

When Filing a Petition Can Result in an Award of Attorney Fees

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On Dec. 22, 2021, the Pennsylvania Supreme Court issued a decision in *Lorino v. Workers' Compensation Appeal Board*, 266 A.3d 487 (Pa. 2021), which held that attorney fees shall be awarded when an injured worker "prevails" in litigation. This case has implications for both the claimant's and the defense side of the aisle. In order to foresee the possible future implications, it is important to examine the portions of the Pennsylvania Workers' Compensation Act (act) that influenced the court's decision and what attorneys on both sides can do to protect their clients. It is also important to look at how the decision of the court could potentially be expanded.

In *Lorino*, the court was asked to interpret the specific wording of Section 440 of the Act, 77 P.S. 996 and an award of attorney fees to a claimant's attorney, even when the employer has established a reasonable basis for contest. The distinction in this case is that Vincent Lorino was not receiving wage loss benefits. The insurance carrier decided to accept his claim for medical only purposes. Subsequently, the employer filed a termination petition arguing that the

claimant was fully recovered from his work injury.

When Lorino obtained an attorney to assist in the litigation, his attorney had no way of collecting an attorney fee for their time and efforts in representation. During testimony at the last hearing, Lorino explained that because he received only medical benefits, he was unable to retain the services of an attorney based on a traditional contingent fee agreement and instead was required to enter into an hourly rate fee agreement. (As an aside, this is not typical in the workers' compensation arena. Attorneys generally enter into a contingent fee agreement with their clients and are paid only when they are successful in a claim petition setting. For other petitions, the claimant's attorney can have their fee agreement approved by the judge so that the carrier can begin deducting their fee from the claimant's weekly wage loss benefits.)

By way of background, Section 440 of the act states: "In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate, the employee in

whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for an attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceeding: provided, that cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or the insurer." Section 440 specifically states that the judge must make a finding as to whether the attorney fee is reasonable, considering the fee agreement between the attorney and the claimant, the legislative declaration of reasonableness and other factors. See *Eugenie v. Workers' Compensation Appeal Board*, 140 Pa.Cmmw.51 (Pa.Cmmw.Ct. 1991).

Prior to *Lorino*, this section was generally interpreted as meaning that the employer was protected against an award of unreasonable contest attorney fees if it met its burden of establishing facts sufficient to prove a reasonable basis for contest. A reasonable contest can be established by the defendant if considering the totality of the circumstances and the litigation was filed to promptly resolve a genuinely disputed issue, and not merely to harass the injured worker. See *Elite Carpentry Contractors v. Workers' Compensation Appeal Board (Dempsey)*, 636 A.2d 250 (Pa.Cmwlt. 1993). Commonly, the defendant can prove a reasonable contest if there is either a factual dispute to the injury or a medical defense to disability or ongoing disability, or if there are other affirmative defenses that can be asserted by the defendant such as the injury occurred outside the course and scope of employment or the claimant was not an employee.

In *Lorino*, the judge ultimately denied the termination petition. Although he found that the employer established a reasonable basis for contest based on the opinion of their medical expert, the judge found that the employer did not meet its burden of proving that the claimant was fully recovered from the work injury. While the judge denied the claimant's request for attorney fees to be awarded under Section 440, he awarded the claimant's attorney \$2,000 in attorney fees pursuant to Section 442 of the Act, which establishes that attorney fees can be awarded to a claimant based on a fee agreement. The Workers' Compensation Appeal Board affirmed the judge's decision, finding that the employer presented a reasonable basis for contest to support its termination petition. The Commonwealth Court affirmed the board's order holding that the claimant was not entitled to attorney fees under Section 440 of the act because the employer had a reasonable basis for the termination petition. See *Lorino v. Workers' Compensation Appeal Board (Commonwealth of Pennsylvania)*, 1217 C.D. 2019, (Pa.Cmwlt. filed Aug. 19, 2020).

As expected, the claimant filed an appeal to the Pennsylvania Supreme Court. The court utilized statutory interpretation to ascertain the intent of the general assembly when Section 440 of the act was written. The court concluded that the term "shall" establishes a mandatory duty, where the term "may" implies an act is permissive, not mandatory. The court further explained that when the legislature uses these terms in the same section of the statute, there was a reason to do so as they intended to explain that some actions are mandatory and some are not. The court found that based on the established meaning of these terms, when a contested case is resolved in

the favor of an employee, a reasonable sum for attorney fees shall be awarded to the claimant, meaning that it is mandatory. Where the employer has established a reasonable basis for contest, an award of an attorney fee may be excluded. The judge is permitted, but not required, to exclude an award of attorney fees based on the legislature's specific use of these words in this section. The court commented that the interpretation of Section 440 disregarded the distinction between the words "shall" and "may," and failed to recognize the discretion afforded to judges to award attorney fees, even when there is a reasonable basis for contest.

The implications of the *Lorino* decision impact both sides of the aisle. Claimants can now be sure that they will not be turned away from obtaining an attorney, if their claim is medical only. Their attorneys can now submit into the record their fee agreement and specifically request that *Lorino* attorney fees be considered, given that is the only practical way that the claimant's attorney can get paid, as long as it is reasonable as would be required by Eugenie. Employers and insurers now must adequately ensure that their evidence will support a reasonable contest with the hope that the judge will use discretion and not award fees to counsel. While this decision came as a surprise to the defense bar, practically speaking, it has not been utilized in a large number of cases. The fact is, most cases across the commonwealth of Pennsylvania do involve both a wage loss and medical

claim, and the current impact of *Lorino* may not be as large as employers and insurers anticipated.

Future implications of this decision remain to be seen. While the *Lorino* court had to make this decision in the face of a termination petition, it is entirely possible that claimant's attorneys in the future will apply *Lorino* when there are other petitions pending, especially when the claimant is not receiving wage loss benefits. Since it is very common for claimants to file review petitions after the employer files a termination petition, it is unknown whether a judge would award attorney fees to the claimant's attorney for his time defending the termination petition and prosecuting the review petition, if the judge finds that neither party prevails. Per the specific wording of the Pennsylvania Supreme Court's decision in *Lorino*, the judge still has the discretion to award attorney fees even if the employer maintained a reasonable contest. Time shall tell where else the court can take this interpretation.



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