STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NELSON PUENTE,

Petitioner,

vs. Case No. 14-2041MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.
_______________________________/

FINAL ORDER

On July 17, 2014, a duly-noticed hearing was held in Miami and Tallahassee, Florida, via video teleconference, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Andrew M. Moss, Esquire
Kutner, Rubinoff and Moss, P.A.
501 Northeast First Avenue, Suite 300
Miami, Florida 33132

For Respondent: Adam James Stallard, Esquire
Xerox Recovery Services Group
2073 Summit Lake Drive, Suite 300
Tallahassee, Florida 32317

STATEMENT OF THE ISSUE

The issue to be decided is the amount payable to Respondent in satisfaction of Respondent's Medicaid lien from a settlement,

judgment, or award received by Petitioner from a third party under section 409.910(17), Florida Statutes.[1/]

PRELIMINARY STATEMENT

On May 1, 2014, Petitioner filed a Petition for Reduction of Medicaid Lien. After a continuance, the hearing was held on July 17, 2014. Petitioner presented the testimony of one expert and fact witness, Mr. Mario Quintero, Jr., Esquire, and offered two exhibits, which were admitted into evidence. Respondent offered no witnesses or exhibits. The parties filed a Joint Pre-hearing Stipulation. The facts stipulated therein were accepted and are made a part of the Findings of Fact below. Respondent's objection to portions of the testimony of Mr. Quintero on the ground that he had not been disclosed as an expert was denied. In a joint motion filed over 45 days prior to hearing, Mr. Quintero was clearly identified as an expert; yet, Respondent did not seek to depose him or seek to discover information he was relying upon as the basis for his opinion.

Respondent's unopposed motion to allow the parties 20 days from the filing of the transcript to submit proposed final orders was granted. The one-volume Transcript of the hearing was filed on July 29, 2014. Both parties timely filed proposed orders, which were carefully considered.

FINDINGS OF FACT

1. It was stipulated that Petitioner, Mr. Nelson Puente, sustained gunshot injuries on or about February 4, 2010, for which he received medical treatment.

2. Mr. Puente had Medicaid at that time, and Medicaid paid the amount of $112,397.79 to treat Mr. Puente for his injuries.

3. As a result of his injuries, Mr. Puente has permanent scars on his abdomen and thigh.

4. Mr. Mario Quintero, Jr., Esquire, represented Mr. Puente in a personal injury case alleging negligent security.

5. Mr. Quintero has been practicing law in Florida for over 30 years, specializing in personal injury litigation. He has tried well over 150 cases and has handled catastrophic injury cases that were similar to Mr. Puente's case. Mr. Quintero is an expert on the valuation of personal injury cases.

6. Mr. Quintero interviewed Mr. Puente regarding the scope of his injuries, reviewed extensive medical records, considered the prognosis for improvement, and examined jury verdict reports and facts from similar cases to reach an opinion as to the value of Mr. Puente's damages.

7. Mr. Quintero testified that if he had presented the case to a jury that he would have asked for damages for past medical expenses, future medical expenses, future loss of earning

capacity, pain and suffering, permanent scarring, and inability to lead a normal life.

8. Mr. Quintero testified that, in addition to the $112,397.79 paid by Medicaid, the Florida Patients' Compensation Fund[2/] or another fund paid for some of Mr. Puente's medical care. There was no evidence presented as to the specific amount that this fund paid. Mr. Quintero testified:

> I don't have the figures in front of me right now. But it was probably significantly less than Medicaid.
>
> * * *
>
> I do know, I just don't remember. I am--my file is three boxes large. And for purposes of my testimony here today, I don't believe it was necessary for me to bring in those three boxes and go through everything. So I mentioned it would be less than Medicaid, but I don't remember the exact amount.

9. The exact amount for which the fund's claim was settled was similarly not in evidence, but Mr. Quintero characterized it as a "few thousand dollars." He testified, "They understood the severity of Mr. Puente's injuries and damages, they knew the amount of the settlement, and they took-—they factored in everything and significantly reduced the amount that we had to repay them."

