In the Matter of the Compensation of
BRADLEY L. ROSE, Claimant
WCB Case No. 01-05056
ORDER ON RECONSIDERATION
Cary et al, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Lowell, Bock and Biehl. Member Biehl chose not to sign the order.

Claimant requests reconsideration of our February 26, 2003 order that: (1) reversed the portion of the Administrative Law Judge's (ALJ's) order that set aside the compensability portion of the insurer's denial; and (2) affirmed the portion of the ALJ's order that declined to award an attorney fee pursuant to ORS 656.386(1). The insurer responds, asserting that the motion should be denied.

In his motion, claimant contends that only the issues litigated by the parties and considered by the ALJ should be addressed on Board review. Claimant further contends that compensability was conceded by the insurer and that consequently, we erred in upholding the compensability portion of the insurer's denial. We disagree.

As explained in our order, based on the discussion between the parties' attorneys and the ALJ at the commencement of the hearing, the insurer took the position that the condition was compensable as to Weyerhaeuser because Weyerhaeuser had accepted the condition. (Tr. 8). The insurer agreed that the claim was compensable against some employer. (Tr. 10). However, the insurer did not concede that the claim was compensable as to it and did not specifically withdraw the compensability portion of its denial. Additionally, in the conclusion to its written closing argument, the insurer argued that its denial "should be affirmed." (Insurer's Written Closing Argument, p. 4).

In conclusion, we continue to believe that, while the insurer agreed that the claim was compensable as to the carrier that accepted it, it did not agree to withdraw its compensability denial and did not agree that the claim was compensable as to its insured.[1]

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[1] Moreover, *at the hearing*, we note that claimant did not seek an attorney fee award based on the insurer's so-called rescission of its compensability denial. Under such circumstances, a question arises regarding whether claimant timely raised an attorney fee based on this particular theory. In any event, for the reasons discussed above, claimant is not entitled to an attoarney fee award.

Accordingly, we withdraw our February 26, 2003 order. As supplemented herein, we republish our February 26, 2003 order in its entirety. The parties' rights of appeal shall run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on March 19, 2003