

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRIAN GLASS,

Petitioner,

vs.

Case No. 19-2679MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

FINAL ORDER

This case came before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings ("DOAH") for final hearing on September 13, 2019, in Tallahassee, Florida.

APPEARANCES

For Petitioners: Floyd B. Faglie, Esquire
Staunton and Faglie, P.L.
189 East Walnut Street
Monticello, Florida 32344

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

STATEMENT OF THE ISSUE

The issue to be decided is the amount payable to Respondent, Agency for Health Care Administration ("Respondent" or "AHCA"), in satisfaction of Respondent's Medicaid lien from a settlement received by Petitioner, from a third party, pursuant to section 409.910, Florida Statutes (2018).

PRELIMINARY STATEMENT

On or about May 20, 2019, Petitioner, Brian Glass ("Glass" or "Petitioner"), filed a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien ("Petition"), pursuant to section 409.910(17)(b), protesting the lien claim and requesting a hearing.

On May 20, 2019, the Petition was filed at DOAH and assigned to the undersigned administrative law judge. The case proceeded as scheduled on September 13, 2019.

At hearing, Petitioner presented the testimony of one witness: Steven B. Phillips. Petitioner's Exhibits 1 through 11 were received into evidence without objection. Respondent did not present any witnesses or proffer any exhibits for admission into evidence.

The proceedings of the hearing were recorded and transcribed. A one-volume Transcript of the hearing was filed at DOAH on October 8, 2019. Both parties timely filed proposed final orders that the undersigned has considered in the preparation of this Final Order.

The parties stipulated to the facts in the Joint Pre-hearing Stipulation, and the relevant facts stipulated therein are accepted and made part of the Findings of Fact below. Unless otherwise noted, all statutory references are to the Florida Statutes (2018).

FINDINGS OF FACT

1. On November 8, 2013, Glass, who was then 25 years old, was struck by a car while crossing the road, which caused multiple severe mental and physical injuries.

2. After the accident, Glass was hospitalized. His medical care related to his injuries was paid by Medicaid.

3. Glass, through counsel, brought a personal injury lawsuit against the driver and company that owned the vehicle that struck him ("tortfeasor") to recover all of his damages associated with his injuries.

4. Steven B. Phillips ("Phillips"), a nearly 28-year civil trial attorney with the law firm of Pincus & Currier in Palm Beach, Florida, represented Glass in his personal injury action.

5. During the pendency of the personal injury action, AHCA neither started a civil action to enforce its rights under section 409.910 nor intervened or joined in Glass's action against the tortfeasor.

6. Phillips handled Glass's personal injury case through settlement. The personal injury lawsuit was ultimately settled for the lump-sum unallocated amount of \$225,000.00.

7. Glass's taxable costs incurred in securing the \$225,000.00 settlement are \$29,677.93.

8. By letter, AHCA was notified of Glass's settlement of the personal injury action.

9. AHCA has neither filed an action to set aside, void, or otherwise dispute the settlement.

10. AHCA, through its Medicaid program, spent \$145,629.51 in Medicaid benefits on behalf of Glass, all of which represents expenditures paid for Glass's past medical expenses.

11. The formula at section 409.910(11)(f), as applied to the entire \$225,000.00 settlement, requires payment of the Medicaid lien in the full amount of the \$69,536.04. AHCA is demanding payment of \$69,536.04 from the \$225,000.00 settlement.

12. Glass deposited the section 409.910(11)(f) formula amount in an interest-bearing account for the benefit of AHCA, pending an administrative determination of AHCA's rights; and this constitutes "final agency action" for purposes of chapter 120, Florida Statutes, pursuant to section 409.910(17).

Hearing

13. At the final hearing, Petitioner presented expert testimony from Phillips, Glass's Florida trial attorney. Phillips is a 21-year board-certified civil trial lawyer who practices exclusively in personal injury and insurance law. Phillip's board-certified designation recognizes him as a specialist that has extensive experience in civil trial practice. He is also a member of the Palm Beach Justice Association.

