

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AUSTIN HOPPER,

Petitioner,

vs.

Case No. 15-5026MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

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FINAL ORDER

D. R. Alexander, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted a hearing in this matter on November 17, 2015, by video teleconferencing at sites in St. Petersburg and Tallahassee, Florida.

APPEARANCES

For Petitioner: Daniel J. Leeper, Esquire
Leeper and Leeper, P.A.
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St. Petersburg, Florida 33713-6902

For Respondent: Alexander R. Boler, Esquire
Xerox Recovery Services Group
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STATEMENT OF THE ISSUE

The issue is the amount payable to Respondent, Agency for Health Care Administration, in satisfaction of Respondent's Medicaid lien from a settlement received by Petitioner, Austin

Hopper, from a third party, pursuant to section 409.910, Florida Statutes (2015).

PRELIMINARY STATEMENT

On August 29, 2013, Petitioner was notified by Respondent's collections contractor that he owed \$102,398.81 in satisfaction of his Medicaid lien for medical benefits paid to him, to be paid from the proceeds of a settlement he received as compensation for injuries he suffered as a result of being struck by a motor vehicle. When the claim could not be settled informally, on September 11, 2015, Petitioner filed with DOAH a Petition for Equitable Distribution to Determine Medicaid Lien Claim Reimbursement Amount. As later clarified, he contends the portion of the settlement that represents past and future medical expenses is less than the amount due under the statutory formula in section 409.910(11)(f), and Respondent is entitled only to \$28,043.00.

At the final hearing, both Petitioner and his counsel testified. Petitioner's Exhibits 1 through 20 were accepted in evidence. Respondent did not present any witnesses or proffer any exhibits for admission into evidence.

A one-volume Transcript of the hearing has been prepared. Proposed final orders (PFOs) were filed by the parties and have been considered by the undersigned in the preparation of this Final Order.

FINDINGS OF FACT

1. Petitioner is a 27-year-old male who currently resides in St. Petersburg, Florida.

2. Respondent is the state agency authorized to administer Florida's Medicaid program. See § 409.902, Fla. Stat.

3. On November 27, 2012, Petitioner, then 24 years of age, was severely injured while riding a motorcycle that was struck by a motor vehicle in St. Petersburg. Among other injuries, Petitioner suffered a severed spinal cord, three fractured cervical vertebrae, a fractured jaw, fractured ribs, the loss of seven teeth, and right shoulder laceration.

4. As a result of his injuries, Petitioner is now a paraplegic confined to a wheelchair. He has other health issues other than paralysis, including an inability to voluntarily void his bladder or bowels. The injuries have had a profound effect on Mr. Hopper's life, including his bodily functions, social life, and work life.

5. The Florida Medicaid program paid accident-related medical expenses totaling \$102,398.81 on behalf of Petitioner. His damages also include the medical expenses paid by the Brain and Spinal Cord Injury Program in the amount of \$1,143.50. These amounts are not in dispute.

6. Petitioner filed a lawsuit against the owner of the vehicle that struck him. The owner maintained a policy of

bodily injury liability insurance, with policy limits of \$250,000.00, which amount was paid to Petitioner. Thus, the lawsuit did not proceed to trial. In addition, Petitioner had available to him an uninsured/underinsured motorist policy with limits of \$10,000.00 per person, which was paid to him. Finally, the vehicle owner agreed to pay an additional \$30,000.00 to resolve all claims arising out of the accident. In all, Petitioner has received \$290,000.00 due to the limited available insurance coverage and the financial resources of the at-fault party. The settlement does not compensate Petitioner for the total value of his damages. The moneys are not differentiated, that is, apportioned to specific types of damages, such as economic or non-economic, past or future.

7. Respondent contends it should be reimbursed for Medicaid expenditures on behalf of Petitioner pursuant to the formula set forth in section 409.910(11)(f). Under the formula, the lien amount is computed by deducting a 25 percent attorney's fee (\$72,500.00) and taxable costs (\$689.12) from the \$290,000 recovery, which yields a sum of \$216,810.88. This amount is then divided by two, which yields \$108,405.44. Under the statute, Respondent is limited to recovery of the amount derived from the statutory formula or the amount of the lien, whichever is less. The parties agree that the application of the formula

in section 409.910(11)(f) to the entire proceeds yields \$102,398.81, or the full amount of the lien.

8. Pursuant to section 409.910(17)(b), which provides that a Medicaid recipient has a right to rebut the default allocation described above, Petitioner asserts that reimbursement for past and future medical expenses should be limited to the same ratio as his recovery amount is to the total value of damages. This theory relies upon establishing the full or total value of damages to the injured party. Full damages include past and future economic losses and past and future non-economic damages. Although Respondent contends that insufficient proof has been submitted, the use of this theory is not in dispute. Under this theory, Petitioner asserts the full value of damages suffered by him is \$15,725,384.00, of which past and future medical expenses comprise \$1,519,792.31, or 9.67 percent of total damages. That percentage of the settlement amount of \$290,000.00 is \$28,043.00, which Petitioner claims is due Respondent in satisfaction of the lien. The statute requires that Petitioner substantiate his position by clear and convincing evidence.

