

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JONATHAN VELEZ,

Petitioner,

vs.

Case No. 15-4843MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

FINAL ORDER

Administrative Law Judge June C. McKinney of the Division of Administrative Hearings ("DOAH") heard this case by video teleconference at locations in Tallahassee and Lauderdale Lakes, Florida, on December 17, 2015.

APPEARANCES

For Petitioner: Alejandro Larrazabal, Esquire
Velasquez Dolan Arias, P.A.
101 North Pin Island Road, Suite 201
Plantation, Florida 33324

For Respondent: Alexander R. Boler, Esquire
2073 Summit Lake Drive, Suite 300
Tallahassee, Florida 32317

STATEMENT OF THE ISSUE

The issue is the amount payable to Respondent, Agency for Health Care Administration ("Respondent" or "ACHA"), in satisfaction of Respondent's Medicaid lien from a settlement

received by Petitioner, Jonathan Velez ("Petitioner" or "Velez"), from a third party, pursuant to section 409.910, Florida Statutes (2015).

PRELIMINARY STATEMENT

By letter, Petitioner was notified by Xerox Recovery Services, Respondent's collection's contractor, that he owed \$142,855.89 to satisfy a Medicaid lien claim, from the medical benefits paid to him from the proceeds of a settlement he received as compensation for injuries he suffered as a result of a football injury. On August 31, 2015, Velez protested the claim and filed a Petition for Equitable Distribution to Determine Medicaid Lien Claim Reimbursement Amount with DOAH, requesting a hearing. The Petition contends that the portion of the settlement that represents medical expenses is less than the amount due under the statutory formula in section 409.910(11)(f), and Respondent is entitled only to \$12,900.00 (or 14 percent of the amount allocated to past medicals).

On December 11, 2015, the parties filed a Joint Pre-hearing Stipulation.

The hearing was set for December 17, 2015, and was held as scheduled. At hearing, Petitioner presented the testimony of Donna Waters-Romero, an attorney with Vernis & Bowling of Broward, P.A., who was qualified without objection as an expert

in valuation of damages. Petitioner's Exhibits 1 through 5 were received into evidence. Respondent did not present any witnesses or proffer any exhibits for admission into evidence. The parties stipulated to facts 1, 2, and 4 through 8 from the Joint Pre-hearing Stipulation, and the relevant facts stipulated therein are accepted and made part of the Findings of Fact below.

The proceedings of the hearing were recorded and transcribed. A one-volume Transcript of the hearing was filed at DOAH on January 20, 2016. Both parties filed timely proposed final orders that the undersigned has considered in the preparation of this Final Order.

Unless otherwise noted, all statutory references are to the Florida Statutes (2015).

FINDINGS OF FACT

1. On September 3, 2008, Velez, then a 14-year-old adolescent child was injured while playing football in Clewiston, Florida.

2. On the date of the accident, Petitioner had a helmet to helmet (face to face) collision with another football participant. The collision caused a hyper-extended injury and Velez immediately fell to the ground and lost consciousness.

3. Velez suffered a C5 burst fracture, a spinal cord injury, anterior cord syndrome and subsequent injuries

originating from this accident, initially rendering him paralyzed.

4. As a result of the injuries, and subsequent ramifications from said injuries, Velez suffered extensive permanent injuries and required extensive medical treatment in Miami, Florida, from September 3, 2008, through October 28, 2013.

5. Petitioner sued numerous defendants for his injuries, but because of waiver and release forms signed by his guardian, the parties settled the case to avoid the possibility of summary judgment against Petitioner.

6. Petitioner recovered \$430,000.00 from a settlement against defendants. The settlement's allocation included: attorney's fees (40 percent) in the amount of \$172,000.00; costs in the amount of \$4,789.72; past medicals in the amount of \$60,000.00; and future medicals in the amount of \$20,000.00.^{1/}

7. ACHA, through the Medicaid program, paid \$142,855.89 on behalf of Petitioner for medical benefits related to the injuries sustained by Petitioner.

8. Xerox Recovery Services, Respondent's collection's contractor, notified Petitioner that he owed \$142,855.89 to satisfy a Medicaid lien claim from the medical benefits paid to him from the proceeds received from the third-party settlement. Petitioner contested the lien amount.

9. At the final hearing, Petitioner presented, without objection, the expert valuation of damages testimony of Donna Waters-Romero ("Waters-Romero"). Waters-Romero has 30 years' experience in both state and federal courts and has solely practiced in the area of personal injury defense, including cases with similar injuries specific to this type of case. Waters-Romero's experience also encompasses evaluation of personal injury cases based on the review of medical records, case law, and injuries.

10. In preparation for her testimony, Waters-Romero reviewed the pleadings, depositions, answers to interrogatories, evaluations, medical records, and defendant's motion for summary judgment along with the attached documents. She also met with Petitioner's attorneys and reviewed the mediation summary, exhibits, case law on Medicaid liens, letter of discharge, and release and settlement agreement.

11. Waters-Romero also specifically researched three circuit court orders that were entered regarding allocation regarding Medicaid liens. To determine how to value Petitioner's claim, Waters-Romero relied on Wos v. E.M.A., 133 S. Ct. 1391(2013), a United States Supreme Court case, and on the circuit court cases as guidance. She determined that every category of the settlement should be reduced based on the ultimate settlement.

12. During her evaluation, Waters-Romero also acknowledged the litigation risk in Velez's case due to the issues with the liability and the waiver and release.

13. Based on her review, Waters-Romero opined that the overall value of Petitioner's claim was valued conservatively at \$2,000,000.00, which was unrebutted. Waters-Romero's testimony was credible, persuasive, and is accepted.

