

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

NATHAN LAVON FLORENCE,

Petitioner,

vs.

Case No. 16-0338

DEPARTMENT OF FINANCIAL  
SERVICES,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

Pursuant to notice, this case was heard on April 4, 2016, by video teleconference at sites in Tallahassee and Pensacola, Florida, before Suzanne Van Wyk, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Nathan Lavon Florence, pro se  
7970 Melbourne Avenue  
Pensacola, Florida 32534

For Respondent: Cynthia L. Jakeman, Esquire  
Division of Workers' Compensation  
Department of Financial Services  
200 East Gaines Street  
Tallahassee, Florida 32399-4229

STATEMENT OF THE ISSUE

Whether Petitioner is entitled to training and education at Respondent's expense in order to return him to suitable gainful employment.

PRELIMINARY STATEMENT

Petitioner was employed by Barnes Electric Company, Inc. (Barnes), as an electrician's helper when he suffered a compensable work-related injury. After a period of treatment, Petitioner's authorized treating physician assigned him a permanent impairment rating (PIR) of 15 percent and assigned work restrictions that limited him to medium-level work and prevented him from using power tools and lifting more than 20 pounds with his right hand. Barnes was unable to provide employment to Petitioner under the assigned restrictions.

Petitioner requested the Department of Financial Services, Division of Workers' Compensation (Department), perform an evaluation to determine if he qualified for vocational assistance to return to suitable gainful employment consistent with his post-injury condition.

On November 19, 2015, the Department determined that the best way for Petitioner to return to suitable gainful employment was through job placement assistance. Petitioner timely filed a Petition for Review challenging the Department's decision, and asserted that he was entitled to training and education, rather than job placement assistance, in order to return to suitable gainful employment.

The petition was forwarded to the Division of Administrative Hearings for a formal hearing. The final hearing was scheduled for April 4, 2016, and was held as scheduled.

At the final hearing, the parties offered Joint Exhibits J1 through J4, which were admitted in evidence. Petitioner testified on his own behalf and offered Exhibits P1 and P2, which were admitted in evidence. Respondent introduced the testimony of Cynthia Baker, vocational rehabilitation consultant; and Mary Cilek, senior management analyst supervisor. Respondent's Exhibits R1 through R9 were admitted in evidence. At the request of Respondent, the undersigned officially recognized Florida Administrative Code Rules 69L-22.006 and 69L-22.008.

The hearing was recorded and a one-volume Transcript of the proceedings was filed on May 9, 2016. On May 18, 2016, Respondent filed an Unopposed Motion for Extension of Time to Submit Recommended Order, which was granted. The parties were given until June 20, 2016, to file proposed recommended orders. Respondent timely submitted a Proposed Recommended Order which has been considered in the preparation of this Recommended Order. Petitioner did not make any post-hearing filing.

References to statutes are to Florida Statutes (2015) unless otherwise noted.

FINDINGS OF FACT

1. Respondent, the Department of Financial Services, Division of Workers' Compensation (Respondent or Department), 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. Petitioner, Nathan Lavon Florence, is a 37-year-old man residing in Pensacola, Florida. Petitioner received his Graduation Equivalent Diploma in 2001, and held a number of different jobs between 2001 and 2007, including line cook, sales associate, construction laborer, and warehouse worker.

3. Petitioner began an electrician apprenticeship program in 2007, which he completed in May 2012.

4. Petitioner began working for Barnes Electrical Company, Inc. (Barnes), as an electrician's helper in August 2013.

5. Barnes paid Petitioner biweekly at the rate of \$13 per hour for regular work and \$19.50 per hour for overtime.

6. On July 16, 2014, Petitioner suffered an on-the-job injury in which his right hand was crushed by a light pole. A workers' compensation claim (the underlying claim) was filed with Amerisure Insurance Companies, Barnes' workers' compensation carrier.

7. Petitioner's authorized treating physician was Dr. Steven Kronlage. On October 22, 2015, following three surgeries and a period of treatment, Dr. Kronlage determined Petitioner had attained maximum medical improvement and referred Petitioner for pain management.

8. Dr. Kronlage assigned Petitioner a permanent impairment rating of 15 percent and assigned the following work restrictions: medium-level work, no use of power tools with right hand, and no lifting more than 20 pounds with right hand.