10. Mr. Quintero said that he would have asked a jury for significant damages for future lost earning capacity. He noted that Mr. Puente was 35 years old at the time of the settlement,

had a long life expectancy, and the "potential to earn 35 to 40 thousand dollars per year." Mr. Quintero did not offer a dollar estimate of lost future earnings. There was no evidence as to Mr. Puente's occupation. Mr. Quintero admitted on cross-examination that he was "pretty sure" that Mr. Puente was unemployed at the time of his injuries.

11. Mr. Quintero testified that future medical expenses would "probably not" be very large, based upon his understanding that "other than maybe palliative issues with therapy and things like that," there wasn't that much more that could be done for Mr. Puente. Mr. Quintero noted that "there probably would be some rehabilitation that he could benefit from in the future, but nothing major." On cross examination, he admitted that there was nothing in evidence to indicate that there would not be significant future medical expenses for Mr. Puente.

12. No life care plan or testimony from health care personnel, vocational specialists, or economists was introduced. Mr. Quintero stated that it is expensive to have life care plans and economist reports prepared. He stated that they are prepared only when there is adequate insurance coverage, and it is worth the expenditure.

13. Mr. Quintero testified that he believed that 80 to 85 percent of a jury verdict in Mr. Puente's personal injury case would have been based upon pain and suffering and the inability

to lead a normal life. He did not elaborate on how he arrived at this conclusion.

14. Mr. Quintero testified that, although the value that a particular jury might put on a case can never be absolutely determined, in his opinion, a reasonable estimate of the value of Mr. Puente's damages was $2.5 million. He testified that, in his opinion, the range of damages would be from $2 million to $5 million and that $2.5 million was a conservative estimate. Mr. Quintero's testimony on this point was credible, Respondent offered no contrary testimony, and the value of Mr. Puente's damages is found to be $2.5 million.

15. The settlement in the personal injury case was for the sum of $100,000.

16. There was no direct evidence as to what portion of the $100,000 total settlement was designated by the parties as compensation to Petitioner for medical expenses, or conversely, for the various other types of damages he may have suffered, such as pain and suffering, scarring and other permanent physical injury, or loss of future earnings. Neither the settlement agreement itself nor any other documents prepared in connection with the settlement were introduced. Mr. Quintero offered no testimony on this issue. Based upon the evidence presented at hearing, all of the settlement might have been for medical care, or none of it might have been.

17. It is possible that there was no discussion or understanding among the parties as to what portions of the settlement were to be allocated to Mr. Puente's various categories of damages, but such a conclusion would be pure speculation, for there was no testimony or other evidence to that effect. Mr. Puente did not show by clear and convincing evidence that the settlement was "unallocated" by the parties.

18. The Florida Statutes provide that Respondent, Agency for Health Care Administration (AHCA), is the Florida state agency authorized to administer Florida's Medicaid program. § 409.902, Fla. Stat.

19. The Florida Statutes provide that Medicaid shall be reimbursed for medical assistance that it has provided if resources of a liable third party become available. § 409.910(1), Fla. Stat.

20. AHCA did not participate in settlement negotiations or sign any of the settlement documents. There was no evidence to suggest that AHCA otherwise released its lien.

21. Application of the formula found in section 409.910(11)(f) to the $100,000 settlement in the personal injury case yields a Medicaid lien in the amount of $33,319.66.

22. The $100,000 total recovery represents four percent of the $2.5 million total economic damages.

23. Mr. Puente failed to prove by clear and convincing evidence that the settlement was unallocated as to categories of damages.

24. Mr. Puente failed to prove by clear and convincing evidence that all categories of damages sought in the personal injury case were, or should be, compromised pro rata in the settlement.

25. Mr. Puente failed to prove the amount of the settlement that should be allocated to medical expenses by clear and convincing evidence.

