In the Matter of the Compensation of
TERRY STRODE, Claimant
WCB Case No. 05-00224, 04-08034
ORDER ON REVIEW
Ernest M Jenks, Claimant Attorneys
Terrall & Terrall, Defense Attorneys
Johnson Nyburg & Andersen,Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Pinnacle Risk Management (Pinnacle) requests review of Administrative Law Judge (ALJ) Lipton's order that: (1) set aside its denial of claimant's occupational disease claim for bilateral carpal tunnel syndrome (CTS); and (2) upheld Liberty Northwest Insurance Corporation's (Liberty's) denial of claimant's occupational disease claim for the same condition. On review, the issue is responsibility.

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

Pinnacle argues that Liberty should be estopped from relying on the "last injurious exposure rule" (LIER) to shift responsibility for claimant's CTS condition forward to Pinnacle by showing that claimant's later employment under Pinnacle's coverage contributed to a worsening of the condition.[1] Specifically, Pinnacle argues that Liberty should not be able to avail itself of LIER, because such use would be predicated on Liberty's alleged failure to timely process the claim. We disagree with Pinnacle's premise and conclusion.

First, Pinnacle assumes that Liberty would have accepted the claim if it had processed it sooner. However, the fact that Liberty does not contest compensability now does not mean that it would have previously accepted the claim. It is at least equally likely that Liberty would have sought a ".307 order," just as it did. Furthermore, assuming that claimant or his physician filed a claim with Liberty at the date of first treatment in March 2004, claimant had already begun employment with Pinnacle's insured by the time of Liberty's 60-day accept/deny period.

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[1] It appears that Pinnacle did not raise its "estoppel defense" before the ALJ. Nonetheless, because Liberty responds to the argument (without objecting to its timing), and neither party is prejudiced by the issue being raised on review, we address it. *See Fred Meyer, Inc. v. Hofstetter*, 151 Or App 21, 26 (1997) ("It is generally recognized that the Board has discretion on whether to reach issues not raised before the ALJ.") (citing *Wright Schuchart Harbor v. Johnson*, 133 Or App 680, 685 (1995)).

Moreover, LIER is not an option that Liberty could "choose," or be estopped from "choosing." It is a common law rule that applies to determine responsibility only when there is no accepted claim. *See SAIF v. Yokum*, 132 Or App 18, 23-24 (1994) ("[For ORS 656.308(1)] to be triggered, there must be an accepted claim for the condition * * *."). When ORS 656.308(1) is not applicable (because there is no accepted claim, as here), LIER applies to determine responsibility. *Lyle H. Brensdal*, 47 Van Natta 2209, 2211 (1995), *aff'd without opinion* 142 Or App 311 (1996).

Accordingly, under LIER and based on the undisputed medical evidence, we agree with the ALJ that Pinnacle is responsible for claimant's CTS condition, because all of claimant's employment activities, including those during Pinnacle's later coverage, independently contributed to the condition.[2] (*See* Exs. 15, 18, 20).

Finally, claimant's counsel is not entitled to an attorney fee for services on review. *See Gary W. Higgins*, 57 Van Natta 336 (2005) (there is no statutory authority under ORS 656.307 to award an assessed attorney fee for the claimant's counsel's services on review); *Lynda C. Prociw*, 46 Van Natta 1875 (1994) (same).

ORDER

The ALJ's order dated July 8, 2005 is affirmed.

Entered at Salem, Oregon on February 1, 2006

[2] Claimant argues that his CTS did not worsen, based on his testimony to that effect. However, considering the medical evidence identifying objective evidence of a worsening, we do not rely on claimant's lay testimony about his condition. *See, e.g., Scott W. Wilson*, 50 Van Natta 1096, 1097 (1998) (the claimant's causation opinion not reliable because he was not a medical expert); *Becky M. Stiles*, 48 Van Natta 439, 440 (1996) ("Because this is a medically complex case, we do not rely on lay opinions, or medical reports based on such opinions, to establish the onset of disability.").