9. According to the U.S. Department of Labor, medium-level work limits lifting to a maximum of 50 pounds.

10. Barnes was unable to offer Petitioner employment that met his work restrictions.

11. The parties to the underlying claim entered into a joint stipulation on January 14, 2016. The joint stipulation "resolv[ed] all issues" and provided, in pertinent part, as follows:

1. The parties agree that the Claimant's average weekly wage shall be amended upward by \$7.59 resulting in a new average weekly wage of \$386.09.

2. The Employer/Carrier shall recalculate Claimant's past indemnity benefits utilizing the average weekly wage of \$386.09 and shall pay past due benefits utilizing this average weekly wage plus penalties and interest.

12. Petitioner was represented by counsel in the underlying claim.

13. On November 8, 2015, Petitioner applied to the Department for a vocational assessment to determine the best way to return Petitioner to suitable gainful employment.

14. On November 19, 2015, the Department issued Petitioner a decision letter determining that the best way to return Petitioner to suitable gainful employment was through job placement assistance.

15. Cynthia Baker was the vocational rehabilitation consultant assigned to Petitioner's case. Ms. Baker based her recommendation for job placement assistance on Petitioner's educational background, his pre-injury average weekly wage (AWW), his work restrictions, and the "transferable skills" Petitioner could bring to the job market (e.g., knowledge of the English language; knowledge of materials, methods, and tools used in construction and repair of housing; and knowledge of machines and tools).

16. Ms. Baker conducted a labor market survey to identify job openings appropriate for Petitioner's skill level and work restrictions. Her goal was to identify jobs which could return Petitioner to employment at, or close to, his pre-injury AWW.

17. The labor market survey identified a variety of jobs available in the Pensacola area which Ms. Baker deemed suitable

to Petitioner's skill level and work restrictions. Potential jobs included customer service representative for Florida Pest Control, retail sales associate for T-Mobile, asset protection/loss prevention specialist for Home Depot, and vehicle transporter for Hertz.

18. Ms. Baker prepared a résumé for Petitioner to utilize in applying for jobs identified in the labor market survey, and she connected Petitioner with Michelle Godson at CareerSource, the customer service specialist who would further assist Petitioner with employment opportunities in the area.

19. Petitioner did not apply for any of the jobs identified by Respondent through the labor market survey. Rather, Petitioner found employment on his own and sought no further assistance from Respondent.

20. Petitioner began work in December 2015 with WIS International (WIS) as an inventory associate. The job entails traveling to, and conducting inventory for, a variety of retail stores in the region. Petitioner utilizes a hand-held scanner to complete retail inventories. Petitioner's rate of pay is \$8.50 per hour and he is paid on a weekly basis.

21. Petitioner works part-time for WIS, thus his earnings are below his pre-injury AWW. Petitioner has no plans to apply for a full-time position with WIS, although full-time work has become available with WIS during his employment.

22. Petitioner invested significant time and effort toward his electrician apprenticeship, and desires a career in a field he enjoyed as much as electrician's helper. Petitioner has requested the Department provide him with a training and education program to become a radiology (x-ray) technician. Specifically, he would like to attend Pensacola State College's Radiography Program.

23. Mary Cilek is a senior management analyst supervisor with the Department and reviewed Petitioner's request for training and education. Ms. Cilek researched information on the internet regarding the personal qualities of, and physical demands on, radiology technicians, as well as the educational requirements to become a radiology technician.

24. No competent evidence was introduced on which the undersigned could make a finding as to the particular educational requirements to become a radiology technician, or whether Petitioner would be able to perform the duties of a radiology technician within his work restrictions.<sup>1/</sup>

25. Petitioner's argument in this case is twofold: First, the Department should assist him to obtain a career, rather than "any old job" that would allow him to earn at or near his pre-injury AWW. Second, Petitioner objects to the Department's reliance on his pre-injury AWW as the basis for a labor market survey. Petitioner maintains that his pre-injury AWW was



artificially low because he was out of work, or working part-time, during some of the weeks prior to the injury due to an illness.

