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Recent Pennsylvania Supreme Court Holding Allows Judges to Award Attorney's Fees on Reasonably Contested Workers' Compensation Claims

For decades, Section 440 of the Pennsylvania Workers' Compensation Act precluded claimant's recovery of legal fees in situations where an employer established a reasonable contest to a workers' compensation claim. However, the Supreme Court recently rejected this interpretation with serious implications for Pennsylvania's employers and workers' compensation carriers.

On December 21, 2021, the Pennsylvania Supreme Court effectively gave workers' compensation Judges *carte blanche* to award attorneys' fees to successful claimants, even when the employer raises a reasonable defense to the claim. *Lorino v. WCAB (Cmwlth. of Pa.)*, 8 EAP 2021 (Pa. 12/22/2021). As discussed below, defense counsel and claims professionals must recognize the far-reaching effects of this holding and be prepared to adapt how they project potential exposure and set reserves on their open claims.

Lorino Explained

At its heart, the outcome in *Lorino* hinged on the Supreme Court's reading of Section 440 of the Pennsylvania Workers' Compensation Act. The relevant portion of that statute reads:

[If employer loses a contested claim, the claimant will be awarded], in addition to the award for compensation, a reasonable sum for costs incurred for attorney's fee ... Provided, that cost for attorney fees may be excluded when a reasonable basis for the contest has been established."

77 P.S. 996(a)

Specifically, the *Lorino* court was asked to interpret the meaning of "may be excluded" within the context of Section 440, and they read this to mean the judges can award attorney's fees, even if the employer establishes a reasonable contest to benefits.

The facts of *Lorino* are fairly straight-forward. A claimant sustained an accepted low back injury requiring medical treatment; however, he was able to return to work without lost wages. The employer obtained an IME, which found claimant to be fully recovered, and filed a Termination Petition.

Since there was no wage loss, claimant was unable to hire an attorney on a contingent fee basis but ultimately retained counsel at an hourly rate. At the conclusion of the litigation, claimant's counsel requested attorney's fees be awarded under Section 440, even though employer presented a reasonable contest by way of the full-recovery IME supporting a Termination Petition.

When the case arrived at the Commonwealth Court, that court adopted the long-standing interpretation of Section 440, stating "despite the General Assembly's use of the word 'may' this Court has always interpreted Section 440 to mean that 'attorney's fees shall be awarded unless a reasonable basis for the employer's contest has been established.'" *Lorino*, 1217 C.D. 2019 at 11.

Unfortunately, the Supreme Court rejected the Commonwealth Court's interpretation and held that the word "may" within the context of Section 440 was permissive, not mandatory.

Essentially, the workers' compensation Judges still have the option of precluding an award of attorney's fees when there is a reasonable contest; however, they are not required to do so. This is in contrast to the past, when Section 440 was treated as a "safe-harbor" against the imposition of attorney fees in reasonably contested cases.

Impact on Claims Handling

In theory, this holding means that attorney's fees could be awarded on any case where the employer does not prevail. In practice, we expect, or at least hope, that the judges will exercise discretion in the application of *Lorino*.

For cases that are factually similar to *Lorino* itself, specifically no-lost time claims with ongoing medical treatment, we can expect most judges to award attorney's fees going forward. The bench is likely to invoke the "humanitarian purpose of the Act" and award fees in these cases because otherwise the claimant would be liable for those fees out-of-pocket.

This affects employers and carriers, because, pre-*Lorino*, these medical-only cases could usually be guided towards resolution by obtaining a full-recovery opinion and filing a Termination Petition. Faced with the prospect of paying an attorney or defending the case on their own, many claimants would opt for the negotiating table. In turn, this would reduce litigation costs and provide a quicker resolution to the claim.

Now, in our post-*Lorino* world, the risks and costs of litigation have increased for the carrier. If a Termination Petition is filed to push resolution but ultimately denied, the carrier is faced with the imposition of claimant's attorney's fee on top of the ongoing medical exposure.

Even in more "traditional" cases involving legitimately contested claims for wage-loss, *Lorino* leaves the door open for judges to award attorney's fees essentially whenever they desire. Neither the statute nor case law provide any guidance as to when fees would be appropriate and when they would amount to an abuse of discretion. Therefore, counsel and claims representatives must be cognizant of their venue and judge's tendencies, since the WCAB and appellate courts are likely to defer to the individual's judge's discretion even if it leads to dramatically different results from judge-to-judge and venue-to-venue.

We also can expect the claimant's bar to begin presenting evidence of financial hardship at trial on almost every claim. Obviously, their goal will be to present their client in a sympathetic light and convince the judge to award fees in order to "make them whole." In these cases, surveillance and/or an assets search may be warranted if there is a question as to whether claimant is being truthful about their financial situation.

Finally, in cases where an attorney's fee is ultimately awarded, defense counsel must be prepared with arguments to limit the damage. We can expect that the claimant's bar will bill exorbitant rates and hours in an effort to maximize fee awards. To this end, it is important to note that Section 442 of the Act limits any award to "reasonable" attorney's fees. This means that the judge should take a critical look at the fees request, and defense counsel should be ready to articulate why the averred fee should be reduced in the event of an award.

Conclusion

From a claims handling perspective, this Decision is obviously less than ideal. This is especially true to cases that are factually similar to *Lorino*; however, this Decision has the potential to affect any workers' compensation case being decided in Pennsylvania. Defense counsel and claims representatives should be prepared.



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