

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE  
ADMINISTRATION,

Petitioner,

Case No. 19-6585F

vs.

ALLEN A. LENOIR, M.D.,

Respondent.

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RECOMMENDED ORDER

On October 15, 2020, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by Zoom.

APPEARANCES

For Petitioner: Robert A. Milne, Esquire  
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The Capitol, Plaza Level 01  
Tallahassee, Florida 32399-1050

For Respondent: Allen A. Lenoir, pro se  
Post Office Box 561823  
Miami, Florida 33256

STATEMENT OF THE ISSUE

The issue is the determination of the amount of investigative, legal, and expert witness costs that Petitioner is entitled to recover from Respondent pursuant to section 409.913(23), Florida Statutes (2017).

## PRELIMINARY STATEMENT

By Petition for Recovery of Petitioner's Fees and Costs filed December 10, 2019 (Petition), Petitioner sought to recover \$159,711.62 in investigative, legal, and expert witness costs in connection with its prosecution of DOAH Case 17-0598MPI against Respondent for the recovery of Medicaid overpayments.

Respondent disputed the material allegations of the Petition, so Petitioner transmitted the file to DOAH to conduct a formal hearing.

Respondent sought to stay the proceeding pending the disposition of his appeal of the final order in DOAH Case 17-0598MPI. The First District Court of Appeal entered a temporary stay by order filed with DOAH on January 21, 2020, but entered an order denying a permanent stay and lifting the temporary stay by order filed with DOAH on February 3, 2020. By order entered February 4, 2020, the administrative law judge denied Respondent's request for a stay. By Notice of Hearing issued on February 27, 2020, the administrative law judge set the final hearing for April 6 and 7, 2020.

Respondent is an infectious disease physician at Nicklaus Children's Hospital. The emergence of the Covid-19 pandemic following the issuance of the Notice of Hearing necessitated several continuances, at Respondent's request, until, after a warning in the preceding order granting a continuance, the administrative law judge entered an order on October 12, 2020, denying Respondent's motion for a continuance.

At the hearing, Petitioner called five witnesses and offered into evidence seven exhibits: Petitioner Exhibits 1 through 7. Respondent called two witnesses and offered into evidence no exhibits. All exhibits were admitted.

The court reporter filed the transcript on November 5, 2020. Petitioner filed a proposed recommended order on November 16, 2020.

#### FINDINGS OF FACT

1. Following an evidentiary hearing that spanned all or part of 24 hearing dates from January 2018 through May 2019, the administrative law judge issued a 357-page recommended order on September 24, 2019, containing 1996 findings of fact and conclusions of law identifying the proper code of the Current Procedural Terminology (CPT) applicable to each of hundreds of specific patient encounters, recommending that Petitioner enter a final order using these CPT codes to recalculate the total overpayments owed by Respondent by applying Petitioner's statistical formula for extending overpayments from the sampled recipients to the universe of recipients during the audit period, and reserving jurisdiction to enter another recommended order, if the parties were unable to settle Petitioner's claim for investigation, legal, and expert witness costs.

2. By final order entered on November 13, 2019, Petitioner substantially adopted the recommended order, determined total overpayments of \$176,144.40, imposed a fine of \$35,228.88, and reserved jurisdiction to transmit the file to DOAH, if either party requested it to do so, for a determination of Respondent's liability for investigative, legal, and expert witness costs.

3. Petitioner issued three "final" audit reports (FARs) prior to transmitting to DOAH the file that was designated as DOAH Case 17-0598MPI. In the first FAR, which was issued on January 28, 2014, Petitioner determined a total overpayment of about \$235,000, a fine of about \$47,000, and costs of about \$5000. In the second FAR, which represented the work of the second peer reviewer, Dr. Rathore, Petitioner determined that the total overpayment was about \$100,000 greater. In the third FAR, which was dated December 15, 2017, and represented the work of

the third peer reviewer, Dr. Stovall, who testified at length at the hearing, Petitioner determined a total overpayment of \$177,578.68, a fine of \$35,515.74, and costs of \$11,114.61.

4. From one perspective, Respondent's challenge to the third FAR produced a very modest victory. A comparison of the third FAR to the final order reveals that the final overpayment and fine amounts are about \$1700 lower than the amounts stated in the third FAR. From another perspective, Respondent's challenge to the third FAR produced unalloyed defeat. At the conclusion of the litigation, he (still) owed Petitioner over \$210,000, or about 99.2% of the overpayment and fine claims in the third FAR.

