

**FILED: December 29, 2011**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of  
Dirk E. Martin, Claimant.

DIRK E. MARTIN,  
Petitioner,

v.

SAIF CORPORATION  
and PENDLETON HEATING & AIR COND -THEWS SHEET METAL,  
Respondents.

Workers' Compensation Board  
0703740

A139520

Argued and submitted on July 08, 2010.

R. Adian Martin argued the cause for petitioner. With him on the brief was Ransom, Gilbertson, Martin & Ratliff, LLP.

Julene M. Quinn argued the cause for respondents.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Duncan, Judge.

ARMSTRONG, J.

Affirmed.

1 ARMSTRONG, J.

2 Claimant seeks judicial review of a Workers' Compensation Board order  
3 that upheld an order on reconsideration of the Appellate Review Unit (ARU) of the  
4 Department of Consumer and Business Services (DCBS) that changed the date of injury  
5 in a notice of closure. The issue on review is whether the director of DCBS and, by  
6 proxy, the ARU has authority on reconsideration of a notice of closure to modify the date  
7 of injury listed in the notice of closure. We review for legal error, ORS 183.482(8), and,  
8 because we conclude that the director has authority to modify the date of injury in a  
9 notice of closure to fulfill the director's task on reconsideration, we affirm.

10 The relevant facts are undisputed. Claimant, a sheet metal worker for 28  
11 years, sought medical treatment on December 13, 2004, for pain in his right hand and was  
12 diagnosed with arthritis in that hand. On January 25, 2005, he was further diagnosed  
13 with an overuse syndrome in his right hand. Claimant's last day at work was on January  
14 10, 2006, when he left work due to symptoms from a flu virus. On January 17, 2006,  
15 claimant filed an occupational disease claim for a hand and wrist condition. SAIF  
16 initially denied that claim; however, SAIF's denial was set aside in December 2006 by  
17 order of an administrative law judge (ALJ).

18 On March 30, 2007, SAIF issued an updated notice of acceptance to  
19 claimant for "unspecified pain to the dorsum of the right hand between the third and  
20 fourth metacarpals due to work exposure at Thews Sheet Metal." That same day, SAIF  
21 also issued a notice of closure to claimant, which awarded temporary disability  
22 compensation for the accepted condition but did not award any permanent partial

1 disability compensation. In both the updated notice of acceptance and the notice of  
2 closure, SAIF listed January 10, 2006, as the date of injury. Claimant requested  
3 reconsideration by the director of DCBS of SAIF's notice of closure.

4           After reviewing the record, the ARU, on behalf of the director, concluded  
5 that "claimant is significantly limited in repetitive use of the right hand due to the  
6 accepted condition." Additionally, the ARU found that the correct date of injury for  
7 claimant's occupational disease claim is December 13, 2004.<sup>1</sup> Based on that date of  
8 injury, the ARU calculated claimant's permanent partial disability compensation by  
9 applying the administrative rules in effect in December 2004 and issued an order on  
10 reconsideration modifying SAIF's notice of closure to award five percent scheduled  
11 permanent partial disability for claimant's right hand.

12           Claimant requested a hearing on the reconsideration order, arguing that the  
13 ARU lacked authority to change the January 10, 2006, date of injury listed in SAIF's  
14 notice of closure and that, based on the standards for determining disability compensation  
15 in effect in 2006, he was entitled to a larger permanent partial disability award. After the  
16 hearing, an ALJ issued an order concluding that December 13, 2004, is the correct date of  
17 injury and that the ARU correctly determined claimant's permanent partial disability  
18 award based on that date of injury. Claimant sought board review of the ALJ's order.  
19 The board issued an order affirming the ALJ, and claimant timely sought judicial review

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<sup>1</sup> For an occupational disease claim of the type at issue here, the date of injury is "the date of disability from the disease or the date of the first medical treatment of it." [Reynoldson v. Multnomah County](#), 189 Or App 327, 332, 75 P3d 477, *rev den*, 336 Or 192 (2003).

1 of the order. On judicial review, claimant argues that, by changing the date of injury in  
2 SAIF's notice of closure, the director of DCBS and, by proxy, the ARU, exceeded the  
3 authority granted by the legislature to the director and, therefore, erred in determining the  
4 amount of permanent partial disability compensation due claimant.

5           We begin our analysis by examining the reconsideration process and the  
6 director's role in it. Under ORS 656.268(5)(c), "[i]f a worker, insurer or self-insured  
7 employer objects to [a] notice of closure, the objecting party first must request  
8 reconsideration by the director \* \* \*." If a claim is not closed in accordance with the  
9 requirements of ORS 656.268(1), the director is authorized to rescind the notice of  
10 closure. ORS 656.268(6)(a)(C). Furthermore, if the director determines that the notice  
11 of closure has not correctly determined the amount of disability compensation due a  
12 claimant, the director will modify the amount and type of disability compensation as  
13 necessary to bring the notice of closure into conformance with the applicable standards  
14 for determining disability compensation. *See* ORS 656.726(4)(a) (the director is  
15 authorized to "issue orders which are reasonably required in the performance of the  
16 director's duties"); OAR 436-030-0135(8) (Feb 29, 2004) (reconsideration orders will  
17 address necessary changes to the amount of disability compensation).

18           Here, the notice of closure did not award claimant any permanent partial  
19 disability compensation. Thus, the director was responsible for determining whether  
20 claimant should be awarded permanent partial disability compensation and, if so, the  
21 amount of that award. However, as we will explain, in order to make that determination,  
22 the director necessarily had to first determine the correct date of injury and was

1 authorized to do that.