14. Phillips's practice of law is a hundred percent personal injury cases, including catastrophic injuries. He has

handled over a hundred jury trials. Phillips currently only represents plaintiffs who are injured, but he also previously was defense counsel for ten years.

15. Phillips's expertise encompasses valuation of personal injury damages and allocation of settlements relating to health care liens. Phillips stays abreast of all State of Florida jury verdicts by reviewing jury verdict reporters and researching cases statewide. He also routinely discusses cases with other plaintiff attorneys.

16. At hearing, Phillips explained that as a routine part of his practice, he makes assessments concerning the value of damages suffered by injured parties, and he detailed the steps for making those assessments.

Valuation

17. Phillips credibly explained the process he took to develop an opinion concerning the value for the damages suffered in Glass's case. Phillips testified that he met with Glass numerous times; reviewed his approximate 1,400 pages of medical records; assessed the injuries and costs of the medical treatment; evaluated how the accident occurred; assessed liability issues and fault; resolved if there was comparative negligence; verified future medical treatment; and established lost economic damages, such as wages, and any intangibles, such

as past and future pain and suffering, loss of capacity to enjoy life, and mental anguish.

18. Phillips analyzed how the accident occurred and detailed that Glass was walking on a main road, Indiantown Road, in Jupiter, Florida. As Glass was walking on a sidewalk, he turned and walked across the roadway. A vehicle was approaching him, and he went back and forth as to whether he was going to cross or step back on the curb; and the car driver did not slow down, hit Glass, and threw him approximately 65 feet in the air. He landed with his face smashed down in the road and was rendered unconscious at the scene.

19. Glass suffered multiple maxillofacial injuries along with numerous broken bones and a traumatic brain injury. As a result, Glass was taken to St. Mary's Hospital, a trauma hospital, for treatment.

20. Phillips explained the importance of assessing each of Glass's injuries in order to properly determine the true value of the case. Next, he went over the injuries in detail describing that Glass had a traumatic head injury that resulted in an acute right and rear frontal lobe hemorrhage, contusion, which bled for several days, and resulted in a traumatic brain injury. He had post-traumatic cephalgia and pain in his head. Glass's optic nerve in his left eye resulted in decreased visual acuity. One side of his lung collapsed, and he had multiple fractured ribs.

Glass suffered a functional decline in his short-term memory, and he had cerebral spinal fluid in the subdural space around the brain. Additionally, he had an extensive LeFort II fracture, which involved the roof of the mouth on both sides; his front teeth on the bottom were fractured; and the top of his eyes was fractured and displaced on the left side, as well as several other bones on his face were fractured. His legs and arms also had broken bones.

21. Glass underwent multiple extensive surgeries to repair all the fractures, and he even had surgical debridement to repair the soft tissue and closure of the skin. There was additional surgery to repair the top third of his face and a broken nose.

22. At hearing, Phillips testified that the medical care related to the accident was paid by Medicaid in the amount of \$145,629.51.

23. Phillips explained that the accident had a tremendous impact on Glass's life. He was hospitalized for approximately seven months. Some results from the accident are Glass cannot retain short memory, count money, or go to the store alone to purchase something. After he was released from the hospital, he moved in with his mother where he resides now.

24. Glass sued the individual driver and driver's company, Quest Diagnostic, because it was Phillips's position that the

driver was negligent in failing to slow down, stop, and take affirmative action to avoid striking Glass on the roadway.

25. As the litigation proceeded, Phillips discovered challenges in the case. One hurdle was that Glass did not remember the accident, and the personal injury case had to be built around the police report.

26. Phillips further explained that another issue existed as to whether Glass had been drinking on the day of the accident and had alcohol in his system. With Glass's memory loss, Phillips ultimately concluded that there was a major issue with comparative negligence in this case, and he determined that it would be difficult to prove the driver of the vehicle was at fault.

