



**PENNSYLVANIA BAR ASSOCIATION
COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY**

June 9, 2022

FORMAL OPINION 2022 – 100

**ATTORNEY’S OBLIGATIONS TO REQUEST COUNSEL FEES
UNDER SECTION 440 OF THE WORKERS’ COMPENSATION ACT**

I. Introduction and Summary

In matters under the Workers’ Compensation Act, attorneys are permitted to collect fees for representing injured workers only when the fee arrangement has been approved by a Workers’ Compensation Judge or the Workers’ Compensation Appeal Board. Generally, attorney’s fees are paid by an injured worker from his or her wage loss benefits.

In *Lorino v. Workers’ Comp. Appeal Bd. (Commonwealth)*, 266 A.3d 487 (Pa. 2021), the Supreme Court interpreted Section 440 of the Pennsylvania Workers’ Compensation Act regarding when a Workers’ Compensation Judge can award attorney’s fees, raising questions about the ethical obligations of attorneys representing Claimants under Section 440. Consequently, the Committee has been asked whether, under the Rules of Professional Conduct, an attorney representing an injured must request such fees in all cases.

As outlined below, this Opinion concludes that although an attorney is not required to request the fees, at the relevant time during the litigation, an attorney is required to discuss the issue with the client, including whether or not to request the fees, and must abide by the client’s decision whether to seek the award of fees. While not required, it is also best practice to confirm such discussions in writing.

II. Discussion

A. Question Presented

This inquiry raises the following question:

What is the duty of a workers’ compensation attorney who is representing an injured worker in light of the Pennsylvania Supreme Court decision in *Lorino v. Workers’ Comp. Appeal Bd. (Commw. of PA)*, 8 EAP 2021 (Pa. Dec. 22, 2021)?

B. Facts Relevant to this Opinion

In *Lorino*, the Supreme Court interpreted Section 440 of the Pennsylvania Workers' Compensation Act regarding when a Workers' Compensation Judge can award attorney's fees, raising questions about the ethical obligations of attorneys representing Claimants under Section 440, which states:

In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate . . . , the employe . . . 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. (emphasis in the case)

The Supreme Court focused on the proviso that attorney's fees "may" be excluded when the employer proves a reasonable basis for the contest in the petition. Prior to *Lorino*, Commonwealth Court had always held that a WCJ was not permitted to award attorney fees to the Claimant's attorney. The Supreme Court said that this was an incorrect interpretation of the plain language of Section 440, concluding that attorney's fees are now awarded at the discretion of the WCJ when there is a reasonable basis for contest. The Supreme Court left the standards for such an award up to the discretion of the WCJ. The request for these fees is customarily made during litigation and/or when briefs are filed by the parties in anticipation of the WCJ's Decision, not at the outset of a case.

The issue is whether a lawyer representing an injured worker must always ask for attorney's fees in light of *Lorino* even where there is a reasonable basis for contest. Some attorneys believe they are required to ask for attorney's fees to protect the injured worker from having to pay attorney's fees, even if the WCJ will decline to award them. Other attorneys believe that an attorney should discuss the option of requesting attorney's fees with the client and then do as instructed. Finally, other attorneys believe that this is solely a question of litigation tactics regarding the WCJ who is hearing the case and how it may affect that case. Thus, these attorneys believe that there is no need to discuss the issue with a client because it is for the attorney alone to make that decision.

The concern is that if the attorney does not request fees based on his or her judgment, is there a risk under the disciplinary rules of being found to have violated them should a complaint be filed with the Disciplinary Board.

C. Discussion

1. Relevant Rules of Professional Conduct

This inquiry falls under Pennsylvania Rule of Professional Conduct 1.2 ("Scope of Representation and Allocation of Authority Between Client and Lawyer"), which states in relevant part:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. ...

Comment [1] to Rule 1.2 states:

Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

Further, Pennsylvania Rule of Professional Conduct 1.4 ("Communication") states in relevant part:

- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information; and
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Finally, Pennsylvania Rule of Professional Conduct 2.1 ("Advisor") states:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment [1] to Rule 2.1 states:

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a

client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

D. Other Ethical Guidance

This Opinion focusses upon a litigation decision under Rule 1.2, for which the *Pennsylvania Ethics Handbook*, Fifth Edition, provides guidance:

RPC 1.2 does not state which litigation decisions should be considered to involve "objectives" and which decisions involve "means." Lawyers generally are viewed as having the authority to act on behalf of a client on procedural matters incident to the litigation or on matters of tactics or trial strategy not involving substantive rights. The lawyer must not only abide by the client's decisions concerning matters of substance, but the lawyer must also inform the client concerning the need for such decisions. This has most frequently been addressed with respect to settlement offers.

RPC 2.1 ... provides that a lawyer representing a client should exercise independent professional judgment and render candid advice. A lawyer should, however, follow the directives of the client, especially with respect to the goals or ends to be achieved by litigation.

III. Conclusion

Fees that may be awarded under Section 440 implicate a client's substantive rights. The potential award of fees is a relevant consideration of which a client should be aware, as would be other factors, including but not limited to tactical reasons to do so, tactical reasons not to do so, and the potential impact of the request upon the Workers' Compensation Judge's analysis of the matter.

Therefore, in matters involving a potential award of attorney's fees under Section 440 of the Workers' Compensation Act, an attorney must discuss the issue with a client and must abide by the client's decision whether to seek the fees. Thus, although an attorney is not required to request the Section 440 fees, the decision to request or decline to request the fees should be made by a client in accordance with the Rules of Professional Conduct.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.