

Court Expands Fee Shifting in Workers Comp Cases

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In a decision that upends a longstanding consensus within the workers' compensation bar, the Pennsylvania Supreme Court has ruled that workers' compensation judges have discretion to award attorneys' fees to successful claimants in all cases. Previously, judges had generally awarded attorneys' fees only when employers lacked a reasonable basis to contest the litigation.

Attorneys' fee awards are governed by Section 440 of the Pennsylvania Workers' Compensation Act, which provides:

"In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate . . . the employer . . . 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 attorney's fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceedings: 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."

Essentially, the workers' compensation act is a fee-shifting statute, but employers can avoid paying a claimant's attorneys' fees if they present evidence sufficient to support an employer-favored outcome. Courts have historically interpreted this language to mean that, if an employer establishes a reasonable contest to a petition, there will be no attorneys' fee award. The state's highest court has now changed that interpretation, relying on the word "may" in the last clause to give judges discretion to grant attorneys' fees in any given case.

In [*Lorino v. Workers' Compensation Appeal Board \(Commonwealth of Pennsylvania\)*](#), an employer filed a petition seeking to terminate benefits for an eight-month-old back and hip injury. The injured worker had returned to work, so now wage loss was being paid, but the employer and carrier desired to stop paying for medical treatment and close the file.

The employer supported the petition with a full recovery opinion from a physician which, if believed, would have been sufficient to grant the petition.

The workers' compensation judge denied the termination petition, finding the claimant's medical evidence more credible and persuasive than the employer's evidence. The judge found that the employer established a reasonable contest but nonetheless ordered reimbursement of the claimant's attorneys' fees. On appeal, the Pennsylvania Commonwealth Court reversed, but the Pennsylvania Supreme Court reinstated the attorneys' fee award, holding that judges always have discretion to issue attorneys' fee awards if doing so supports the remedial purposes of the Pennsylvania Workers' Compensation Act.

In light of this significant decision, employers and carriers should be prepared to see attorneys' fee awards more often

and should take that cost into consideration when assessing exposure risk. We are also likely to see additional litigation as the courts begin to figure out the limits of a judge's discretion to issue attorney's fees.

If you have any questions about the *Lorino* case or how it could affect your business, please [reach out to me](#), [Lindsey Cook](#) or [Michael C. Crocenzi](#).

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