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COURT OF APPEALS
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No. 93984-5

SUPREME COURT OF THE STATE OF WASHINGTON

ROGER A. STREET,

Respondent

v.

WEYERHAEUSER COMPANY

Petitioner.

REPLY TO ANSWER TO PETITION FOR REVIEW

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 ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
A. Argument	1
B. Conclusion	3

TABLE OF AUTHORITIES

CASES

<i>Carnation Co. v. Hill</i> , 115 Wash.2d 184, 796 P.2d 416 (1990)	1
<i>Flanigan v. Department of Labor and Industries</i> , 123 Wn.2d 418, 869 P.2d 14 (1994)	2, 3
<i>Ziegler v. Department of Labor and Industries</i> , 42 Wn.App. 39, 708 P.2d 1212 (1985)	2, 3

STATUTES

RCW 51.52.130	1, 2, 3
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OTHER AUTHORITIES

RAP 13.1(a)	2
RAP 13.4(d)	1
RAP 18.1(j)	1

A. Argument

Claimant's answer to Weyerhaeuser's petition for review raises a new issue: his entitlement to employer-paid attorney fees and costs under RCW 51.52.130. Weyerhaeuser replies as follows pursuant to RAP 13.4(d).

Attorney fees and costs for appeals in workers' compensation matters are controlled by RCW 51.52.130 and may be awarded only as that statute expressly authorizes. *Carnation Co. v. Hill*, 115 Wash.2d 184, 188, 796 P.2d 416 (1990). RAP 18.1(j) provides no independent authority for such an award in a workers' compensation appeal. RCW 51.52.130 states, in relevant part:

"...If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained...the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer."

This court has held that an award of fees and costs under RCW 51.52.130 is authorized only when: (1) the claimant prevails on the appeal and (2) the court's decision directly results in the claimant

receiving benefits. *Flanigan v. Department of Labor and Industries*, 123 Wn.2d 418, 869 P.2d 14 (1994); see also *Ziegler v. Department of Labor and Industries*, 42 Wn.App. 39, 708 P.2d 1212 (1985). Neither element is present here. And the underlying purpose of the statute is not implicated by Weyerhaeuser's petition for review.

Review in this court is discretionary. RAP 13.1(a). Therefore, in contrast to appeals in lower courts that are filed as a matter of right, a petition for review in this court does not expose a claimant to the risk of losing benefits unless and until the court grants review. The main justification for granting employer-paid fees and costs—protecting the right of workers to benefits—is therefore not present to any significant degree, if at all. The decision to file an answer to a petition for review is discretionary, and not necessary for protection of the claimant's interests. Although the decision to file an answer is reasonable, the discretionary nature of that decision and the absence of current risk to the claimant's right to benefits, does not justify departing from the general rule that a party must bear the burden of its own attorney's fees. In short, neither the terms nor the purpose of RCW 51.52.130 supports imposing on an

employer the burden of paying the claimant's attorney fees for filing an answer to a petition for review in this court.

Further, as discussed in Weyerhaeuser's petition for review and briefing before the Court of Appeals, claimant should not prevail on this appeal—which is an essential prerequisite for granting any award of attorney fees.

And finally, even if the court were to deny review, that would not constitute an affirmative decision on the merits that claimant's right to relief should be sustained or otherwise result directly in his receipt of benefits. A denial of review would operate only to leave the Court of Appeals' decision intact. That decision determined only that claimant had sustained an occupational disease. Claimant's right to any particular benefits was not raised on appeal, much less decided. Because denial of review by this court would not directly or necessarily result in any award of benefits, no assessed attorney fees and costs may be granted.

RCW 51.52.130; *Flanigan, supra*; *Ziegler, supra*.

B. Conclusion

For the above reasons, the court should deny claimant's request for an award of employer-paid attorney fees and costs for filing an answer to Weyerhaeuser's petition for review.

DATED this 10th day of February 2017.

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a horizontal line extending to the right.

Craig A. Staples, WSBA # 14708
Attorney for Weyerhaeuser

CERTIFICATE OF FILING/SERVICE

I certify that I caused to be served the foregoing REPLY TO ANSWER TO PETITION FOR REVIEW on the following persons by mailing to each of them on February 10, 2017 by first class mail a true copy contained in a sealed envelope on the date noted below, with postage prepaid, and addressed as follows:

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I further certify that I filed the original and a copy of the same document by mailing it by express mail in a sealed envelope on the same date, with postage prepaid, and addressed as follows:

Susan L. Carlson, Clerk
The Supreme Court
State of Washington
P.O. Box 40929
Olympia, WA 98504-0929

Dated this 10th day of February, 2017.



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