

**FILED: February 8, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of  
Debra Carr, Claimant.

PRESSING MATTERS  
and CNA CLAIMPLUS,  
Petitioners,

v.

DEBRA CARR,  
Respondent.

Workers' Compensation Board  
0900149

A143893

Argued and submitted on July 07, 2011.

Jerald P. Keene argued the cause and filed the briefs for petitioners.

Roger Ousey argued the cause and filed the brief for respondent.

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

ARMSTRONG, J.

Affirmed.

1                   ARMSTRONG, J.

2                   Employer seeks review of an order of the Workers' Compensation Board  
3 that determined that employer had prematurely closed claimant's claim because the  
4 supporting medical documentation lacked sufficient information to close the claim  
5 pursuant to ORS 656.268(1)(a). We conclude that the board did not err and affirm.

6                   After 20 years working as a presser for a drycleaner, claimant began to  
7 experience symptoms in both of her hands and arms. Employer accepted a claim for  
8 bilateral carpal tunnel syndrome and right lateral epicondylitis, and claimant had surgery  
9 on both hands. Employer closed the claim in March 2007. Claimant's symptoms  
10 continued, and employer reopened the claim on an aggravation basis on July 1, 2008. In  
11 August 2008, Dr. Korpa declared claimant's accepted conditions to be medically  
12 stationary and rated claimant's permanent impairment. Based on Korpa's report,  
13 employer issued a notice of closure on August 14, 2008, which it corrected on August 28,  
14 2008, awarding permanent disability benefits including "work disability."

15                   Claimant filed a request for reconsideration, checking a box on the request  
16 for reconsideration form indicating that she disagreed with the impairment findings, and  
17 seeking an impairment rating for chronic conditions of both wrists and the right elbow.  
18 Claimant did not check the box on the form that would request the notice of closure to be  
19 reviewed to determine whether the "the insurer closed my claim too soon or closed it  
20 improperly (*e.g.*, not medically stationary)." Claimant also did not indicate on the form  
21 that she was asserting a contention that the claim had been prematurely closed due to the  
22 lack in the physician's closing report of sufficient information under ORS 656.268(1)(a)

1 to rate her impairment.

2 The form on which to request reconsideration contains this notice:

3 "Notice to all parties: A request for reconsideration automatically includes  
4 review of the appropriateness of the closure under ORS 656.268 (*e.g.*  
5 medically stationary, sufficient information to close, etc.)["

6 The Department of Consumer and Business Services appointed Dr. Young  
7 as a medical arbiter to reassess claimant's impairment. Young examined claimant and  
8 reported that her bilateral carpal tunnel syndrome and right lateral epicondylitis  
9 conditions had worsened and that she was no longer medically stationary. In Young's  
10 opinion, claimant's worsened condition was attributable to her working beyond her  
11 restrictions. He recommended that claimant be retrained to light duty work and that she  
12 undergo a new nerve conduction study. He suggested that additional surgery might be  
13 necessary.

14 When a worker's condition deteriorates between the time of the notice of  
15 closure and the reconsideration so that the worker is no longer medically stationary, both  
16 parties may agree to postpone the reconsideration process until the worker's condition has  
17 stabilized. ORS 656.268(7)(i)(B); OAR 436-030-0165(9).<sup>1</sup> Employer declined to

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<sup>1</sup> ORS 656.268(7)(i)(B) provides:

"If the worker's condition has substantially changed since the notice of closure, upon the consent of all the parties to the claim, the director shall postpone the proceeding until the worker's condition is appropriate for claim closure[.]"

OAR 436-030-0165(9) provides:

"When the worker's medical condition is not stationary on

1 postpone the reconsideration proceeding until claimant was medically stationary. The  
2 department accordingly proceeded to reconsider the notice of closure as originally issued  
3 on August 14, 2008 (as corrected on August 28, 2008), and issued an order on  
4 reconsideration affirming employer's notice of closure and corrected notice of closure  
5 based on a report from claimant's attending physician, Korpa. On that same date,  
6 claimant's counsel forwarded to the department a report from Dr. Ampel, a consulting  
7 physician, concurring in the arbiter's conclusions and suggesting that claimant's worsened  
8 symptoms represented ulnar neuropathy, a condition not previously claimed or accepted.  
9 The department withdrew its original order so that claimant could offer Ampel's report  
10 into the record.

