STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RANDY R. WILLOUGHBY,

Petitioner,

vs. Case No. 15-3276MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

On August 11, 2015, an administrative hearing in this case was held by video teleconference in Tampa and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brent Steinberg, Esquire
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For Respondent: David N. Perry, Esquire
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STATEMENT OF THE ISSUE

The issue in this proceeding is the amount payable to the Agency for Health Care Administration (AHCA) to satisfy a Medicaid lien under section 409.910, Florida Statutes (2015).[1/]

PRELIMINARY STATEMENT

On June 4, 2015, Randy R. Willoughby (Petitioner) filed with the Division of Administrative Hearings (DOAH) a Petition to Determine Amount Payable to Agency for Health Care Administration and Medicaid Health Maintenance Organizations in Satisfaction of Medicaid Lien (the Petition).

On June 25, 2015, the Petitioner filed a Notice of Voluntary Dismissal of the claims against the Health Maintenance Organizations. The remaining claim challenges AHCA's lien for recovery of medical expenses paid on behalf of the Petitioner in the amount of $147,019.61.

By Notice of Hearing dated June 17, 2015, the hearing was scheduled for August 11, 2015.

On July 30, 2015, the parties filed a Pre-hearing Stipulation containing an extensive statement of admitted facts. The statement of admitted facts has been incorporated within the Findings of Fact set forth below.

At the hearing, the Petitioner's Exhibits 1 through 39 were admitted into evidence. AHCA presented no witnesses and offered no exhibits.

The Transcript of the hearing was filed on August 31, 2015. Both parties filed proposed final orders that were reviewed in the preparation of this Final Order.

FINDINGS OF FACT

1. On November 2, 2012, the Petitioner, then 20 years old, was a restrained passenger in his girlfriend's Ford Mustang when it was t-boned on the passenger side by a Chevy pickup truck operated by Eddie Ellison.

2. On November 2, 2012, immediately prior to the collision, Eddie Ellison, who was driving eastbound on Harney Road in Hillsborough County, Florida, failed to stop at the stop sign at Williams Road.

3. Eddie Ellison was negligent in the operation of his Chevy Truck on November 2, 2012, and caused it to strike the Ford Mustang occupied by the Petitioner.

4. Eddie Ellison's wife, Alberta Ellison, was the co-owner of the Chevy truck.

5. The Petitioner was wearing his seatbelt at the time of the collision, and there was no negligence on the part of the Petitioner that was a proximate cause of any injury suffered by him as a result of the motor vehicle collision.

6. There was no negligence on the part of any person other than Eddie Ellison that was a proximate cause of the motor vehicle collision on November 2, 2012.

7. When the Hillsborough County Fire and Rescue team arrived at the accident scene at approximately 8:20 p.m., the Petitioner was unresponsive and exhibiting decorticate posturing. He was extricated from the vehicle, intubated at the scene and immediately transported via ambulance to Tampa General Hospital (TGH).

8. The Petitioner arrived at TGH by approximately 8:39 p.m., presenting in critical condition. He was admitted to the Intensive Care Unit (ICU), where he remained for 11 days.

9. The Petitioner suffered serious injuries as a result of the collision, including: injuries to the brain; multiple fractures to the skull, face, jaw, and other head injuries; multiple pelvic fractures; pulmonary contusions; acute respiratory failure; dysphagia; and splenic lacerations.

10. On November 3, 2012, Stephen Reintjes, M.D., performed a ventriculostomy, wherein he drilled through the right parietal region of the Petitioner's skull and placed an external ventricular drain (EVD) into the right lateral ventricle to relieve the Petitioner's elevated intracranial pressure. The EVD was removed on November 12, 2012.

