
In the Matter of the Compensation of
GAYLEN J. KILTOW, Claimant
WCB Case No. 11-03049
ORDER ON REVIEW
Ronald A Fontana, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Rissberger's order that: (1) reversed an Order on Reconsideration that found claimant's left foot claim not prematurely closed; (2) declined to address claimant's permanent disability resulting from a Notice of Closure; and (3) declined to assess penalties and attorney fees against the SAIF Corporation for allegedly unreasonable claim processing. On review, the issues are claim processing, premature closure, issue preclusion, permanent disability (impairment and work disability), penalties, and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as supplemented and summarized as follows.

Procedural History

In February 2008, claimant injured his left foot when he jumped out of a truck and landed on a rock. He developed a foot ulcer and sought medical treatment.

In June 2008, SAIF accepted "foot ulcer, plantar, left second metatarsal head area with subsequent cellulitis and abscess formation combined with type II diabetes mellitus." (Ex. 4). In December 2008, SAIF issued a "ceases" denial under ORS 656.262(6)(c), stating that claimant's "accepted injury is no longer the major contributing cause of [his] combined left foot condition." (Ex. 5).

Claimant requested a hearing on that denial, which was set aside by an earlier ALJ's order, which found that claimant's diabetes was a "predisposition," and not a "contributing cause" of his left foot condition or any disability/need for treatment of that condition. (Ex. 6).¹ SAIF consequently modified its Notice of

¹ The ALJ's order was affirmed and is final. (Ex. 13A).

Acceptance to reflect the absence of a “combined condition,” and informed claimant that his claim remained “open and accepted for: [f]oot ulcer, plantar, left second metatarsal head area with subsequent cellulitis and abscess formation.” (Ex. 7).

A December 7, 2010 Notice of Closure closed claimant’s left foot claim for those accepted conditions, with an award of 12 percent whole person impairment and 36 percent work disability. (Ex. 18). Claimant requested reconsideration, specifically disagreeing with the rating of permanent disability and the base functional capacity (BFC) used in the closure. (Ex. 23). He did not raise premature closure as an issue. (*Id.*)

In a January 19, 2011 Order on Reconsideration, the Appellate Review Unit (ARU) identified the accepted conditions as “[f]oot ulcer, plantar, left second metatarsal head area with subsequent cellulitis and abscess formation *combined with type II diabetes mellitus.*” (Ex. 28-1) (emphasis added). The ARU then determined that the claim was prematurely closed because claimant’s attending physician did not provide an opinion as to whether “the *accepted combined condition*” was “medically stationary,” but rather only stated that the “accepted foot ulcer, plantar, left second metatarsal head area with subsequent cellulitis and abscess formation conditions [were] medically stationary.” (Ex. 28-2) (emphasis added). The ARU further found that the record contained medical evidence that claimant had a vascular impairment that was “due to the diabetes mellitus condition,” and that SAIF “did not obtain the appropriate classification in order to accurate[ly] rate the vascular impairment.” (*Id.*) Thus, the ARU found that SAIF did not “obtain sufficient information to determine the extent of permanent disability for *all of the accepted conditions.*” (*Id.*) (emphasis added). Consequently, the ARU rescinded the December 7, 2010 Notice of Closure. (Ex. 28-3).

SAIF requested a hearing concerning the January 19, 2011 Order on Reconsideration. (Ex. 30A). On March 29, 2011, the request was dismissed after SAIF withdrew its request for hearing. (Ex. 30B).

On April 1, 2011, SAIF issued a second Notice of Closure, which listed the same accepted conditions as its December 7, 2010 Notice of Closure, *i.e.*, “foot ulcer, plantar, left second metatarsal head area and subsequent cellulitis and abscess formation.” (Ex. 31). The April 2011 closure notice awarded 17 percent whole person impairment, and 37 percent work disability. (*Id.*)

Claimant sought reconsideration, asserting that the claim was prematurely closed, and disagreeing with the Notice of Closure's medically stationary date, temporary disability dates, and rating of permanent disability. (Exs. 35, 35A).

