

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
MIAMI DISTRICT OFFICE

Charles Clifton,
Employee/Claimant,

vs.

OJCC Case No. 12-005235MAM

Ring Power Corp. Pompano Beach / Crane
Divisions/USIS, FWCIGA/Florida Workers
Comp Guaranty Association,
Employer/ Carrier/Servicing Agent.

Accident date: 7/29/2011

ORDER GRANTING EMERGENCY MOTION TO COMPEL CLAIMANT'S ATTENDANCE AT
VOCATIONAL TESTING

This cause came for hearing before me on 02/03/14 pursuant to Employer/Carrier's Emergency Motion to Compel filed 01/27/14. Upon review of the motion, claimant's response thereto, and after hearing and considering the arguments of counsel, I hereby find as follows.

Claimant is seeking permanent total disability benefits. Previously, at employer/carrier's request, claimant attended what is being referred to as a "reemployment assessment" conducted by employer/carrier's vocational expert. Said expert is now recommending "vocational testing," which he says is necessary to complete the "reemployment assessment."

Claimant objects to the vocational testing on various grounds, including the assertion that the vocational expert in question made false or misleading statements to the claimant, that the expert's company is not a valid or legitimate business, and that the scope of the previous assessment already went well beyond the parameters of a permissible reemployment assessment, and included inappropriate questioning on irrelevant and highly personal matters.

At the outset of the hearing, the undersigned inquired as to exactly what statute or rule E/C and their expert were traveling under. This was because the terms "re-employment assessment," "vocational evaluation," and "vocational assessment" have been used interchangeably (not just in this case, but in many cases) and the use of imprecise terminology can lead to confusion as to the parties' rights and obligations, especially as it pertains to "vocational testing."

I find there is no such thing as a "vocational assessment," as that term is not found anywhere in the statute or the rules. There is a "vocational evaluation, which is defined in section 440.491(1)(h), and which is referred to in section 440.15(1)(e)1. and 2. as to a carrier's right to conduct vocational evaluations *and testing*. And there is a "reemployment assessment," which is defined in section 440.491(1)(d) and referred to in section 440.491(4) as to a carrier's

right to receive or obtain said assessment. By definition, a re-employment assessment includes the development of “a cost-effective physical and vocational rehabilitation plan”

A vocational evaluation (and testing) may be conducted at the carrier’s request under 440.15(1)(e). However, such right is limited to one vocational evaluation per year. Alternatively, a vocational evaluation may be conducted at the request of the Department of Financial Services, after a training and education screening, pursuant to section 440.491(6)(a).¹

In contrast, a reemployment assessment is a right given exclusively to carriers under 440.491(4), with no limitation on the number or frequency (although it would seem that some kind of reasonableness standard would apply).

Counsel for E/C in this case confirmed at the hearing that we are dealing here with a reemployment assessment and not with a vocational evaluation. This is supported by the letter from the vocational expert attached to the motion. The expert states, and E/C argues, that the recommended *vocational testing* is necessary to complete the reemployment assessment and development of the vocational rehabilitation plan.

The definition of reemployment assessment does not make any reference to the inclusion of vocational testing (nor does the definition of vocational evaluation). Rule 69L-22.0031(1)(f), which addresses what reemployment assessments are to include, makes reference to the “results of any vocational, interest, academic, psychological or other testing if conducted with the injured employee,” which seems to imply that testing can or even should be part of the assessment. On the other hand, the use of the term “testing” in conjunction with vocational evaluation in 440.15(1)(e), and the absence of the term “testing” in conjunction with reemployment assessments in 440.491(1)(d) and (4) might seem to imply that testing is (or can be) associated with one but not the other.

I find that the carrier is entitled to conduct a reemployment assessment under 440.491(4). I further find that there is no requirement for the assessment to take place on one day as opposed to over the course of two or more days. I also find that vocational testing is a permissible part of a reemployment assessment, when reading all the statutory sections and the administrative rules in para materia. I find that although reemployment assessments and vocational evaluations have separate and different definitions, they also have many similarities and serve the same goal: determining whether and to what extent the injured employee is capable of returning to gainful employment, and if so what the best way is to achieve that. I find that “vocational testing” is merely a tool that can be used under either or both a reemployment assessment or a vocational evaluation, in order to achieve that goal. I find that to deprive the carrier of the right to have their expert conduct the testing, would be to deprive them of their right to obtain or receive a *complete* reemployment assessment.

¹ Under previous versions of the statute, only the second alternative was available. *Eckert v Publix Supermarkets*, 783 So. 2d 1187 (Fla. 1st DCA 2001). However, under the current version, the statute has been amended to allow either the carrier or the department to conduct a vocational evaluation. *Douglas v Fla. Power & Light*, 921 So. 2d 750 (Fla. 1st DCA 2006).

Claimant's arguments and allegations regarding the reasonableness and appropriateness of the behavior of the vocational expert so far, have not gone unnoticed. However, I find that such allegations, even if accepted as true, go more toward the credibility of said expert and the weight to be given his opinion, and do not deprive the carrier of their right to obtain the testing in question.

WHEREFORE the Motion to Compel is GRANTED and claimant is ordered to appear for the recommended vocational testing provided that sufficient notice is given as to the date, time and location of such testing.

DONE AND ORDERED this 3rd day of February, 2014, in Chambers.



A blue ink handwritten signature of Mark Massey, written in a cursive style.

Mark Massey
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I HEREBY CERTIFY that the foregoing order
was posted to the DOAH website
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