11. On November 6, 2012, David Ciesla, M.D., and a TGH resident, performed a percutaneous tracheostomy, wherein he created an opening through the Petitioner's neck and placed a windpipe because of the Petitioner's prolonged respiratory

failure. That same day, John Cha, M.D., performed a percutaneous endoscopic gastrostomy (PEG), wherein a feeding tube was placed into the Petitioner's stomach due to the Petitioner's dysphagia. The Petitioner's PEG tube was removed on January 3, 2013.

12. On November 9, 2012, Michael Harrington, M.D., performed an open reduction and internal fixation (ORIF) of the Petitioner's right zygomaticomaxillary fracture, and a closed reduction with maxillomandibular fixation (MMF) of the Petitioner's right zygomatic arch fracture. Essentially, screws and plates were implanted into the Petitioner's right cheekbone and then his jaw was wired shut to facilitate healing. The Petitioner's jaw remained wired shut until December 3, 2012, and the MMF hardware was surgically removed on December 20, 2012.

13. On November 13, 2012, the Petitioner was transferred from the ICU to a surgical trauma unit.

14. Once the Petitioner became medically stable on December 6, 2012, he was transferred to the Tampa General Rehabilitation Center (TGRC). There, the Petitioner received intensive physical and occupational therapy, speech and swallow therapy, psychological services, and 24/7 rehabilitation nursing care.

15. The Petitioner remained at TGRC until January 16, 2013, 75 days after the crash, when he was discharged to his home.

16. Medicaid paid a total of $147,019.61 for the Petitioner's past medical expenses.

17. For nearly two years following his discharge, the Petitioner was unable to perform the tasks of daily living and was completely dependent on his parents and girlfriend for his care and supervision. The Petitioner was toileted, bathed, and dressed by his parents and his girlfriend. The Petitioner could not walk without assistance. All of the Petitioner's meals were prepared for him. The Petitioner would become obsessive over minor things, easily agitated, and frequently combative. The Petitioner had violent outbursts which required all three of his caretakers to physically restrain him. If left unattended at meals, the Petitioner would overeat until he would vomit. The Petitioner gained a life-threatening 100 pounds over this period. Beyond the most basic level, the Petitioner could not use a computer, play video games, or engage in an active social life, much less skateboard or participate in any of the other physical activities he once enjoyed. The Petitioner spent the majority of his time at home with his parents and girlfriend watching television, with occasional supervised trips outside the home.

18. On June 12, 2013, the Petitioner filed suit against Eddie Ellison and Alberta Ellison in the Circuit Court of the Thirteenth Judicial Circuit, in and for Hillsborough County,

Florida, Case No: 13-CA-008277 ("the underlying lawsuit"), seeking to recover damages in excess of $15,000.

19. In the underlying lawsuit, the Petitioner seeks to recover damages for the following: medical expenses incurred in the past; medical expenses to be incurred in the future; lost earnings incurred in the past; loss of earning capacity in the future; property damage incurred in the past; pain, suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect, and loss of capacity for the enjoyment of life sustained in the past; and pain, suffering, disability, physical impairment, disfigurement, mental anguish, inconvenience, aggravation of a disease or physical defect, and loss of capacity for the enjoyment of life to be sustained in the future. The Petitioner also seeks to recover costs incurred by the Petitioner in the underlying lawsuit, pre-judgment interest at the statutory rate for actual, out-of-pocket pecuniary losses from the date of the loss, and attorney's fees to the extent allowed by law.

20. In the underlying lawsuit, the Petitioner sued his uninsured motorist carrier, 21st Century Centennial Insurance Company (21st Century), seeking to recover $10,000 in uninsured motorist benefits owed to the Petitioner under an automobile insurance policy paid for by the Petitioner's parents, Richard

and Linda Willoughby. The insurer denied coverage and refused to pay the uninsured motorist benefits.

21. In the underlying lawsuit, the Petitioner also sued 21st Century for violation of section 624.155, Florida Statutes, seeking to recover the total amount of the Petitioner's damages from 21st Century as provided in section 627.727(10), Florida Statutes. The Petitioner also sought to recover from 21st Century applicable pre-judgment interest, attorneys' fees pursuant to sections 624.155, 627.727(10), and 627.428 and taxable costs.

