
In the Matter of the Compensation of
EDWARD SCOTT, Claimant
WCB Case No. 14-02658
ORDER ON REVIEW
Carney Buckley Hays & Marsh, Claimant Attorneys
Gress & Clark LLC, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Sencer's order that: (1) found that its modified acceptance of several described conditions had been validly issued; and (2) found that its "updated" Notice of Acceptance at claim closure was inconsistent with the modified acceptance. On review, the issue is claim processing. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we summarize and supplement as follows.

On June 11, 2013, claimant sustained a compensable injury, which the employer accepted as a right knee strain. (Ex. 10). On November 8, 2013, the employer denied "current and/or pre-existing condition(s) of partial to full thickness cartilage loss, degeneration and tearing of the posterior horn of the medial meniscus * * *." (Ex. 31).

On November 20, 2013, the employer issued an Updated Notice of Claim Acceptance at Closure that referred to a disabling right knee strain. (Ex. 32). The employer also issued a Notice of Closure that awarded no permanent disability.

Claimant requested reconsideration. On February 4, 2014, an Order on Reconsideration rescinded the Notice of Closure. The reconsideration order found that claimant's accepted condition was not medically stationary and there were insufficient findings to determine extent of permanent disability. (Ex. 34-2).

Also on February 4, 2014, the employer "produced" a Modified Notice of Acceptance, stating that it was rescinding its November 8, 2013 denial and accepting "right knee strain, partial to full thickness cartilage loss, degeneration and tearing of the posterior horn of the medical [*sic*] meniscus as disabling." (Exs. 34A, 42). The modified acceptance stated that copies were mailed to claimant, claimant's counsel, WCD, the employer, and the employer's attorneys.

However, the parties stipulated to the following facts related to the claim adjuster's and the parties' attorneys' actions regarding the modified acceptance. The employer's claim adjuster retrieved copies of the modified acceptance that were addressed to claimant, WCD, the employer and its attorneys before they were mailed. (Ex. 42). The adjuster took this action because the modified acceptance indicated that the employer was accepting conditions (which it had previously denied) that it did not intend to accept. (*Id.*) The adjuster was unable to retrieve claimant's counsel's copy of the modified acceptance. Nevertheless, the employer's counsel contacted claimant's counsel before he had received it and requested that it be returned to him unopened. (*Id.*) Upon learning from the employer's counsel that the modified acceptance essentially accepted "pretty much everything," claimant's counsel declined to do so. (*Id.*)

Thereafter, the employer issued an Updated Notice of Acceptance at Closure that was limited to the right knee strain and did not include the other conditions. (Ex. 39-1). Claimant requested a hearing, asserting that the employer's acceptance should include the conditions in the earlier modified acceptance.

CONCLUSIONS OF LAW AND OPINION

Reasoning that claimant's attorney was his agent with authority to accept service and other notices, the ALJ determined that the employer was bound by its modified acceptance. The ALJ further concluded that a "clerical" error did not meet either of the two statutory grounds for revocation of a claim acceptance. *See* ORS 656.262(6)(a).

On review, the employer challenges the ALJ's conclusion that its modified acceptance was effective. In response, claimant asserts that because his counsel received the modified acceptance—whether by mistake or inadvertence—the acceptance became effective. Based on the particular facts presented, we conclude that this record does not establish that the employer accepted the conditions in question.

To begin, we note that it is undisputed that the employer did not mail a copy of the acceptance to claimant. Under such circumstances, we are disinclined to find that the modified acceptance was "furnished" to claimant, as required under ORS 656.262(6)(a).¹ However, in this particular case, we need not conclusively resolve that question. We reason as follows.

¹ That statute provides: "Written notice of acceptance or denial of the claim shall be furnished to the claimant by the insurer or self-insured employer within 60 days after the employer has notice or knowledge of the claim."

Even if claimant's attorney had authority to receive the modified acceptance on claimant's behalf and that such receipt would satisfy the "furnishing" of the acceptance as required by ORS 656.262(6)(a),² it is undisputed that, before claimant's counsel received the acceptance, the employer's counsel notified him that the acceptance was issued in error and should be disregarded. Because notice of this error reached claimant's counsel before he received the acceptance, we conclude that the employer effectively withdrew the modified acceptance.

Accordingly, the modified acceptance was not effective and, as such, was null and void.³ Therefore, we reverse.

ORDER

The ALJ's order dated September 18, 2014 is reversed. The Modified Notice of Acceptance is null and void. The ALJ's \$5,000 attorney fee award is reversed.

Entered at Salem, Oregon on April 29, 2015

² Claimant's retainer agreement does not expressly authorize his counsel to accept receipt of acceptance notices on his behalf. In the absence of an express authorization, we are also disinclined to find that the mailing of a copy of the employer's modified acceptance to claimant's counsel constituted "furnishing" the acceptance to claimant. In any event, for the reasons expressed above, we need not conclusively resolve this "authorization" question here.

³ The determination of the existence of an acceptance is a factual determination that is not necessarily dependent on the issuance of a formal acceptance notice. *See William H. Hoffnagle*, 66 Van Natta 1471, *recons*, 66 Van Natta 1522 (2014). (Notwithstanding absence of formal acceptance notice, record established that carrier's letter denying "new injury" claim was also acceptance of current condition under previously accepted claim). Here, as in *Hoffnagle*, no formal acceptance complying with all applicable statutory/regulatory requirement was issued. However, in contrast to *Hoffnagle*, for the reasons expressed above, this particular record persuasively establishes that the employer did not accept the disputed conditions.