In a June 14, 2011 Order on Reconsideration, the ARU again identified the accepted conditions as: "foot ulcer, plantar, left second metatarsal head area and subsequent cellulitis and abscess formation *combined with type II diabetes mellitus.*" (Ex. 41). The ARU again found the claim prematurely closed and rescinded the April 1, 2011 Notice of Closure. (Ex. 41-3). The ARU reasoned that: (1) SAIF had not obtained the "required vascular findings" concerning the "*diabetes condition*"; and (2) the "medically stationary status" of "the *accepted diabetes condition*" was "unclear." (*Id.*) (emphases added). SAIF requested a hearing.

Permanent Disability

The April 1, 2011 Notice of Closure awarded 17 percent whole person impairment. (Ex. 31-4). In doing so, the closure notice attributed 85 percent of claimant's range of motion (ROM) findings to the accepted conditions. (*Id.*)

The closure notice also awarded 37 percent work disability, based on a 20 percent value for social/vocational factors. (*Id.*) That social/vocational value used a BFC of "medium" and a residual functional capacity (RFC) of "sedentary." (*Id.*)

In claimant's request for reconsideration, he asserted that the claim was closed prematurely and disagreed with, among other things, "the rating of permanent disability." (Ex. 35A). In his written submission to the ARU, claimant contended that, if the April 1, 2011 Notice of Closure was not set aside, he was entitled to increased compensation because: (1) his at-injury job was "heavy" or "very heavy," rather than "medium"; and (2) he should be awarded an additional 15 percent for his loss of ROM. (Ex. 35-2). Claimant also requested penalties. (*Id.*)

CONCLUSIONS OF LAW AND OPINION

The ALJ set aside the June 14, 2011 Order on Reconsideration, but did not proceed to determine the extent of claimant's permanent disability.² In setting aside the reconsideration order, the ALJ determined that the ARU's previous

² Rather, the ALJ concluded that claimant could again request reconsideration of the Notice of Closure. Yet, only one reconsideration proceeding may be held on each Notice of Closure. ORS 656.268(6)(a). In essence, the ALJ's order attempted to remand the claim to the ARU for the issuance

January 19, 2011 Order on Reconsideration, which had rescinded SAIF's earlier December 7, 2010 Notice of Closure, was not preclusive concerning the currently-disputed June 14, 2011 Order on Reconsideration, which concerned SAIF's April 1, 2011 Notice of Closure.

On review, claimant contends that, because the January 19, 2011 Order on Reconsideration had become "final," that order precludes a finding that the April 1, 2011 Notice of Closure was not premature. In advancing that argument, claimant relies on both the "law of the case" doctrine and "issue preclusion."

In the event that we affirm that portion of the ALJ's order that set aside the January 19, 2011 Order on Reconsideration, claimant seeks an additional permanent disability award. Specifically, he asserts that 100 percent (rather than 85 percent) of his loss of ROM was due to his accepted conditions. He further argues that his work disability award should be increased because: (1) his BFC should be classified as "very heavy" or "heavy," but not "medium" as determined in the April 1, 2011 Notice of Closure; and (2) his RFC should be "sedentary restricted," as opposed to "sedentary."³

SAIF asserts that the earlier January 19, 2011 Order on Reconsideration's rationale regarding its "premature closure" finding did not prohibit the ALJ from setting aside the more recent June 14, 2011 Order on Reconsideration's premature closure finding (which had been based on a similar rationale). Concerning the extent of claimant's permanent disability, SAIF asks that we affirm the Notice of Closure. SAIF further asserts that claimant did not properly preserve the issue of the appropriate RFC value. We address each of the parties' contentions, in turn.

of another Order on Reconsideration. There is, however, no authority that permits remand to ARU in these circumstances. See *Pacheco-Gonzalez v. SAIF*, 123 Or App 312, 316-17 (1993) (Board lacked authority to remand to the Director when a reconsideration order was invalid); *Francisco D. Parda*, 55 Van Natta 2785, 2788 (2003) (Board lacked the authority to remand to ARU for a second medical arbiter examination); *Melody R. Ward*, 52 Van Natta 241 (2000) (Board lacked the authority to remand a matter to ARU for clarification of a medical arbiter report). Consequently, consistent with the aforementioned points and authorities, the extent of claimant's permanent disability must be determined based on the reconsideration record, as developed at the hearing level.