22. On February 13, 2015, the Petitioner agreed to settle his claims against 21st Century for $4,000,000.

23. The Petitioner received the settlement proceeds from 21st Century on March 16, 2015.

24. On March 20, 2015, the Petitioner and 21st Century filed a joint stipulation to dismiss the Petitioner’s claims against 21st Century with prejudice.

25. As of March 20, 2015, the Petitioner had incurred a total of $50,375.32 in taxable costs, which the Petitioner repaid to the Petitioner's counsel out of the 21st Century settlement proceeds.

26. On May 14, 2015, a total of $147,844.16 was transferred into an interest-bearing trust account for the benefit of AHCA

pending an administrative determination of the agency's right to benefits under section 409.910.

27. The parties to this proceeding stipulated that, of the $4 million paid by 21st Century, $3.99 million was "bad faith damages," paid to settle the Petitioner's claim for damages under section 627.727(10), on account of 21st Century's wrongful failure to pay the Petitioner's uninsured motorist claim and other violations of section 624.155.

28. The settlement agreement between the Petitioner and 21st Century does not specifically attribute any of the $4 million settlement amount to "bad faith" and states that "all sums set forth herein constitute damages on account of personal injuries or sickness." The settlement agreement further states as follows:

> The parties agree and acknowledge that this agreement is a settlement of claims which are contested and disputed. Any payments are not to be construed as an admission of liability on the part of 21st Century, which expressly denies any liability for this action.

29. The Petitioner also received a total of $20,000 from Esurance Property and Casualty Insurance Company, reflecting the $10,000 limit of bodily injury liability insurance and $10,000 limit of uninsured motorist coverage under the automobile insurance policy that insured the driver of the Ford Mustang, Kayliegh Lewis, at the time of the crash.

30. The Petitioner's claims against Eddie Ellison and Alberta S. Ellison remain pending in the underlying lawsuit.

31. As of the July 30, 2015, filing of the Pre-hearing Stipulation, the Ellisons' insurer has only offered the $100,000 limit of bodily injury liability insurance to settle all of the Petitioner's claims against the Ellisons.

32. The $4,020,000 paid to the Petitioner does not fully compensate him for the full monetary value of all of his damages.

33. The full monetary value of all of the Petitioner's damages is at least $10 million.

34. At the time of the settlement with 21st Century, the full monetary value of all of the Petitioner's damages was at least $10 million.

35. At the time of the settlement with 21st Century, the Petitioner had suffered not less than $23,800 in lost wages.

36. At the time of the settlement with 21st Century, the Petitioner's work life expectancy through age 67 was 45 years.

37. At the time of the settlement with 21st Century, the Petitioner's loss of future earning capacity was within the range of $794,135.92 and $2,093,950.12.

38. At the time of the settlement with 21st Century, the Petitioner's future medical expenses were projected to exceed $5 million.

39. At the time of the settlement with 21st Century, the Petitioner's past non-economic damages exceeded $1 million.

40. At the time of the settlement with 21st Century, the Petitioner's life expectancy was 59.7 years.

41. At the time of the settlement with 21st Century, the Petitioner's future non-economic damages were within the range of $5 million to $10 million.

42. Although the parties to this proceeding stipulated that the Petitioner has recovered less than $147,019.61 as payment for past medical expenses, the settlement agreement between the Petitioner and 21st Century states that "all sums set forth herein constitute damages on account of personal injuries or sickness."

43. The Petitioner is no longer eligible for Medicaid.

44. Medicaid has not paid or committed to pay any funds for the Petitioner's future medical care.

CONCLUSIONS OF LAW

45. DOAH has jurisdiction over the parties to and subject matter of this proceeding. See §§ 120.569, 120.57(1), and 409.910(17), Fla. Stat.