2 Under ORS 656.202(2), the amount of disability compensation awarded to  
3 a claimant is to be determined according to "the law in force at the time the injury giving  
4 rise to the right of compensation occurred." That requirement is pivotal in this case  
5 because there are different administrative rules for calculating permanent partial  
6 disability compensation depending on whether the injury occurred before or after January  
7 1, 2005. *Compare* OAR 436-035-0008 (standards for calculating disability benefits for  
8 injuries that occurred before January 1, 2005), *with* OAR 436-035-0009 (standards for  
9 calculating disability benefits for injuries that occurred on or after January 1, 2005).  
10 Thus, once the ARU concluded in this case that, based on the record, "claimant is  
11 significantly limited in repetitive use of the right hand due to the accepted condition," the  
12 ARU necessarily had to determine the date of injury and the applicable standards for  
13 calculating permanent partial disability compensation in order to complete its statutorily  
14 mandated task of reconsidering SAIF's notice of closure.

15 Furthermore, we conclude that the ARU was authorized to determine and  
16 change the date of injury in SAIF's notice of closure. As we have previously noted in  
17 other workers' compensation cases, an agency is authorized to decide matters that are  
18 committed to it by the legislature, unless the legislature has specifically limited the  
19 agency's authority to do so. [\*Boydston v. Liberty Northwest Ins. Corp.\*](#), 166 Or App 336,  
20 341, 999 P2d 503, *rev den*, 331 Or 191 (2000); *SAIF v. Fisher*, 100 Or App 288, 291, 785  
21 P2d 1082 (1990). Our review of the relevant statutes has revealed no limitation on the  
22 director's ability to change the date of injury listed in a notice of closure. We conclude

1 that the legislature's grant of reconsideration authority to the director encompasses the  
2 authority to determine and change the date of injury on reconsideration of a notice of  
3 closure and, accordingly, that the board did not err in affirming the ARU's  
4 reconsideration order.

5           Claimant disagrees with that conclusion. First, claimant contends that,  
6 under ORS 656.704 (2007), *amended by Or Laws 2009, ch 35, § 5,*<sup>2</sup> changing the date of  
7 injury in a notice of closure involves a matter concerning a claim, and, therefore, it is  
8 outside the director's review authority. Generally speaking, under ORS 656.704, the  
9 board has review authority over matters concerning a claim, and the director has review  
10 authority over matters *other* than those concerning a claim. Matters concerning a claim  
11 are defined as "those matters in which a worker's right to receive compensation, or the  
12 amount thereof, are directly in issue." ORS 656.704(3)(a). Thus, the ARU's  
13 determination of the date of claimant's injury and the amount of permanent partial  
14 disability compensation to which claimant is entitled are matters concerning a claim.

15           However, contrary to claimant's assertion, ORS 656.704 does not prevent  
16 the director from determining the amount of disability compensation to which a claimant  
17 is entitled on reconsideration of a notice of closure. As previously noted, the parties  
18 involved in a workers' compensation claim for which a notice of closure has been issued  
19 are *required* to first seek reconsideration of the notice of closure by the director before  
20 the board can hear a dispute over the amount of disability compensation. ORS

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<sup>2</sup> All subsequent references to ORS 656.704 are to the 2007 version.

1 656.268(5)(c). Once the director has issued an order on reconsideration resolving the  
2 parties' dispute over a notice of closure, only then can the board exercise its review  
3 authority over the notice of closure. *See Duncan v. Liberty Northwest Ins. Corp.*, 133 Or  
4 App 605, 610, 894 P2d 477 (1995). Accordingly, the legislature has carved out an  
5 exception to the general rule under ORS 656.704 that the director lacks authority over  
6 matters concerning a claim by requiring the director to engage in the review of such  
7 matters to the extent necessary to fulfill the reconsideration tasks assigned to the director  
8 regarding notices of closure.

9           Claimant additionally argues that, by changing the date of injury in SAIF's  
10 notice of closure, the ARU impermissibly changed the notice of acceptance, which  
11 claimant asserts may not be done "other than by the process set forth by the legislature at  
12 ORS 656.262(6)(a)." We disagree. ORS 656.262(6)(a) (2007), *amended by Or Laws*  
13 *2009, ch 171, § 3; Or Laws 2009, ch 526, § 1,*<sup>3</sup> provides that, once a claim is accepted,  
14 the insurer cannot revoke the acceptance unless the insurer establishes that certain  
15 circumstances exist, such as fraud or misrepresentation. However, the date of injury is  
16 not among the required information that must be included in a notice of acceptance. *See*  
17 *ORS 656.262(6)(b)*. Thus, while ORS 656.262(6)(a) protects the acceptance of a claim  
18 against revocation by an insurer, it does not prohibit the director from modifying the date  
19 of injury, and such a change by the director does not affect the insurer's acceptance of the  
20 underlying claim. Rather, changing the date of injury to conform to the record simply

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<sup>3</sup> All subsequent references to ORS 656.262 are to the 2007 version.

1 allows the director to correctly determine the amount of permanent partial disability to  
2 which a claimant is entitled, which is one of the tasks assigned to the director in the  
3 reconsideration process. Accordingly, we are not persuaded by claimant's arguments.

4           For the reasons described above, we conclude that the board did not err in  
5 affirming the ARU's reconsideration order.

6           Affirmed.