11 In its second order on reconsideration, the department adhered to the  
12 original order. Because employer had not consented to postponement of the  
13 reconsideration proceeding, the department determined claimant's impairment based on  
14 the record developed as of the time of closure on August 14, 2008. Because the medical

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reconsideration which may result in difficulties in obtaining findings of  
impairment by the arbiter, the director will, where appropriate, send a letter  
to the parties requesting consent to defer the reconsideration proceeding.

"(a) If the parties agree to the deferral, the reconsideration  
proceeding will be deferred until the medical record reflects the worker's  
condition has stabilized sufficiently to allow for examination to obtain the  
impairment findings. \* \* \*

"(b) If deferral is not appropriate, at the director's discretion either a  
medical arbiter examination or a medical arbiter record review may be  
obtained, or the director may issue an Order on Reconsideration based on  
the record available at claim closure and other evidence submitted in  
accordance with ORS 656.268(6)."

1 arbiter had determined that claimant was not medically stationary, the department did not  
2 use his report to rate impairment and instead used Korpa's rating of impairment. The  
3 department admitted Ampel's report into the record but declined to consider it for the  
4 purpose of rating claimant's impairment, because the attending physician had not  
5 reviewed it or concurred in it. *See SAIF v. Owens*, 247 Or App 402, 411-15, \_\_\_ P3d \_\_\_  
6 (2011) (on reconsideration, only the impairment findings of the medical arbiter and the  
7 attending physician may be considered in determining a claimant's impairment).

8           The order on reconsideration expressly addressed the issue of premature  
9 claim closure:

10           **"Medically Stationary/Premature Closure:**

11           *"The worker's attorney raised the issue of medically stationary status and*  
12 *premature closure. Upon review, we find the worker was seen by her*  
13 *attending physician on August 4, 2008, at which time the physician*  
14 *performed a complete closing evaluation, declared the worker medically*  
15 *stationary, and reported the worker had sustained no permanent impairment*  
16 *due to the accepted conditions. Therefore, the medically stationary date of*  
17 *August 4, 2008, as determined by the attending physician, is affirmed*  
18 *pursuant to OAR 436-030-0035(1). When the worker becomes medically*  
19 *stationary and the attending physician has provided a closing report*  
20 *detailing measurements and findings regarding permanent impairment, the*  
21 *claim qualifies for closure. See OAR 436-030-0020(1)(a) and OAR 436-*  
22 *035-0007(5). The claim closure of August 14, 2008, as corrected on*  
23 *August 28, 2008, was not premature. The Notice of Closure is affirmed in*  
24 *this regard."*

25 (Emphasis added.)

26           Claimant filed a request for hearing, arguing that Korpa's closing report did  
27 not contain "sufficient information" from which to determine permanent disability

1 pursuant to ORS 656.268(1)<sup>2</sup> and OAR 436-030-0020(2), and, thus, the claim had been  
2 closed prematurely. The ALJ agreed and set aside the notice of closure.

3 Employer appealed the ALJ's order to the board, contending that the ALJ  
4 should not have addressed claimant's objection to the sufficiency of the information in  
5 Korpa's report, because claimant had not preserved the issue of premature claim closure  
6 for consideration by the ALJ, as required by ORS 656.268(8) and ORS 656.283(7), by  
7 checking the box on the reconsideration request form that requested review of claim  
8 closure, or by otherwise raising the issue in her request for reconsideration.

9 ORS 656.268(8) provides:

10 "No hearing shall be held on any issue that was not raised and  
11 preserved before the director at reconsideration. However, issues arising  
12 out of the reconsideration order may be addressed and resolved at hearing."

13 Similarly, at the relevant time, ORS 656.283(7) (2007) provided:

14 "Evidence on an issue regarding a notice of closure that was not  
15 submitted at the reconsideration required by ORS 656.268 is not admissible  
16 at hearing, and issues that were not raised by a party to the reconsideration  
17 may not be raised at hearing unless the issue arises out of the  
18 reconsideration order itself."

19 In employer's view, under those statutes, only issues that are preserved by a claimant on  
20 reconsideration may be raised at the hearing. Employer contended that, claimant having

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<sup>2</sup> ORS 656.268(1) provides that "[t]he insurer or self-insured employer shall close the worker's claim \* \* \* when:

"(a) The worker has become medically stationary and there is sufficient information to determine permanent disability[.]"

1 failed on reconsideration to challenge the notice of closure as premature, she could not  
2 assert that ground before the ALJ or the board.