14. The evidence was clear and convincing that the total value of the damages related to Petitioner's injury was \$2,000,000.00 and that the settlement amount, \$430,000.00 was 21.5 percent of the total value. The settlement does not fully compensate Petitioner for the total value of his damages.

15. ACHA's position is that it should be reimbursed for its Medicaid expenditures pursuant to the statutory formula in section 409.910(11)(f). Under the statutory formula, the lien amount is computed by deducting 25 percent attorney's fee of \$107,500.00 from the \$430,000.00 recovery, which yields a sum of \$322,500.00. In this matter, ACHA then deducted zero in taxable costs, which left a sum of \$322,500.00, then divided that amount by two, which yields \$161,250.00. Under the statute, Respondent is limited to recovery of the amount derived from the statutory formula or the amount of its lien, whichever is less.

16. Petitioner's position is that reimbursement for past medical expenses should be limited to the same ratio as

Petitioner's recovery amount to the total value of damages. Petitioner has established that the settlement amount of \$430,000.00 is 21.5 percent of the total value (\$2,000,000.00) of Petitioner's damages. Using the same calculation, Petitioner advances that 21.5 percent of \$60,000.00 (Petitioner's amount allocated in the settlement for past medical expenses), \$12,900.00, should be the portion of the Medicaid lien paid.

17. Petitioner proved by clear and convincing evidence that Respondent should be reimbursed for its Medicaid lien in a lesser amount than the amount calculated by Respondent pursuant to the formula set forth in section 409.910(11)(f).

CONCLUSIONS OF LAW

18. DOAH has jurisdiction over the subject matter and the parties in this case, and final order authority pursuant to sections 120.569, 120.57(1), and 409.910(17), Florida Statutes.

19. 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 a third party. See Ark. Dep't of Health & Hum. Servs. v. Ahlborn, 547 U.S. 268, 276 (2006). To secure reimbursement from liable third parties, the state must require a Medicaid recipient to assign to the state his right to recover medical expenses from those third parties. In relevant part, 42 U.S.C. § 1396a(a)(25) requires:

(H) that to the extent that payment has been made under the State Plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, to the extent that payment has been made under the State Plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services.

20. To comply with this federal mandate, the Florida Legislature enacted section 409.910, Florida's Medicaid Third-Party Liability Act. This statute authorizes and requires the State, through AHCA, to be reimbursed for Medicaid funds paid for a recipient's medical care when that recipient 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.

21. It was undisputed that Medicaid provided \$142,855.89 in medical expenses for Petitioner or that AHCA asserted a Medicaid lien against Petitioner's settlement and the right to seek reimbursement for its expenses. The mechanism by which AHCA enforces its right is set forth in section 409.910 as follows:

(11) 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.

22. As discussed in Finding of Fact 15, supra, AHCA calculated the lien amount utilizing the statutory formula in paragraph (11)(f). One-half of the amount remaining, after deduction of 25 percent attorneys' fees and costs, would be \$161,250.00, which exceeds the actual amount expended by Medicaid on Petitioner's medical care. Application of the formula would provide sufficient funds to satisfy the Medicaid lien of \$142,855.89.

23. Section 409.910(13) provides that AHCA is not automatically bound by the allocation of damages set forth in Petitioner's settlement agreement:

(13) No action of the recipient shall prejudice the rights of the agency under this section. No settlement, agreement, consent decree, trust agreement, annuity contract, pledge, security arrangement, or any other device, hereafter collectively referred to in this subsection as a "settlement agreement," entered into or consented to by the recipient or his or her legal representative shall impair the agency's rights. However, in a structured settlement, no settlement agreement by the parties shall be effective or binding against the agency for benefits accrued without the express written consent of the agency or an appropriate order of a court having personal jurisdiction over the agency.

24. Section 409.910(17)(b) provides a mechanism whereby a recipient may challenge AHCA's presumptively correct calculation of medical expenses payable to the agency. The mechanism is a means for determining whether a lesser portion of total recovery should be allocated as reimbursement for medical expenses in lieu of the amount calculated by application of the formula in section 409.910(11)(f). Section 409.910(17)(b) provides in pertinent part that:

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 this 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.

25. The clear and convincing standard of proof has been described by the Florida Supreme Court, as follows:

Clear and convincing evidence requires that evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

26. In this matter, Petitioner challenged AHCA's calculation and demonstrated by clear and convincing evidence that the settlement amount is 21.5 percent of the total value of damages suffered by Velez. Petitioner's expert correctly explained that lien recovery is based on a reduction in every category. However, the undersigned is not persuaded by Petitioner's contention that \$60,000.00 (the allocated amount of the settlement for past medical expenses) should be the amount utilized when calculating the reduction in this case. Hence, Petitioner's formula for calculating the Medicaid amount owed is rejected. Instead of taking 21.5 percent of the allocated medical expenses in the settlement amount of \$60,000.00, the 21.5 percent should be applied to the total Medicaid lien to determine the amount owed. Accordingly, ACHA is entitled to 21.5 percent of the total Medicaid lien of \$142,855.89, or \$30,714.02.

27. In summary, the evidence in this case is clear and convincing that \$30,714.02 of the total third-party recovery represents the share of the settlement proceeds fairly attributable to the expenditures that were actually paid by Respondent for Petitioner's medical expenses.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED that:

The Agency for Health Care Administration is entitled to \$30,714.02 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 12th day of April, 2016, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
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 12th day of April, 2016.

ENDNOTE

^{1/} See Exhibit 4.

COPIES FURNISHED:

Alejandro Larrazabal, Esquire
Velasquez Dolan Arias, P.A.
101 North Pin Island Road, Suite 201
Plantation, Florida 33324
(eServed)

Alexander R. Boler, Esquire
2073 Summit Lake Drive, Suite 300
Tallahassee, Florida 32317
(eServed)

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

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.