46. Medicaid is a federal program, established in 1965 by Title XIX of the Social Security Act, which provides medical care to needy individuals. The federal government provides funds to

state Medicaid programs, which then use the funds to pay the costs of medical care provided to qualified individuals.

47. AHCA is the state agency responsible for administering the Florida Medicaid program. § 409.902, Fla. Stat.

48. States that participate in the federal Medicaid program are required to comply with applicable federal requirements, including a requirement that a state must seek reimbursement for medical expenses incurred on behalf of qualified individuals if such individuals subsequently recover funds from liable third parties. It is often said that Congress wanted Medicaid to be a "payer of last resort, that is, other available resources must be used before Medicaid pays for the care of an individual enrolled in the Medicaid program." S. Rep. No. 99-146, at 312 (1985), reprinted in 1986 U.S.C.C.A.N. 42, 279. See also Ahlborn v. Arkansas Dep't of Human Servs., 397 F.3d 620, 623 (8th Cir. 2005), aff'd, Arkansas Dep't of Health and Human Servs. v. Ahlborn, 547 U.S. 268 (2006).

49. In compliance with the federal requirements, the Florida Legislature adopted section 409.910, the "Medicaid Third-Party Liability Act." Section 409.910(1) provides as follows:

> It is the intent of the Legislature that Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid. If benefits of a liable third party are discovered or become available

> after medical assistance has been provided by Medicaid, it is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity. Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. Principles of common law and equity as to assignment, lien, and subrogation are abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources. It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources.

50. Section 409.910(11), which establishes the procedure by which AHCA seeks reimbursement for Medicaid medical assistance provided to a qualified individual, states as follows:

> The agency may, as a matter of right, in order to enforce its rights under this section, institute, intervene in, or join any legal or administrative proceeding in its own name in one or more of the following capacities: individually, as subrogee of the recipient, as assignee of the recipient, or as lienholder of the collateral.
>
> (a) If either the recipient, or his or her legal representative, or the agency brings an action against a third party, the recipient, or the recipient's legal representative, or the agency, or their attorneys, shall, within 30 days after filing the action, provide to the other written notice, by personal delivery or registered mail, of the action, the name of the court in which the case is brought, the case number of such action, and a copy of the pleadings. If an action is brought by either the agency, or the recipient or the recipient's legal representative, the other may, at any time before trial on the merits, become a party

to, or shall consolidate his or her action with the other if brought independently. Unless waived by the other, the recipient, or his or her legal representative, or the agency shall provide notice to the other of the intent to dismiss at least 21 days prior to voluntary dismissal of an action against a third party. Notice to the agency shall be sent to an address set forth by rule. Notice to the recipient or his or her legal representative, if represented by an attorney, shall be sent to the attorney, and, if not represented, then to the last known address of the recipient or his or her legal representative.

(b) An action by the agency to recover damages in tort under this subsection, which action is derivative of the rights of the recipient or his or her legal representative, shall not constitute a waiver of sovereign immunity pursuant to s. 768.14.

(c) In the event of judgment, award, or settlement in a claim or action against a third party, the court shall order the segregation of an amount sufficient to repay the agency's expenditures for medical assistance, plus any other amounts permitted under this section, and shall order such amounts paid directly to the agency.

(d) No judgment, award, or settlement in any action by a recipient or his or her legal representative to recover damages for injuries or other third-party benefits, when the agency has an interest, shall be satisfied without first giving the agency notice and a reasonable opportunity to file and satisfy its lien, and satisfy its assignment and subrogation rights or proceed with any action as permitted in this section.

(e) Except as otherwise provided in this section, notwithstanding any other provision of law, the entire amount of any settlement of the recipient's action or claim involving third-party benefits, with or without suit,

is subject to the agency's claims for reimbursement of the amount of medical assistance provided and any lien pursuant thereto.