27. As a result of the challenges to the personal injury action, Phillips settled the case for \$225,000.00.

28. Phillips credibly explained that to determine the true value of Glass's case, he used the routine method of researching the value of damages for each injury. Phillips discovered while researching the jury verdict system that there was not even one case that had half of the injuries Glass had sustained. Phillips discovered memory-loss cases ranged in damages from \$160,000.00 upward, depending on the extent. He found that brain injury cases started at \$500,000.00 in damages depending on the hemorrhaging and residual effect. Elbow fractures are calculated

\$50,000.00 upward. Optic nerve damage cases are \$200,000.00 upward. Orbital fractures cases were awarded damages from \$300,000.00 upward.

29. Phillips put together about ten different jury verdicts adding up the various injuries Glass sustained to calculate a fair value for his injuries. Phillips concluded that a true value of the case conservatively was \$1.5 million. Phillips also round tabled the case with other attorneys to finalize a value. The other attorneys all agreed that Glass's damages were in excess of \$1.5 million. As a result, Phillips concluded that the low-end conservative number for the value of Glass's damages is \$1.5 million.

Allocation

30. Phillips also credibly and persuasively testified that he is familiar with and has participated in several hundred allocations of settlements including Medicaid cases,^{1/} health insurance liens, automobile insurance coverage liens, Medicare set asides, jury verdict setoff for comparative negligence, as well as allocations of judgments. Phillips explained that he has been dealing with Medicaid payment allocations, negotiation of settlements, and reductions of the liens on a routine basis for his 27 years' membership in The Florida Bar.

31. Phillips summarized how common the method of allocation is in the industry and stated about "90 percent of his cases

involve some type of allocation of medical expenses versus the true or pure value of the case to determine a fair and reasonable amount to reimburse a lien holder on payments, such as Medicaid."

32. Phillips opined that the settlement was not the full value of Glass's damages and that the settlement only represents 15 percent of the full measure of his damages. Phillips's testimony was uncontradicted and compelling.

33. Phillips explained that the 15 percent is the percentage of the settlement value, \$225,000.00, from the true value of \$1.5 million. He calculated the percentage by dividing \$225,000.00 into \$1.5 million which equals 15 percent. Phillips also credibly testified that he utilized the same method that he has been routinely using for over 25 years to properly and reasonably allocate Glass's past medical expenses. Phillips took 15 percent of the \$145,629.51 Medicaid lien, which makes the allocation of past medical expenses \$21,844.43. Phillips also explained that it is the only allocation method he has ever used.

Findings Regarding the Testimony Presented at the Final Hearing

34. The undersigned finds that Petitioner has established by unrebutted uncontested evidence that the \$225,000.00 settlement amount is 15 percent of the total value (\$1.5 million) of Petitioner's damages. Using the same calculation, Petitioner correctly established that 15 percent of \$145,629.51

(Petitioner's lien amount for past medical expenses), \$21,844.43, should be the portion of the Medicaid lien paid to AHCA.

35. ACHA offered no evidence to counter either Phillips's opinions or Petitioner's Exhibit 8, Scott S. Warburton's ("Warburton") sworn affidavit. Warburton is opposing counsel in Glass's personal injury case, who corroborates the value of Glass's damages in excess of \$1.5 million and also allocates the case with the same 15 percent recovery amount resulting in a \$21,844.43 claim for past medical expenses.

36. Petitioner proved by a preponderance of the 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

37. 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 (2019).

38. As the party contesting the amount of the settlement that should be payable to AHCA for past medical expenses, Petitioner must prove by the preponderance of evidence that a lesser portion of the total recovery should be allocated as reimbursement for past medical expenses than the amount

calculated by AHCA pursuant to the formula. Gallardo v. Dudek, 263 F. Supp. 3d 1247 (N.D. Fla. 2017).

39. The Florida Supreme Court defines "preponderance of the evidence" as follows:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

S. Fla. Water Mgmt. v. RLI Live Oak, LLC, 139 So. 3d 869, 872 n.1 (Fla. 2014).

40. AHCA is the agency authorized to administer Florida's Medicaid program. See § 409.902, Fla. Stat.

41. 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 & Human Servs. v. Ahlborn, 547 U.S. 268, 276 (2006). To secure reimbursement from liable third parties, the state must require the Medicaid recipient 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.

42. 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.