26. Section 440.491(1)(g), Florida Statutes, defines "suitable gainful employment" as

employment . . . that is reasonably attainable in light of the employee's age, education, work history, transferable skills, previous occupation, and injury, and which offers an opportunity to restore the individual as soon as practicable and nearly as possible to his or her average weekly earnings at the time of injury.

27. While Petitioner maintains that none of the jobs identified was reasonably obtainable, given Petitioner's work history, education, and work restrictions, Petitioner introduced insufficient evidence on which the undersigned could make that finding.<sup>2/</sup>

28. In this case, Petitioner's AWW was established by the stipulation. Petitioner introduced no evidence that he had moved to set aside the stipulation or otherwise challenge the determination of his AWW. Petitioner did not claim that the stipulation was obtained by either fraud or duress, or based on mistake of fact.

#### CONCLUSIONS OF LAW

29. 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).

30. As the party asserting the affirmative of the issue, Petitioner has the burden to demonstrate, by a preponderance of the evidence, that he is entitled to a training and education program to return him to suitable gainful employment, pursuant to section 440.491. Balino v. Dep't of HRS, 348 So. 2d 349, 350 (Fla. 1st DCA 1977); 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).

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

(a) [U]pon 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.

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

33. 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 . . . .

\* \* \*

(d) If the injured employee is eligible to receive reemployment services, the vocational assessment shall determine which of the following shall be offered to the injured employee: placement, and/or on-the-job training, and/or vocational evaluation, and/or a training and education program costing less than \$2,500 and lasting twelve (12) months or less.

34. In this case, Petitioner challenges the Department's determination that employment which would allow him to earn at or near his AWW at the time of the injury is suitable gainful employment. Primarily, Petitioner disputes Respondent's reliance on the stipulation as to his AWW in the underlying claim and sought to prove that his AWW was artificially low due to illness prior to his injury.

35. It is axiomatic that settlement agreements, like the stipulation in the underlying claim, are contracts. See Eagle FL VI SPE v. T&A Family P'ship, 177 So. 3d 1277, 1280 (Fla. 2d DCA 2015); Point Mgmt., Inc. v. Dep't of Bus. Reg., Div. of Fla. Land Sales & Condos., 449 So. 2d 306, 307 (Fla. 4th DCA 1984).

36. Relief is not warranted "where it appears that the stipulation was voluntarily undertaken and there is no indication that the agreement was obtained by fraud, misrepresentation, or mistake of fact." Id. quoting Henrion v. New Era Realty IV, Inc., 586 So. 2d 1295, 1298 (Fla. 4th DCA 1991).

37. While Petitioner's desire to pursue a career is laudable, Petitioner did not establish that employment within his work restrictions which allows him to earn at or near his pre-injury AWW is not suitable gainful employment.

38. Thus, Petitioner did not prove by a preponderance of the evidence that Respondent is responsible for training and education assistance pursuant to section 440.491(6).

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 Petitioner, Nathan Lavon Florence, is not eligible for training and education services at Respondent's expense.

DONE AND ENTERED this 1st day of July, 2016, in Tallahassee, Leon County, Florida.



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Suzanne Van Wyk  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of July, 2016.

ENDNOTES

<sup>1/</sup> Ms. Cilek testified that, in her opinion, Petitioner would not be able to perform the duties of radiology technician within his work restrictions. Ms. Cilek was not qualified as an expert witness, thus her opinion testimony was neither credible nor reliable. See § 90.701(2), Fla. Stat. ("If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when . . . [t]he opinions and inferences do not require a special knowledge, skill, experience, or training.").

Further, Ms. Cilek's testimony was based solely on articles and reports she obtained from the internet, which constitute hearsay. § 90.801(c), Fla. Stat. Those materials, although accepted in evidence, neither supplemented nor explained other non-hearsay evidence. Thus, the undersigned cannot make any finding of fact based solely on the evidence introduced. See Fla. Admin. Code R. 28-106.213(3) ("Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding[.]").

<sup>2/</sup> The record does reveal that one of the jobs identified in the labor market survey, store associate/stocker for Big Lots, was outside of Petitioner's work restrictions because it required the "ability to lift, carry, push and pull a minimum of 50 pounds." That requirement exceeds Petitioner's work restriction for lifting maximum loads of 20 pounds.

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.