³ Because, as explained below, we affirm the April 1, 2011 Notice of Closure, claimant is not entitled to the requested penalty under ORS 656.268(5)(e), or to any attorney fee award, which he requested under ORS 656.382(1), ORS 656.386, and ORS 656.388. Likewise, we do not address SAIF's arguments concerning any entitlement to such penalties or attorney fees, or the appropriate amount for the requested attorney fee awards.

Claimant first contends that we are barred, under the doctrines of “issue preclusion” or “the law of the case,” from addressing whether the April 1, 2011 Notice of Closure was premature because an earlier (and final) January 19, 2011 Order on Reconsideration determined that a previous December 7, 2010 Notice of Closure was premature. For the following reasons, we disagree with claimant’s contention.

Issue preclusion “precludes future litigation on a subject issue only if the issue was ‘actually litigated and determined’ in a setting where ‘its determination was essential to’ the final decision reached.” *Drews v. EBI Companies*, 310 Or 134, 139 (1990) (quoting *North Clackamas School Dist. v. White*, 305 Or 48, 53, *modified*, 305 Or 468 (1988)). In *Washington Cty. Police Officers v. Washington Cty.*, 321 Or 430, 435 (1995), the Supreme Court explained that a decision in a prior proceeding may preclude relitigation of the issue in another proceeding if five requirements are met: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded has had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which this court will give preclusive effect.

In *Brian L. Schmitt*, 51 Van Natta 393, *aff’d without opinion*, 164 Or App 536 (1999), we addressed the application of issue preclusion to a Notice of Closure that issued subsequent to a final Board order that had rescinded an earlier Notice of Closure as premature. We explained that “ORS 656.268(1) permits an insurer to close accepted claims when the compensable conditions have become medically stationary.” *Schmitt*, 51 Van Natta at 394. Thus, despite a final Board order determining that a particular Notice of Closure was premature, “[t]he statutory scheme allowed the insurer to again close the claim when it determined that the compensable condition had become medically stationary.” *Id.*; *see also Drews*, 310 Or at 143 (statutory scheme may expressly contemplate that successive proceedings may be brought, notwithstanding the finality of the first proceeding). Consequently, we determined that issue preclusion did not prevent a new examination of the propriety of the most recent closure, notwithstanding a previous final order concerning an earlier notice of closure. *Schmitt*, 51 Van Natta at 394.

Likewise, here, the ARU’s January 19, 2011 Order on Reconsideration is a final order concerning whether the previous December 7, 2010 Notice of Closure was premature. However, the issue presently before us is whether the *April 1*,

2011 Notice of Closure was premature, an issue that could not have been decided by the January 19, 2011 Order on Reconsideration. *See id.* Therefore, “issue preclusion” does not preclude a determination concerning the propriety of the April 1, 2011 Notice of Closure.⁴

Similarly, the doctrine of the “law of the case” also does not apply to SAIF’s April 1, 2011 Notice of Closure. “The ‘law of the case’ doctrine is a general principle of law that when a ruling or decision has been once made in a particular case by an appellate court, * * * it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review.” *See Steven J. Depue*, 61 Van Natta 799, 800 (2009). Here, as set forth above, a subsequent Notice of Closure, issued after a previous notice was set aside

⁴ In other words, because of the unique and limited nature of an order rescinding a Notice of Closure as premature, such a final order does not satisfy four of the requisite criteria for issue preclusion to apply to a potential future Notice of Closure. Specifically, (1) the issue as to whether an earlier Notice of Closure was premature is not identical to whether a subsequent Notice of Closure is premature; (2) the issue of the premature nature of a future Notice of Closure would not have been actually litigated and essential to a final decision on the merits in the prior proceeding that determined whether a previous Notice of Closure was premature; (3) there would not be a full and fair opportunity to be heard in the prior proceeding on the issue of the premature nature of a future and yet-to-be-issued Notice of Closure; and (4) the prior proceeding, which was limited to the premature nature of an earlier Notice of Closure, is not the type of proceeding intended to have preclusive effect on a future Notice of Closure, the issuance of which is permitted by the statutory scheme.

Claimant’s contention could also be interpreted as an assertion that the ARU’s earlier determination that SAIF independently accepted the diabetes condition had a preclusive effect on the subsequent claim closure. Yet, we agree, for the reasons set forth in the ALJ’s order, that such an issue was not actually litigated before the ARU, and that the ARU’s proceeding was not the type that would have preclusive effect concerning a “scope of acceptance” issue.