26. Mr. Puente failed to prove by clear and convincing evidence that the statutory lien amount of $33,319.66 exceeds the amount actually recovered in the settlement for medical expenses.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this case pursuant to sections 120.569, 120.57(1), and 409.910(17), Florida Statutes (2014).

28. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses incurred on behalf of beneficiaries who later recover from third-party tortfeasors. See Arkansas Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268 (2006).

29. Consistent with this federal requirement, the Florida Legislature has enacted section 409.910. This statute authorizes and requires the State to be reimbursed for Medicaid funds paid for a plaintiff's medical care when that plaintiff later receives a personal injury judgment or settlement from a third party. Smith v. Ag. for Health Care Admin., 24 So. 3d 590 (Fla. 5th DCA 2009). The statute creates an automatic lien on any such judgment or settlement for the medical assistance provided by Medicaid. § 409.910(6)(c), Fla. Stat.

30. A formula is set forth in section 409.910(11)(f) to determine the amount the State is to be reimbursed. The statute sets that amount at half the amount of the total recovery, after deducting taxable costs and 25 percent attorney's fees, not to exceed the amount actually paid by Medicaid on the beneficiary's behalf. Ag. for Health Care Admin. v. Riley, 119 So. 3d 514, 515 n.3 (Fla. 2d DCA 2013).

31. Section 409.910(17)(b) makes clear that the formula set forth in subsection (11) constitutes a default allocation of the amount of a settlement attributable to medical costs. See Davis v. Roberts, 130 So. 3d 264, 268 (Fla. 5th DCA 2013); Roberts v. Albertson's Inc., 119 So. 3d 457, 465-466 (Fla. 4th DCA 2012), reh'g and reh'g en banc denied sub nom. Giorgione v. Albertson's, Inc., 2013 Fla. App. LEXIS 10067 (Fla. 4th DCA June 26, 2013).

32. Section 409.910(17)(b) provides that a Medicaid recipient has the right to rebut this presumptively valid allocation created under Florida law in an administrative hearing by establishing, through clear and convincing evidence, that either: 1) a lesser portion of the total recovery should be allocated as medical expense reimbursement than has been calculated by the statutory formula; or 2) Medicaid actually provided a lesser amount of medical assistance than has been asserted by AHCA.

33. Petitioner stipulated as to the amount of medical assistance provided by Medicaid, but attempted to show that a lesser portion of the total recovery should be allocated as medical expense reimbursement than that calculated by the statutory formula.

34. Petitioner argues[3/] that $112,397.79 represents 4.49 percent of the $2.5 million total damages and concludes that the Medicaid lien should therefore be limited to that same 4.49 percent of the $100,000 total recovery, that is, to the sum of $4,495, which he (questionably) rounds to $4,900.

35. In reliance upon this pro rata approach, Petitioner's case was centered upon proof of only three facts: the amount of total damages; the amount of the Medicaid lien; and the amount of the settlement. While it might result in less litigation,

Florida and federal[4/] law do not provide for automatic application of this mathematical calculation.

36. First, any such calculation would have to be based upon the total amount of medical expense paid, not just that portion of medical expense paid by Medicaid. Section 409.910(17)(b) provides for determination that a lesser portion of a total recovery has been allocated as reimbursement for "medical expenses." Smith v. Ag. for Health Care Admin., 24 So. 3d 590, 591 (Fla. 5th DCA 2009). The federal anti-lien provision, 42 U.S.C. § 1396p(a)(1), similarly pre-empts State efforts to take any portion of a Medicaid beneficiary's settlement allocated as compensation for other than "medical care." Arkansas Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 284 (2006). Petitioner presented no clear and convincing evidence as to the total amount of medical expenses. Putting aside the issue of future medical care,[5/] in addition to the $112,397.79 paid by Medicaid, the evidence clearly showed an unknown amount paid for medical expenses by another fund, and possibly some small amounts paid by Petitioner and his family.[6/]