43. The amount to be recovered for Medicaid medical expenses from a judgment, award, or settlement from a third party is determined by the formula in section 409.910(11)(f). Ag. for Health Care Admin. v. Riley, 119 So. 3d 514, n.3 (Fla. 2d DCA 2013).

44. The parties stipulated that the amount due to AHCA in satisfaction of its lien, pursuant to the formula set forth in section 409.910(11)(f), is \$69,535.04. Petitioner, however,

asserts that a lesser amount is owed to Respondent because Petitioner did not recover the full value of his damages.

45. It is undisputed that Medicaid provided \$145,629.51 in medical expenses for Glass and that AHCA asserted a Medicaid lien against Petitioner's \$225,000.00 settlement and the right to seek reimbursement for its expenses. AHCA is utilizing the mechanism set forth in section 409.910(11)(f) to enforce its right.

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

(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.

47. Section 409.910(17)(b) provides a method 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:

If federal law limits the agency to reimbursement from the recovered medical expense damages, a recipient, or his or her legal representative, 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 designated as recovered medical expenses, the recipient must prove, by clear and convincing evidence, that the portion of the total recovery which should be allocated as past and future medical expenses is less than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f). Alternatively, the recipient must prove by clear and convincing evidence that Medicaid provided a lesser amount of medical assistance than that asserted by the agency.

48. An administrative procedure for adversarial testing of the fair allocation of the amount of the settlement that is attributable to medical costs includes considering the evidence used to rebut the section 409.910(11)(f) formula when determining whether AHCA's lien amount should be adjusted. See Harrell v. State, 143 So. 3d 478, 480 (Fla. 1st DCA 2014) (holding that petitioner "should be afforded an opportunity to seek the reduction of a Medicaid lien amount established by the statutory default allocation by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses").

49. Where uncontradicted testimony is presented by the recipient, there must be a "reasonable basis in the record" to reject it. Giraldo v. Ag. for Health Care Admin., 248 So. 3d 53 (Fla. 2018). In this matter, there is no reasonable basis to reject Petitioner's uncontradicted testimony.

50. The undersigned is not persuaded by Respondent's position in its Proposed Final Order that Petitioner's "pro-rata allocation methodology" is inaccurate because Respondent failed to provide any evidence or a reasonable basis for an alternative to rebut Petitioner's method. Instead, the record demonstrates that the allocation process in this matter is rational, proper, and reasonable.

51. Here as in Eady v. State, 2019 Fla. App. LEXIS 13685, 44 Fla. L. Weekly D2287, Petitioner presented sufficient facts

through expert testimony to establish the Medicaid lien should be reduced to 15 percent. Likewise, AHCA failed to refute the expert's opinions or present any evidence to the contrary.

52. Therefore, Petitioner proved by the preponderance of the evidence that the \$225,000.00 settlement recovered represents only 15 percent of Petitioner's claim valued conservatively at \$1.5 million, and AHCA's full Medicaid lien amount should be reduced by the percentage that Petitioner's recovery represents of the total value of Petitioner's claim.

53. Accordingly, applying the 15 percent ratio to the \$145,629.51 claim for past medical expenses is \$21,844.43 and represents Glass's recovery of past medical expenses, which constitutes a fair, reasonable, and accurate share of the total proportionate recovery for past medical expenses actually paid by AHCA.

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 \$21,844.43 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 21st day of November, 2019, in
Tallahassee, Leon County, Florida.

June C. McKinney

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 21st day of November, 2019.

ENDNOTE

^{1/} The undersigned finds Phillips's testimony regarding his experience with Medicaid allocations while practicing nearly 28 years persuasive and rejects Respondent's position in the Proposed Final Order that Phillips has no expertise in Medicaid allocations.

COPIES FURNISHED:

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

Floyd B. Faglie, Esquire
Staunton and Faglie, P.L.
189 East Walnut Street
Monticello, Florida 32344
(eServed)

Kim Annette Kellum, Esquire
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)

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

Mary C. Mayhew, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)

Shena L. Grantham, Esquire
Agency for Health Care Administration
Building 3, Room 3407B
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

Thomas M. Hoeler, Esquire
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.