniations and epidural steroid treatments.

42. To be clear, the undersigned in no way discounts or denigrates Dr. Riddlehoover's record of medical training, experience, and service, which appears to be exemplary.

However, based on Dr. Lowell's depth of specialized knowledge, and the substance and certainty of his testimony regarding the cause of Mr. Baxter's inability to continue working at his previous level of exertion, the undersigned accepts Dr. Lowell's conclusion that Mr. Baxter's medical condition is the result of degenerative conditions that predate the workplace injury as being the most persuasive evidence on that issue.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.; Ring Power Corp. v. Campbell, 697 So. 2d 203, 206 (Fla. 1st DCA 1997).

44. As the parties asserting the affirmative of the issue, Respondents have the burden to demonstrate, by a preponderance of the evidence, that the Department's approval of training and education as a means of returning Mr. Baxter to suitable gainful employment is appropriate under section 440.491, Florida Statutes. Balino v. Dep't of HRS, 348 So. 2d 276, 280 (Fla. 2000); Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981); N. W. v. Dep't of Child. & Fam. Servs., 981 So. 2d 599 (Fla. 3d DCA 2008).

45. The issue for resolution in this case is not whether the training and education proposed for Mr. Baxter is appropriate, but whether Mr. Baxter qualifies for such training

and education at the expense of Petitioners as the result of a workplace injury.

46. Section 440.491(6), entitled "Training and Education," provides, in pertinent part, that:

(a) Upon referral of an injured employee by the carrier, or upon the request of an injured employee, the department shall conduct a training and education screening to determine whether it should refer the employee for a vocational evaluation and, if appropriate, approve training and education or other vocational services for the employee. At the time of such referral, the carrier shall provide the department a copy of any reemployment assessment or reemployment plan provided to the carrier by a rehabilitation provider. The department may not approve formal training and education programs unless it determines, after consideration of the reemployment assessment, that the reemployment plan is likely to result in return to suitable gainful employment. The department is authorized to expend moneys from the Workers' Compensation Administration Trust Fund, established by s. 440.50, to secure appropriate training and education at a Florida public college or at a career center established under s. 1001.44, or to secure other vocational services when necessary to satisfy the recommendation of a vocational evaluator. As used in this paragraph, "appropriate training and education" includes securing a general education diploma (GED), if necessary. The department shall by rule establish training and education standards pertaining to employee eligibility, course curricula and duration, and associated costs.

47. In accordance with the rulemaking authority conferred by the Legislature, the Department has adopted Florida Administrative Code Chapter 69L-22.

48. Rule 69L-22.006, entitled "Screening Process," provides, in pertinent part, that:

(2) The screening process shall consist of:

* * *

(b) A review of the documentation which supports the payment of temporary partial disability and wage loss benefits to determine the injured employee's inability to obtain suitable gainful employment because of his injury

49. Rule 69L-22.006 further provides, in pertinent part, that:

(9) The Department shall not refer the injured employee for a vocational evaluation if the injured employee:

* * *

(b) Has no documented permanent physical restrictions related to the injury. . . .

50. In this case, Respondents failed to establish, by a preponderance of competent, substantial evidence, that Mr. Baxter's inability to work at his previous position with Ring Power was the result of the August 24, 2010, workplace accident, or of any other compensable workplace accident. The greater weight of the evidence establishes that Mr. Baxter's physical restrictions are related to severe degenerative disk

disease that manifested before the August 24, 2010, workplace injury.

51. There is no requirement that an employer provide training benefits for physical restrictions which are unrelated to a work-related injury. Thus, Petitioners are not responsible for training and education benefits intended to return Mr. Baxter to suitable gainful employment.

RECOMMENDATION

Upon consideration of the above findings of fact and conclusions of law, it is

RECOMMENDED that the Department of Financial Services, Division of Workers' Compensation, enter a final order determining that Respondent, Jeffrey R. Baxter, is not eligible for reemployment services at Petitioners' expense.

DONE AND ENTERED this 3rd day of July, 2013, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of July, 2013.

ENDNOTE

^{1/} Both Dr. Riddlehoover and Dr. Lowell discussed their office assessment records in their depositions. Dr. Trimble is in the same practice firm with Dr. Riddlehoover, and his records fall under the same precepts applicable to Dr. Riddlehoover's records. Many of the records were introduced as joint exhibits, and in any event there was no objection to their authenticity. The records and the statements therein were produced as part of Mr. Baxter's efforts to obtain medical diagnosis and treatment. Based on the testimony of the doctors who produced and relied upon the records, the undersigned concludes that they fall within exceptions to the hearsay rule pursuant to sections 90.803(4) and 90.803(6), Florida Statutes.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.