

Opinion No. 549

August 2003

QUESTION PRESENTED

May a lawyer representing a workers' compensation claimant in a third-party action collect a contingent fee from the client based on the gross recovery, part of which is required to be paid to the workers' compensation carrier?

STATEMENT OF FACTS

The question presented is illustrated by the following example. Walter Worker is injured in the course and scope of his employment by ABC Corporation and receives \$50,000.00 in workers' compensation benefits. Worker employs Lawyer A to file suit against a negligent third-party and agrees to pay Lawyer A one-third of the amount recovered from such third-party. Walter Worker's suit against the third party is settled for \$100,000.

Lawyer A proposes to disburse funds from the settlement to Worker as follows:

Total settlement with third-party defendant	\$100,000
Less Lawyer A's fee, one-third of the gross settlement	\$ 33,333
Less Reimbursement to workers' compensation carrier	<u>\$ 50,000</u>
Disbursement to Walter Worker	<u>\$ 16,667.</u>

DISCUSSION

Rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct provides:

"A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable."

Section 417.001 of the Texas Labor Code provides that the insurance carrier is subrogated to the rights of an injured employee against a third-party and Section 417.002 provides that the workers' compensation carrier shall be reimbursed, for benefits that have been paid for a compensable injury, out of the net amount recovered in a third-party action. Under settled Texas law, a workers' compensation carrier is entitled to the first money out of any third-party recovery until the carrier is reimbursed for benefits paid, regardless of whether the recovery is in an action initiated by the worker or in an action initiated by the workers' compensation carrier. The first money recovered in any third-party action belongs to the workers' compensation carrier, and until the carrier is repaid in full neither the employee nor his representative has any right to any of the third-party funds (subject to the provisions of Section 417.003 of the Texas Labor Code noted below). *Fort Worth Lloyds v. Haygood*, 246 S.W.2d 865 (Tex. 1952) and numerous cases following it.

Walter Worker and his representatives, including Lawyer A, have no right to the funds due the compensation carrier. A fee that includes in its calculation funds to which Walter Worker has no rights is unconscionable and violates Rule 1.04(a) of the Texas Disciplinary Rules of Professional Conduct. A competent lawyer could not form a reasonable belief that the fee charged under the proposed division is reasonable.

The following allocation would not result in an unconscionable fee:

Total settlement with third-party defendant	\$100,000
Less Reimbursement to insurance carrier	<u>\$ 50,000</u>
Recovery for Walter Worker	\$ 50,000
Less contingent fee	<u>\$ 16,667</u>
Disbursement to Walter Worker	<u>\$ 33,333.</u>

It should be noted that Section 417.003 of the Texas Labor Code provides that the funds recovered on behalf of a workers' compensation carrier whose interest is not actively represented by an attorney in third-party action are subject to payment of an attorney's fee and this section sets out how the amount of such fee is to be determined.

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer representing a workers' compensation claimant in the third-party action pursuant to a contingent fee arrangement may not collect a fee from the client/claimant based on the gross recovery, part of which is required to be paid to the workers' compensation carrier.