37. Second, even had there been clear and convincing evidence of the total amount of medical expenses, it would not follow that the settlement necessarily reflected a pro rata allocation. As the Fifth District has noted, a tortfeaser might be willing to pay 100 percent of a plaintiff's medical expense

claim, but not all non-economic claims. Smith v. Ag. for Health Care Admin., 24 So. 3d 590, n.1 (Fla. 5th DCA 2009). The evidence here does not negate the possibility of disproportional allocation, for Petitioner chose not to introduce the settlement documents or any other evidence as to the parties' own allocation. Petitioner had the burden in this proceeding to prove appropriate division of the settlement between medical and non-medical expenses.[7/] Dillard v. Ag. for Health Care Admin., 127 So. 3d 820, 821 (Fla. 2d DCA 2013).

38. While Petitioner's assessment that the case had an overall value of $2.5 million was unrefuted, he did not go on to clearly or convincingly break down that total amount among the various categories of damages--most importantly the amount of medical claims--much less demonstrate, as he was then obligated to do, that it was appropriate and accurate to attribute these same proportions to the total recovery.

39. Petitioner failed to prove by clear and convincing evidence what portion of the $100,000 settlement should be allocated to compensate Petitioner for his medical expenses.

40. Petitioner failed to prove by clear and convincing evidence that less than $33,319.66 of the total recovery should be allocated as reimbursement for medical expenses.

ORDER

Upon consideration of the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED that the Agency for Health Care Administration is entitled to $33,319.66 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 29th day of August, 2014, in Tallahassee, Leon County, Florida.

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of August, 2014.

ENDNOTES

[1/] All statutory citations are to the 2013 Florida Statutes except as otherwise indicated.

[2/] It does not appear that the Florida Patients' Compensation Fund would have any liability for damages resulting from negligent security. See § 766.195, Fla. Stat. It is more likely that the Crimes Compensation Trust Fund was involved, see section 960.065, Florida Statutes. The testimony on this point, as with so many others, was less than clear or convincing. As noted, the settlement agreement and supporting documents were not introduced and details of the settlement were not made a part of the record.

[3] This calculation is taken from Petitioner's proposed order. Petitioner arrived at a slightly different amount based upon the calculations in his original Petition for Reduction of Medicaid Lien.

[4] Federal law is relevant because Medicaid is a cooperative federalism program. The United States Supreme Court has determined that a State statute allowing a Medicaid lien to be asserted against any portion of a settlement allocated to other than medical care is contrary to, and preempted by, the "anti-lien" provision of federal law found at 42 U.S.C. § 1396p(a)(1). Arkansas Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 284-285 (2006)("[T]he exception carved out by §§ 1396a(a)(25) and 1396k(a) is limited to payments for medical care. Beyond that, the anti-lien provision applies.").

[5] The parties disagree as to whether or not settlement amounts allocated to future medical expenses are subject to a Medicaid lien. In view of the insufficient evidence as to the amount allocated to past medical expenses, it is not necessary to address this issue.

[6] In the Petition for Reduction of Medicaid Lien, it was noted in footnote 1, "Mr. Puente actually had other medical bills not covered by Medicaid. For the sake of simplicity he is not claiming these additional bills in this Petition." Since Mr. Quintero testified that another fund's claim for medical care was settled, it was incumbent upon Petitioner to either prove that the settlement did not include these expenses or alternatively include them in calculations.

[7] The Court in Wos v. E.M.A., 133 S. Ct. 1391, 1400-1401 (2013), noted that states can conduct administrative or judicial proceedings to perform the difficult task of dividing settlements between medical and non-medical expenses in the absence of stipulation.

COPIES FURNISHED:

Andrew M. Moss, Esquire
Kutner, Rubinoff and Moss, P.A.
501 Northeast First Avenue, Suite 300
Miami, Florida 33132
(eServed)

Adam James Stallard, Esquire
Xerox Recovery Services Group
2073 Summit Lake Drive, Suite 300
Tallahassee, Florida 32317
(eServed)

Elizabeth Dudek, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)

Stuart Williams, General Counsel
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Richard J. Shoop, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.