Moreover, when an Order on Reconsideration makes a determination that a Notice of Closure is premature, that notice is rescinded and, effectively, no longer exists. Thus, we do not agree with claimant’s apparent contention that findings made in rescinding a particular Notice of Closure should be granted preclusive effect when determining the propriety of a future Notice of Closure.

We further note that the purposes of the issue preclusion doctrine “are to prevent parties from being harassed by successive, duplicative proceedings and to promote the efficient use of judicial resources.” *Thomas v. U.S. Bank Nat. Ass’n*, 244 Or App 457, 469 (2011); *accord White*, 305 Or at 50. Those purposes are not effectuated by applying the issue preclusion doctrine here. As explained above, the two (or possibly more) proceedings may not accurately be described as “duplicative,” given that they involve different Notices of Closure with different dates of closure. Moreover, the statute expressly contemplates that, once a particular Notice of Closure is rescinded because it was premature, a carrier may issue a subsequent Notice of Closure with a new closure date, the propriety of which may be determined in a new proceeding.

as premature, is expressly contemplated by the statutory scheme. Moreover, such a subsequent closure notice does not constitute a “further step or proceeding[] in the same litigation” as the prior closure notice, but rather constitutes a new Notice of Closure to be decided on its own terms. *See Schmitt*, 51 Van Natta at 394. Consequently, the January 19, 2011 Order on Reconsideration, which found SAIF’s December 7, 2010 Notice of Closure to be premature, does not establish the “law of the case” concerning whether SAIF’s subsequent April 1, 2011 Notice of Closure was premature.

Therefore, we agree with the ALJ’s conclusion that the January 19, 2011 Order on Reconsideration does not have preclusive effect concerning whether the April 1, 2011 Notice of Closure was premature.

With respect to the April 1, 2011 Notice of Closure and June 14, 2011 Order on Reconsideration, the ALJ determined that the claim was not prematurely closed. In reaching its reconsideration decision, the ARU had reasoned that: (1) the accepted conditions for the closed claim included “type II diabetes mellitus”; (2) SAIF had not obtained vascular and endocrine system impairment findings due to that diabetes condition; and (3) the medically stationary status of the diabetes condition at the time of claim closure was “unclear.” (Ex. 41-3).

The ALJ, however, noted that SAIF’s Modified Notice of Acceptance, on which the April 1, 2011 Notice of Closure was based, did not include any acceptance of “type II diabetes mellitus.” The ALJ further explained that SAIF’s prior acceptance of “type II diabetes mellitus” as the “preexisting condition” component of a “combined condition” did not mean that it was obligated to *accept* the diabetes condition as independently compensable once a prior ALJ determined that the diabetes condition did not “contribute[] to disability or need for treatment,” and was, therefore, not a statutory “preexisting condition.” *See* ORS 656.005(24)(a); (*see also* Ex. 6-6 through 11). Consequently, the ALJ set aside the June 14, 2011 Order on Reconsideration, which was premised on the erroneous conclusion that the closed claim included an accepted “type II diabetes mellitus” condition.

We have previously held that a determination of whether a claim has been prematurely closed (because the claimant’s conditions were not medically stationary) must focus only on those conditions that were accepted at the time of claim closure. *John H. Dixon*, 56 Van Natta 1171, 1172 (2004); *Joseph A. Gerber*, 51 Van Natta 278, 279-80 (1999); *James L. Mack*, 50 Van Natta 338, 339-40 (1998). Claimant does not challenge that legal premise, but maintains that, despite

SAIF's Modified Notice of Acceptance at closure, SAIF accepted and continues to accept the "type II diabetes mellitus" condition by way of its previous "combined condition" acceptance and denial. For the following reasons, we disagree with claimant's position.

The scope of an acceptance is a question of fact. *Columbia Forest Products v. Woolner*, 177 Or App 639, 643 (2001); *Lillian A. Wilkinson*, 63 Van Natta 1839, 1841 (2011). Here, SAIF's initial Notice of Acceptance listed the accepted conditions as: "foot ulcer, left second metatarsal head area with subsequent cellulitis and abscess formation *combined with type II diabetes mellitus*." (Ex. 4) (emphasis added). SAIF subsequently issued a denial under ORS 656.262(6)(c), reiterating that acceptance, but stating that the "otherwise compensable injury [had] combined with one or more preexisting conditions," and that the "accepted injury is no longer the major contributing cause of [the] combined left foot condition." (Ex. 5).

