In the Matter of the Compensation of
DIRK E. MARTIN, Claimant
WCB Case No. 07-03740
ORDER ON REVIEW
Ransom Gilbertson Martin et al, Claimant Attorneys
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Otto's order that: (1) found that claimant's date of injury was December 13, 2004; and (2) affirmed an Order on Reconsideration that awarded 5 percent (7.5 degrees) scheduled permanent disability for loss of use or function of the right hand. On review, the issues are jurisdiction, "back-up" denial, and extent of scheduled permanent disability.

We adopt and affirm the ALJ's order with the following supplementation.

Claimant, a sheet metal worker, sought treatment for right hand pain on December 13, 2004. At that time, he was diagnosed with right hand arthritis, but he was diagnosed with an overuse syndrome on January 25, 2005. Claimant last worked on January 10, 2006. An occupational disease claim for a hand/wrist condition was filed on his behalf on January 17, 2006.

SAIF denied the claim on March 31, 2006, but a prior ALJ's order set aside the denial on December 12, 2006. SAIF ultimately accepted "unspecified pain to the dorsum of the right hand between the third and fourth metacarpals."

On March 30, 2007, SAIF issued a Notice of Closure, which awarded temporary disability, but no permanent disability. In its acceptance and closure of the claim, SAIF listed January 10, 2006 as the date of injury. Claimant requested reconsideration.

The Appellate Review Unit (ARU) of the Workers' Compensation Division (WCD) issued an Order on Reconsideration that found that claimant was significantly limited in the repetitive use of his right hand due to the accepted condition. The ARU also found that December 13, 2004 was claimant's date of injury. Applying the rules for calculating permanent disability benefits for claims with a date of injury before January 1, 2005, the ARU awarded 5 percent scheduled permanent disability for claimant's loss of use or function of his right hand.

Contending that January 10, 2006 was his date of injury and that his permanent disability award should, therefore, include "work disability," claimant requested a hearing. The ALJ found that December 13, 2004 was the correct date of injury because that was the date on which claimant first sought medical treatment for the accepted condition.

On review, claimant contends that the ARU lacked jurisdiction to reexamine the date of injury because it is a "matter concerning a claim," which falls within the Hearings Division's jurisdiction. Claimant also asserts that changing the date of injury was an impermissible "back-up" denial. Thus, claimant argues that his date of injury was January 10, 2006, and that he is therefore entitled to a larger scheduled permanent disability award. We disagree with claimant's contentions.

"Matters concerning a claim" are defined as "matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue." ORS 656.704(3)(a). The Hearings Division has jurisdiction over "matters concerning a claim" unless there is a statute setting forth an alternative procedure for resolving the dispute. ORS 656.283(1).

Here, there is a statute that sets forth a procedure for resolving disputes arising from a Notice of Closure. Under ORS 656.268(5)(c), a party that objects to a Notice of Closure must request reconsideration by the Director. Therefore, the ARU has jurisdiction to review all issues necessary for reconsideration of a Notice of Closure.[1] *Denise Coleman*, 55 Van Natta 3832, 3834-35, *on recons*, 55 Van Natta 4098 (2003).

Where the date of injury determines the method of calculating permanent disability benefits, it is an issue that arises from the claim closure, and therefore falls within the ARU's jurisdiction. *James T. Ellison*, 57 Van Natta 1465, 1469 (2005). Amendments to ORS 656.214 and ORS 656.726 providing for the award of work disability apply to injuries occurring on or after January 1, 2005. Or Laws 2003, ch 657, §§ 1, 3, 13. Thus, whether claimant is entitled to work disability depends on whether the date of injury was before January 1, 2005. *See* OAR 436-035-0008; OAR 436-035-0009. Because the calculation of claimant's disability depends on the date of injury, the ARU had jurisdiction over the issue.

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[1] Claimant contends that reconsideration may only address disagreement with the findings used to rate impairment. However, ORS 656.268(5)(c) merely provides that "a request for reconsideration by an insurer or self-insured employer may be based only on disagreement with the findings used to rate impairment." Because claimant, rather than SAIF, requested reconsideration, that limitation does not apply.

Citing *Deborah L. Hamelin*, 57 Van Natta 1643 (2005), claimant contends that the change in the date of injury amounted to an impermissible "back-up" denial under ORS 656.268(1). In *Hamelin*, the carrier initially accepted bilateral wrist tendonitis and denied several other conditions. The carrier later issued an "Updated Notice of Acceptance at Claim Closure" that listed as accepted the conditions that had been denied, but did not include the bilateral wrist tendonitis, and closed the claim. It then issued another "Updated Notice of Acceptance at Claim Closure" that listed only bilateral wrist tendonitis, and issued a second closure notice that purported to withdraw the first closure and replace it. The second closure notice stated that the earlier acceptance "was in error in that it included conditions that had been denied * * * and did not include the conditions that had actually been accepted."

In *Hamelin*, we rejected the carrier's argument that only bilateral wrist tendonitis had been accepted because the first "Updated Notice of Acceptance at Claim Closure" had been issued by mistake. 57 Van Natta at 1644. We noted that a valid acceptance may not be nullified because it was issued by mistake. *Id*. Accordingly, we found that the carrier's attempt to withdraw the acceptance was a "back-up denial" prohibited by ORS 656.262(6)(a).[2] *Id*. at 1645.

Here, claimant contends that by changing the date of injury, the ARU rescinded the initial acceptance, just as the carrier did in *Hamelin*, and imposed the acceptance of a different condition. However, *Hamelin* is distinguishable.

In *Hamelin*, the carrier successively accepted and denied several conditions. Here, by contrast, SAIF has not attempted to withdraw or revoke its acceptance, nor does it dispute the scope of its acceptance. SAIF acknowledges that the only condition at issue, the accepted "unspecified pain to the dorsum of the right hand between the third and fourth metacarpals," is compensable and that it is responsible for the condition. The change in the date of injury did not affect SAIF's liability for the accepted condition. Because the change does not affect SAIF's liability, it did not deny the accepted condition. *See Kathy L. Kellington*, 53 Van Natta 1418 (2001) (where the carrier initially accepted a low back strain and later accepted a low back strain combined with preexisting conditions, the later acceptance was not a denial of the earlier acceptance because it did not dispute the compensability of the low back strain).

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[2] We also rejected the carrier's argument that an Updated Notice of Acceptance issued pursuant to ORS 656.262(7)(c) is not subject to ORS 656.262(6)(a).

Because we have found that the Order on Reconsideration did not exceed the ARU's authority, we affirm the ALJ's order.

ORDER

The ALJ's order dated November 7, 2007 is affirmed.

Entered at Salem, Oregon on July 15, 2008