(f) Notwithstanding any provision in this section to the contrary, in the event of an action in tort against a third party in which the recipient or his or her legal representative is a party which results in a judgment, award, or settlement from a third party, the amount recovered shall be distributed as follows:

1. After attorney's fees and taxable costs as defined by the Florida Rules of Civil Procedure, one-half of the remaining recovery shall be paid to the agency up to the total amount of medical assistance provided by Medicaid.

2. The remaining amount of the recovery shall be paid to the recipient.

3. For purposes of calculating the agency's recovery of medical assistance benefits paid, the fee for services of an attorney retained by the recipient or his or her legal representative shall be calculated at 25 percent of the judgment, award, or settlement.

4. Notwithstanding any provision of this section to the contrary, the agency shall be entitled to all medical coverage benefits up to the total amount of medical assistance provided by Medicaid. For purposes of this paragraph, "medical coverage" means any benefits under health insurance, a health maintenance organization, a preferred provider arrangement, or a prepaid health clinic, and the portion of benefits designated for medical payments under coverage for workers' compensation, personal injury protection, and casualty.

(g) In the event that the recipient, his or her legal representative, or the recipient's

> estate brings an action against a third party, notice of institution of legal proceedings, notice of settlement, and all other notices required by this section or by rule shall be given to the agency, in Tallahassee, in a manner set forth by rule. All such notices shall be given by the attorney retained to assert the recipient's or legal representative's claim, or, if no attorney is retained, by the recipient, the recipient's legal representative, or his or her estate.
>
> (h) Except as otherwise provided in this section, actions to enforce the rights of the agency under this section shall be commenced within 5 years after the date a cause of action accrues, with the period running from the later of the date of discovery by the agency of a case filed by a recipient or his or her legal representative, or of discovery of any judgment, award, or settlement contemplated in this section, or of discovery of facts giving rise to a cause of action under this section. Nothing in this paragraph affects or prevents a proceeding to enforce a lien during the existence of the lien as set forth in subparagraph (6)(c)9.

51. The formula set forth at section 409.910(11)(f) essentially provides that the amount to be recovered by AHCA is half of the total settlement recovery, after deducting taxable costs and attorney fees (25 percent of the total settlement or judgment) not to exceed the amount actually paid by Medicaid on the beneficiary's behalf. In this case, the calculation under the formula results in an amount in excess of what Medicaid actually paid on behalf of the Petitioner, and accordingly, the recovery amount being sought is $147,019.61.

52. Section 409.910(17) establishes the procedure by which a recipient can contest the medical expense damages payable to the agency and provides as follows:

> (17)(a) A recipient or his or her legal representative or any person representing, or acting as agent for, a recipient or the recipient's legal representative, who has notice, excluding notice charged solely by reason of the recording of the lien pursuant to paragraph (6)(c), or who has actual knowledge of the agency's rights to third-party benefits under this section, who receives any third-party benefit or proceeds for a covered illness or injury, must, within 60 days after receipt of settlement proceeds, pay the agency the full amount of the third-party benefits, but not more than the total medical assistance provided by Medicaid, or place the full amount of the third-party benefits in an interest-bearing trust account for the benefit of the agency pending an administrative determination of the agency's right to the benefits under this subsection. Proof that such person had notice or knowledge that the recipient had received medical assistance from Medicaid, and that third-party benefits or proceeds were in any way related to a covered illness or injury for which Medicaid had provided medical assistance, and that such person knowingly obtained possession or control of, or used, third-party benefits or proceeds and failed to pay the agency the full amount required by this section or to hold the full amount of third-party benefits or proceeds in an interest-bearing trust account pending an administrative determination, unless adequately explained, gives rise to an inference that such person knowingly failed to credit the state or its agent for payments received from social security, insurance, or other sources, pursuant to s. 414.39(4)(b), and acted with the intent set forth in s. 812.014(1).