3           The board rejected employer's preservation argument, noting that OAR  
4 436-030-0115(5) expressly required that, on reconsideration, "the director will review  
5 those issues raised by the parties *and the requirements under ORS 656.268(1)*."  
6 (Emphasis added.) The board explained that ORS 656.268(1) provides that a claim may  
7 be closed only when the worker "has become medically stationary and there is sufficient  
8 information to determine permanent disability." The board reasoned that the issue of  
9 premature closure is necessarily among the issues that the Appellate Review Unit (ARU)  
10 *must* consider on reconsideration and, thus, the question whether there is sufficient  
11 information for closure arises out of the reconsideration order itself and need not be  
12 separately preserved by the claimant.

13           Employer further contended that, if the board is correct that the issue was  
14 preserved for the board's review, sufficient information existed to close the claim. On  
15 that issue, the board also agreed with claimant, concluding that employer lacked  
16 sufficient information to close the claim based on Korpa's report and that the notice of  
17 closure was therefore premature.

18           On judicial review, employer contends that the board's analysis is flawed.  
19 Employer continues to dispute the board's conclusion that every reconsideration request  
20 necessarily puts before the director the issues whether the claimant was medically  
21 stationary and whether there was sufficient information for claim closure and,  
22 consequently, there is no need for a claimant to specifically assert on reconsideration that

1 a claim was not ripe for claim closure. In employer's view, the board's rationale conflicts  
2 with ORS 656.268(8) and ORS 656.283(7) and effectively renders superfluous the  
3 preservation requirements of those statutes. Employer concedes that, as the board held,  
4 there are some issues (including premature closure and whether the claimant is medically  
5 stationary or there is sufficient information for closure) that are inherently a part of every  
6 impairment rating and that, necessarily, must be "considered" by the director on  
7 reconsideration. For example, employer does not dispute that, under ORS  
8 656.268(6)(a)(C), the director has authority to set aside any claim closure that was not  
9 closed in accordance with ORS 656.268(1). However, in employer's view, despite the  
10 director's authority and obligation to consider those issues on reconsideration, a claimant  
11 must nonetheless raise particular concerns about premature claim closure with the  
12 director in order to preserve challenges to the director's order based on those issues.

13           We are in general agreement with employer's statutory analysis. Although  
14 the director has the authority (and the obligation) under ORS 656.268 to consider issues  
15 relating to the correctness of claim closure, in order to preserve a challenge to the  
16 director's order based on a defect in claim closure, *the claimant* must raise that issue with  
17 the director. It is not sufficient to conclude, as the board reasoned, that the issue of  
18 premature closure is implicitly "raised" in every order by virtue of the director's  
19 obligation to evaluate whether a claim was properly closed. In order to be preserved for  
20 hearing, the issue of premature claim closure must be raised by the claimant seeking

1 reconsideration.<sup>3</sup>

2           In any event, we conclude that the issue of premature closure *was*  
3 preserved. The order on reconsideration recited that "[t]he worker's attorney raised the  
4 issue of medically stationary status and premature closure" and contained a paragraph  
5 resolving that issue. Employer describes that statement as "anomalous," in view of the  
6 fact that claimant did not check the box on the reconsideration request form indicating  
7 that she was raising premature closure as an issue. However, the medical arbiter reported  
8 that claimant was no longer medically stationary. The ARU itself sent a letter to the  
9 parties explaining that the medical arbiter had reported that claimant was not medically  
10 stationary and asking whether the parties agreed to postpone the reconsideration  
11 proceeding. Claimant also submitted to the ARU a report by Dr. Ampel, who concurred  
12 in the medical arbiter's view and expressed the independent opinion that claimant was  
13 never medically stationary. Although the medical arbiter's report and Ampel's report  
14 were not used to rate claimant's impairment, they were a part of the record and the  
15 appellate reviewer was presumably aware of them and their implication that claimant was  
16 challenging the closure as premature. In light of that, we conclude that the board  
17 correctly concluded that the question of premature closure was before it.

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<sup>3</sup> We note that this case is distinguishable from [\*Pietrzykowski v. Albertsons, Inc.\*](#), 212 Or App 421, 427-28, 157 P3d 1268 (2007). There, we held that, on the claimant's request for reconsideration, the *employer* had no obligation to preserve the precise argument that it made before the ALJ as to why the evidence in the reconsideration record failed to meet the claimant's burden of proof. Here, the question is whether, on the claimant's request for reconsideration, the *claimant* must raise challenges in aid of the claimant's own burden of proof in order to preserve those challenges for hearing.

- 1                   Employer does not challenge on review the board's determination that
- 2   employer did not have sufficient information to close the claim.
- 3                   Affirmed.