9. Petitioner's counsel presented fact and opinion testimony on the issue of valuation of damages. Counsel has been practicing for 25 years and tried dozens of jury and bench trials, focusing primarily in civil trial law. He has handled numerous personal injury cases in the seven-figure range,

including his most recent trial that resulted in a \$3.1 million judgment. In forming his opinions, counsel relied on peer-reviewed studies, government studies, a damage evaluation by the at-fault party's counsel, and his personal experience in valuation of damages in personal injury suits. Except for the damage evaluation by the at-fault party's counsel, none of these materials, all hearsay, were offered in evidence.

10. After the accident, Mr. Hopper moved to his parents' home. This required extensive modifications for his needs and convenience, such as installing an ADA-accessible bathroom, building a new room at ground level to serve as his bedroom, and installing a lift that allows him to access other areas of the home that are above ground level. Also, it was necessary to install paddles on Petitioner's motor vehicle which allows him to drive. According to counsel's testimony, these modifications cost "\$50,000, or so." Given the extensive modifications described above, a cost of \$50,000.00 is not an unreasonable amount, is credible, and is hereby accepted.

11. The parties agree that lost earnings and lost earning capacity should be included in Mr. Hopper's damages. He was employed full-time in the construction industry as a carpenter just prior to the accident. To increase his income, he also worked weekends as a window installer, a food service helper, and a bouncer at a local bar. The testimony reflects that his

wages were in the \$10.00 to \$20.00 per hour range. He has not returned to gainful employment since the date of the injuries. At \$10.00 per hour, for 40 hours per week, which represents the minimum hourly range that he earned, for the three years post injury, Mr. Hopper's loss is \$63,400.00. This amount is a conservative estimate of lost earnings over the last three years, is reliable and persuasive, and is hereby accepted.

12. Lost earning capacity is the difference between what Mr. Hopper would have earned, and what he can now earn. On this issue, the record shows that Mr. Hopper has extremely serious spinal cord injuries, but there is no credible evidence that he cannot work again in some capacity during his expected life span. According to counsel's testimony, the national average hourly wage is \$24.05. Counsel explained that he arrived at this amount by "tak[ing] everyone's wages, you know, people that are making substantial salaries and people who are making minimum wage, and we dump them all together and we come up with a national average. That's what the national worker's average is." He further testified that in his most recent trial, "the jury went with that figure one hundred percent." A work-life expectancy of 41 years was then assumed, when Mr. Hopper reaches the normal retirement age of 67, resulting in future loss of earning capacity of \$2,050,984.00. Respondent did not suggest an alternative number, simply arguing in its PFO that no damages

for lost earning capacity can be found, as Petitioner now performs minor household projects that entail some skill and labor. The undersigned finds there is less than clear and convincing evidence to support the national average hourly wage used by counsel or his assumption that Petitioner will be unable to work at any time during his expected life span. This element of damages is accordingly rejected.

13. The parties agree that future medical expenses should also be included in the full value of damages. Petitioner's counsel opined that "roughly \$27,500 per year" for 51.5 years (the estimated remaining life expectancy of Mr. Hopper based on Social Security Administration actuarial numbers), or a total of \$1,416,250.00, should be considered the future medical expenses. In formulating this opinion, counsel relied on research performed by the United States Department of Veterans Affairs for paraplegics who have incomplete motor function at any level, such as Mr. Hopper. He also relied on two peer review studies performed by the private sector in 1997 and 2009 that corroborate the government research. The proposed amount is credible, reasonable, and persuasive and has been accepted.

14. Future non-medical expenses should likewise be included in the full value of damages. These expenses cover such things as renovations to make future homes accessible, special equipment such as wheelchairs, lifts, bathroom bars, and

modifications to motor vehicles so that he can drive. Relying on "studies that are done at [unnamed] universities," counsel testified that "the best information that [he has] available" is an average cost of \$5,500.00 per year, for 51.5 years, or a total of \$283,250.00. There is less than clear and convincing evidence to support this element of damages, and the claim for future non-medical expenses has been rejected.

15. Mr. Hopper now lives with his parents. It is not unreasonable to assume that he will outlive his parents and require long-term care for the last 21 and one-half years of his life expectancy. Counsel opined that a conservative estimate of those expenses is \$1,000.00 per month, or an additional \$258,000.00. The undersigned has accepted this testimony as credible, persuasive, and reliable.