We do not interpret the Notice of Acceptance as accepting the type II diabetes condition as being independently compensable, but rather as accepting that condition as the "preexisting condition" component of a combined condition. *See Susan E. Deshon*, 63 Van Natta 1391, 1394 (2011) (a "combined condition" consists of two components: (1) "an otherwise compensable injury"; and (2) a statutory "preexisting condition"). As set forth above, a prior ALJ disagreed with SAIF's determination that claimant had a "combined condition," finding that the asserted "preexisting condition" of "type II diabetes mellitus" did not qualify as a statutory "preexisting condition." (Ex. 6). Consistent with that prior ALJ's order, SAIF modified its acceptance notice to remove any reference to a "combined condition" or to the previously alleged "preexisting condition" (*i.e.*, type II diabetes mellitus). (*See Exs. 6, 7, 18, 31*). Such claim processing is consistent with the prior ALJ's order.⁵ Claimant may, of course, challenge that acceptance notice. *See* ORS 656.262(6)(d); ORS 656.267.

We turn to claimant's contention that he is entitled to an additional permanent disability award. He first asserts that his BFC should be "heavy" or "very heavy," rather than "medium," as used in the April 1, 2011 Notice of Closure. Based on the following reasoning, we disagree.

⁵ We note that the prior ALJ did not direct SAIF to modify its acceptance to include the type II diabetes mellitus condition as an accepted condition. Rather, the prior ALJ's order set aside SAIF's denial and remanded the claim to SAIF for further processing in accordance with the law. (Ex. 6-12).

Claimant's BFC is determined by the highest strength category of the job(s) successfully performed by him during the five years prior to the date of injury. OAR 436-035-0012(9)(a).⁶ The strength categories are found in the Dictionary of Occupational Titles (DOT). *Id.* However, if a preponderance of evidence establishes that the requirements of a specific job differ from the DOT descriptions, a specific job analysis that includes the strength requirements may be substituted for the DOT description(s) if it most accurately describes the job. *Id.*

Here, claimant performed the same job during the five years before the date of injury. Although SAIF requests, in part, that we use the strength category (medium) for DOT 905.663-010 (garbage collector driver (motor trans.)), we find that a preponderance of the evidence establishes that the requirements of claimant's specific job differs from the DOT description. *See* OAR 436-035-0012(9)(a); *Oath Boun*, 60 Van Natta 505, 506-7 (2008). In reaching that determination, we rely on the more detailed and specific job analysis completed by a vocational counselor. (Ex. 26).

Because that specific job analysis also includes the strength requirements for claimant's job, and most accurately describes that job, we use that analysis to determine his BFC. OAR 436-035-0012(9)(a). The job analysis determined that claimant occasionally lifted up to 40 pounds. (Ex. 26-3). Under OAR 436-035-0012(8)(h), (9)(a), such strength requirements result in a BFC of "medium."⁷

Claimant next contends that his RFC should be "sedentary restricted," as opposed to "sedentary." SAIF responds that claimant has raised the RFC issue for the first time on Board review.

It is our general practice to not consider issues raised for the first time on review. *Shannon D. Summers*, 60 Van Natta 2637, 2639 (2008); *see also Fister v. South Hills Health Care*, 149 Or App 214 (1997), *rev den*, 326 Or 389 (1998) (absent adequate reason, Board should not deviate from its well-established

⁶ Because claimant's claim was closed by an April 1, 2011 Notice of Closure, WCD Admin. Order 10-051 (eff. June 1, 2010) applies. OAR 436-035-0003(1).

⁷ Claimant references another portion of the job analysis reporting that he used 50 to 100 pounds of force for occasionally "pushing or pulling." Yet, the Director's rules refer to "lifting/carrying" limitations as the strength criteria for purposes of determining BFC. *See* OAR 436-035-0012(8)(h), (9)(a). Consequently, we conclude that claimant's BFC is "medium."

practice of considering only those issues raised by the parties at hearing); *Stevenson v. Blue Cross*, 108 Or App 247 (1991) (Board can refuse to consider issues on review that are not raised at hearing).⁸ In reply to SAIF's procedural objection, claimant does not assert that he specifically challenged the RFC used in the April 1, 2011 Notice of Closure either during the reconsideration proceeding or at the hearing level.⁹ Rather, he asserts that, because we are considering the appropriateness of his BFC, "it does not make sense" to forego consideration of his RFC.

