

In the Matter of the Compensation of
LEAH M. FRITZ, Claimant
WCB Case No. 01-01833
ORDER ON REVIEW
Jean M Fisher, Claimant Attorneys
Craig A Staples, Defense Attorneys

Reviewing Panel: Members Langer and Phillips Polich.

Claimant requests review of Administrative Law Judge (ALJ) Spangler's order that: (1) found that claimant's hernia injury claim was untimely filed; and (2) alternatively, upheld the self-insured employer's denial of that claim. On review, the issues are timeliness of claim filing, scope of issues, and (potentially) compensability.

We adopt and affirm the ALJ's order with the following correction and supplementation. The second sentence of the eleventh paragraph of the ALJ's conclusions of law and opinion is corrected to read as follows: "Here, Jaecks did not explain his change of opinion."

The ALJ concluded that claimant's injury claim was not timely filed. ORS 656.265(1). For the reasons set forth in the ALJ's order, we agree. Claimant's argument that a claim submitted within 90 days following her "need for concern" regarding her condition is not well taken. ORS 656.265(1) focuses on the occurrence of an "accident," *i.e.*, an injurious event, rather than the appearance of any symptom or disability. *See Robert G. Glassburn*, 53 Van Natta 798 (2001). In short, ORS 656.265(1) specifies a 90-day period after the accident for submission of a claim for injury and makes no provision for further extension.

Claimant further contends that her condition qualified as an occupational disease and, therefore, that her claim was timely filed in accordance with ORS 656.807. The ALJ declined to consider the occupational disease theory, explaining that claimant had not raised the issue until closing argument. The ALJ's decision was correct.

An ALJ's scope of review is limited to issues raised by the parties. *See Michael R. Petkovich*, 34 Van Natta 98 (1982). Here, claimant did not identify occupational disease as an issue in her request for hearing or during the preliminary discussion of issues at the hearing. In that discussion, the ALJ noted that the employer had indicated its intention to assert that the claim was barred as

untimely under ORS 656.265(1), a statute describing the 90-day deadline for submission of injury claims. The ALJ then summarized, “[T]he second issue in this morning’s hearing is raised by claimant. And that issue concerns the compensability of a spigelian – of a May 10, 2000 spigelian hernia *injury*, with claimant appealing Exhibit 10, a February 6, 2001 denial.”¹ (Tr. 2) (emphasis supplied). When asked if the ALJ’s summary was correct, counsel for claimant responded in the affirmative.

Having reviewed the preliminary discussion of issues, it is apparent that the occupational disease issue was first raised in closing argument. We have consistently held that we will not consider an issue raised for the first time during closing argument. *See Larry L. Schutte*, 45 Van Natta 2085 (1993) (occupational disease issue presented for the first time in closing argument not considered); *Leslie Thomas*, 44 Van Natta 200 (1992). Accordingly, we affirm.

ORDER

The ALJ’s order dated October 3, 2001 is affirmed.

Entered at Salem, Oregon on June 7, 2002

¹ The employer’s denial indicates its receipt of a claim “for an injury occurring on 5/10/00.” (Ex. 10).