16. Past and future non-economic damages, which include damages for pain and suffering, mental anguish, and the loss of capacity for the full enjoyment of life, are a more difficult item to estimate. Petitioner's counsel testified that a jury typically awards a larger amount for past non-economic damages during the acute phase of the injury, that is, the first years after the injury, but a lesser amount per year going forward in the future. Based on his experience trying personal injury cases, counsel opined that, given the nature of the injuries, an award of \$500,000.00 per year for each of the three years since

the accident, or a total of \$1,500,000.00, would be an appropriate amount. The undersigned finds this amount for past non-economic damages is credible and persuasive and is hereby accepted.

17. Based on numerous cases that he has tried to verdict, the number of multiple eight-figure verdicts handed down over the last ten years in Pinellas County (where Petitioner resides), and Mr. Hopper's life expectancy of 51.5 years, counsel opined that a jury would award at least \$10 million for future non-economic damages. The undersigned finds this amount to be credible and persuasive and is hereby accepted.

18. In summary, by clear and convincing evidence, Petitioner has demonstrated that the full value of his damages is \$13,287,650.00 consisting of the following: past economic losses of \$50,000.00 for extensive modifications to his parent's home and his vehicle; future damages for medical expenses totaling \$1,416,250.00 (comprised of \$27,500.00 per year times 51.5 years); future assistance damages totaling \$258,000.00 (consisting of \$1,000.00 per month times 21.5 years); past lost earnings of \$63,400.00; past non-economic damages in the amount of \$1,500,000.00 (\$500,000.00 per year for three years); and future non-economic damages totaling \$10,000,000.00.

19. Of his total damages, the past and future medical expenses comprise \$1,519,792.31 (\$102,398.31 Medicaid lien,

\$1,143.50 paid by the Brain and Spinal Cord Injury Program, and \$1,416,250.00 in future medical expenses). As such, the past and future medical expenses equal 11.4 percent of the total damages. When applying that factor to the total settlement, \$33,060.00 of the settlement represents past and future medical expenses. Respondent is entitled to recover that amount.

CONCLUSIONS OF LAW

20. 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 Ark. Dep't of Health & Hum. Servs. v. Ahlborn, 547 U.S. 268 (2006). States may satisfy this requirement by enacting statutes that impose Medicaid liens to recover the portion of settlements that represent medical expenses.

21. Consistent with federal law, section 409.910 authorizes and requires the State to be reimbursed for Medicaid funds paid for medical expenses when the beneficiary subsequently receives a settlement from a third-party. The statute creates an automatic lien on any such settlement for the medical assistance provided by Medicaid. See § 409.910(6)(c), Fla. Stat.

22. Section 409.910(11)(f) establishes a formula to determine the amount of Medicaid medical assistance benefits the

State is to be reimbursed. "The formula operates by reducing the gross settlement amount by 25% to account for attorneys' fees, then subtract taxable costs, then divides that number by two, and awards Medicaid the lesser of the amount of benefits paid or the resulting number." Mobley v. State, Ag. for Health Care Admin., 40 Fla. L. Weekly D2816 (1st DCA, Dec. 18, 2015).

23. The application of the apportionment formula in section 409.910(11)(f)1. to the \$290,000.00 settlement at issue yields attorney's fees of \$72,500.00, less taxable costs of \$689.12, with \$216,810.88 of the recovery amount remaining. One-half of this is \$108,405.44, which is greater than the \$102,398.81 of Medicaid assistance that Respondent provided for Petitioner. Accordingly, if the statutory formula applies to determine the reimbursement due in this case, Respondent is entitled to \$102,398.81, or the amount of Medicaid medical assistance it actually paid on Petitioner's behalf.

24. Under section 409.917(17)(b), a Medicaid recipient has the right to rebut this presumptively valid statutory default allocation in an administrative proceeding. This is accomplished by establishing, through clear and convincing evidence, that either a lesser portion of the total recovery should be allocated as a medical expense reimbursement than is calculated under the statutory formula, or that Medicaid actually provided a lesser amount of medical assistance than has

been asserted by Respondent. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997).

25. By clear and convincing evidence, Petitioner has established a total value of damages suffered in the amount of \$13,287,650.00, of which the past and future medical expenses comprise \$1,416,250.00, or 11.4 percent of that amount. Accordingly, Respondent is entitled to 11.4 percent of the total settlement amount of \$290,000.00, or \$33,060.00.

26. In summary, the evidence in this case is clear and convincing that \$33,060.00 of the total third-party recovery represents the share of the settlement proceeds fairly attributable to expenditures that were actually paid by Respondent for Petitioner's medical expenses.

DISPOSITION

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

ORDERED that Respondent is entitled to reimbursement in the amount of \$33,060.00 in satisfaction of its Medicaid lien.

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

D.R. Alexander

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.