We do find no compelling reason to depart from our practice of considering only issues properly raised and preserved below. In reaching this conclusion, we note that claimant's initial request for reconsideration of the Notice of Closure disagreed with the impairment rating in the April 1, 2011 Notice of Closure. (*See* Ex. 35A). At that stage, claimant's contesting of his overall permanent disability rating would sufficiently encompass a challenge to the RFC used in the Notice of Closure.

However, following the issuance of the Order on Reconsideration, claimant presented written arguments at the hearing level regarding his entitlement to permanent disability benefits. In those arguments, he expressly limited his challenge of the Notice of Closure to the "BFC" issue. He did not indicate that he disputed the RFC used in the Notice of Closure, until his respondent's brief on Board review. Under such circumstances, we decline claimant's request, made for the first time on Board review, to examine whether the April 1, 2011 Notice of Closure used the appropriate RFC.

Claimant next contends that the Notice of Closure improperly "apportioned" his loss of ROM by only awarding 85 percent of that loss of ROM. Specifically, claimant asserts that the ROM award violates OAR 436-035-0014(1)(c), which provides:

⁸ Compare also *Pressing Matters v. Carr*, 248 Or App 41, 48 n3, 49 (2012) (a party requesting reconsideration of a closure notice must raise challenges at reconsideration in aid of that party's own burden of proof in order to preserve those challenges for hearing) and *Pietrzykowski v. Albertsons, Inc.*, 212 Or App 421, 427-28 (2007) (when one party requests reconsideration, the non-requesting party had no obligation to preserve the precise argument that it made before an ALJ as to why the evidence in the reconsideration record failed to meet the requesting party's burden of proof).

⁹ We note that claimant's written arguments to the ALJ are not in the record. Nonetheless, because claimant does not contend that he raised "RFC" as an issue at the hearing level, and because he has had an opportunity to fully present his position on his entitlement to permanent disability benefits under the standards, the record is sufficiently developed for us to address the parties' respective positions.

“Where a worker’s compensable condition combines with a pre-existing condition, under ORS 656.005(7), the current disability resulting from the total accepted combined condition is rated under these rules as long as the compensable condition remains the major contributing cause of the accepted combined condition (e.g., a major contributing cause denial has not been issued under ORS 656.262(7)(b)). Disability is rated without apportioning.”

By its terms, OAR 436-035-0014(1)(c) pertains to “combined condition” claims. As set forth above, claimant’s claim regarding the April 1, 2011 Notice of Closure does not involve a “combined condition.” Therefore, OAR 436-035-0014(1)(c) is inapposite.

Moreover, only findings of impairment that are permanent and caused by the accepted compensable condition may be used to rate impairment. OAR 436-035-0007(1); *Khrul v. Foremans Cleaners*, 194 Or App 125, 130 (2004). “Unrelated or noncompensable impairment findings are excluded and are not valued” in rating permanent disability. OAR 436-035-0007(1).

Here, claimant’s longstanding treating physician, Dr. Sampson, made impairment findings with which claimant’s surgeon, Dr. Baum, concurred. (Exs. 15, 16).¹⁰ Consistent with those impairment findings, “apportionment” of claimant’s permanent impairment is appropriate. Consequently, claimant’s loss of ROM is 85 percent due to the accepted conditions. OAR 436-035-0007(1).

In sum, for the foregoing reasons, we: (1) affirm that portion of the ALJ’s order that set aside the June 14, 2011 Order on Reconsideration, which had determined that the April 1, 2011 Notice of Closure was premature; and (2) reinstate and affirm the April 1, 2011 Notice of Closure.

ORDER

The ALJ’s order dated January 6, 2012 is affirmed in part and modified in part. That portion of the ALJ’s order that set aside the Order on Reconsideration is affirmed. In lieu of the ALJ’s “referral” directive to the ARU, the Notice of Closure’s 17 percent whole person impairment and 37 percent work disability awards are reinstated and affirmed.

Entered at Salem, Oregon on June 15, 2012

¹⁰ Claimant did not request a medical arbiter examination.