> (b) A recipient may contest the amount designated as recovered medical expense damages payable to the agency pursuant to the formula specified in paragraph (11)(f) by filing a petition under chapter 120 within 21 days after the date of payment of funds to the agency or after the date of placing the full amount of the third-party benefits in the trust account for the benefit of the agency pursuant to paragraph (a). The petition shall be filed with the Division of Administrative Hearings. For purposes of chapter 120, the payment of funds to the agency or the placement of the full amount of the third-party benefits in the trust account for the benefit of the agency constitutes final agency action and notice thereof. Final order authority for the proceedings specified in 1this subsection rests with the Division of Administrative Hearings. This procedure is the exclusive method for challenging the amount of third-party benefits payable to the agency. In order to successfully challenge the amount payable to the agency, the recipient must prove, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f) or that Medicaid provided a lesser amount of medical assistance than that asserted by the agency. (Emphasis added.)

53. The evidence in this case fails to establish that Medicaid provided a lesser amount of medical assistance than that claimed by AHCA. The parties stipulated that Medicaid paid a total of $147,019.61 for the Petitioner's past medical expenses. The parties also stipulated that AHCA has not paid or committed to pay any expenses related to future medical care.

54. Accordingly, the remaining issue presented in this case is whether the Petitioner has established, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement than the amount calculated by AHCA pursuant to the formula set forth at section 409.910(11)(f). The Petitioner has failed to meet the burden.

55. The parties stipulated that "of the $4 million paid by 21st Century, $3.99 million was 'bad faith' damages, paid to settle the Petitioner's claim for damages under section 627.727(10), Florida Statutes." The Petitioner asserts that "bad faith" damages are unavailable as a source for reimbursement of medical expenses incurred by ACHA on the Petitioner's behalf.

56. Section 627.727(10) provides as follows:

> The damages recoverable from an uninsured motorist carrier in an action brought under s. 624.155 shall include the total amount of the claimant's damages, including the amount in excess of the policy limits, any interest on unpaid benefits, reasonable attorney's fees and costs, and any damages caused by a violation of a law of this state. The total amount of the claimant's damages is recoverable whether caused by an insurer or by a third-party tortfeasor.

57. Section 624.155(1)(b) establishes a civil cause of action against an insurer for a variety of reasons including "not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted

fairly and honestly toward its insured and with due regard for her or his interests."

58. The actual settlement agreement executed between the Petitioner and 21st Century fails to support a finding that the $3.99 million was a "bad faith" penalty based on the alleged wrongful failure by 21st Century to pay the Petitioner's uninsured motorist claim and other violations of section 624.155. The agreement states that it was not to be construed as an admission of liability by 21st Century and that the parties entered into the agreement to settle the dispute. The agreement further specifically states that "all sums set forth herein constitute damages on account of personal injuries or sickness."

59. Additionally, the agreement to settle the case was executed solely between the Petitioner and the insurer. AHCA was not a party to the settlement. Even assuming the settlement agreement contained an allocation of damages as asserted by the Petitioner, AHCA would not be bound by the allocation. To find otherwise would allow the parties to a settlement to escape the statutory Medicaid reimbursement formula merely by reducing the allocation identified in the settlement as "medical expenses." See Agras v Ag. for Health Care Admin., Case No. 14-2403MTR, (Fla. DOAH Oct. 30, 2014); Mobley v. Ag. for Health Care Admin.,

Case No. 13-4785MTR (Fla. DOAH May 21, 2014); Savasuk v. Ag. for Health Care Admin., Case No. 13-4130MTR (Fla. DOAH Jan. 29, 2014).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that the Respondent, Agency for Health Care Administration, is entitled to reimbursement from the Petitioner, Randy R. Willoughby, in the amount of $147,019.61, pursuant to section 409.910(11)(f), in satisfaction of its Medicaid lien.

DONE AND ORDERED this 7th day of October, 2015, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of October, 2015.

ENDNOTE

[1/] All citations to the Florida Statutes are to the 2015 edition unless stated otherwise.

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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.