5. The Office of the Attorney General incurred \$27,717.08 in costs, which excludes any amount representing fees for its attorneys, as discussed in the Conclusions of Law. Although the administrative law judge never left Tallahassee for any of the hearing sessions, one of Petitioner's two attorneys had to travel to Fort Myers, where Dr. Stovall practices, in order to assist her with accessing specific information in the voluminous medical records that occupied center stage in the underlying case. This travel was reasonable and necessary.

6. According to their timesheets, two attorneys made the trip on three occasions: for the second attorney, the dates were February 1 through 2, 2018; November 9, 2018; and December 17 through 19, 2018. The second attorney's participation in the underlying case was very helpful. At times, his availability permitted the scheduling of hearing dates in order to move the case along, even at the slow pace that it took. However, the second attorney's participation did not require that he accompany the first attorney on two trips to Fort Myers to assist Dr. Stovall and one trip to Miami to attend Respondent's testimony.

7. For some reason, Petitioner's cost documents include only two travel events for the second attorney--evidently a round trip. Bearing the dates of December 27 and 28, 2018, these expenses omit a rental car or other ground

transportation at the remote site, so as to suggest that the first and second attorneys shared such transportation. For these two dates, the total expenses for the second attorney are \$1786.52, and Petitioner's claim must be reduced by this amount.

8. Except for some minor expenses, the vast majority of the remaining costs of the Office of the Attorney General are for court reporting services and were reasonable and necessary. As reduced by the amount noted in the preceding paragraph, the adjusted costs of the Office of Attorney General were \$25,930.56 and were reasonable and necessary.

9. Petitioner incurred \$19,170.86 in costs, exclusive of any amount paid Dr. Rathore. Petitioner did not claim entitlement to reimbursement for any payment to the first peer reviewer. Petitioner initially claimed entitlement to reimbursement for \$3225 paid Dr. Rathore, but wisely withdrew that claim during the hearing because Dr. Rathore's upcodings were largely useless. By contrast, the \$15,912.50 paid Dr. Stovall was entirely reasonable and necessary due to her impressive facility with coding, knowledge of pediatric infectious diseases, and communication skills. Costs of under \$750 each for investigative and nursing services were reasonable and necessary; contrary to Respondent's strenuous and repeated objections, nurse Kinser dutifully discharged her responsibilities without usurping the authority reserved for the peer reviewer.

10. The \$1781.25 paid Dr. Huffer, the statistician, bears special comment. Respondent did not concede the accuracy of Petitioner's statistical formula for extending overpayments from those determined with regard to a small subset of the recipients audited. Prior to the testimony of Dr. Huffer, the administrative law judge warned that, barring an exceptionally effective cross-examination, Dr. Huffer's testimony would be superfluous, unless Respondent intended to call an expert statistician to explain the flaws of the formula. Nevertheless, Respondent maintained his objection to the formula, and Dr. Huffer testified for over three hours--testimony that was very

helpful, but somewhat dry, except for the memorable moment that he disclosed that he had to adjust the confidence interval for the fact that the sampling of recipients happened to miss two or three mega-recipients, whose inclusion would have doubled or tripled the number of patient encounters in this case.

11. The costs of Petitioner of \$19,170.86 were reasonable and necessary.

12. The total costs are thus \$45,101.42.

13. Respondent produced no evidence of his financial resources, earning ability, and needs.

#### CONCLUSIONS OF LAW

14. DOAH has jurisdiction. §§ 120.569 and 120.57(1).

15. Petitioner must prove the material allegations by a preponderance of the evidence. § 120.57(1)(j).

16. Section 409.913(23) provides:

(a) In an audit or investigation of a violation committed by a provider which is conducted pursuant to this section, the agency is entitled to recover all investigative, legal, and expert witness costs if the agency's findings were not contested by the provider or, if contested, the agency ultimately prevailed.

(b) The agency has the burden of documenting the costs, which include salaries and employee benefits and out-of-pocket expenses. The amount of costs that may be recovered must be reasonable in relation to the seriousness of the violation and must be set taking into consideration the financial resources, earning ability, and needs of the provider, who has the burden of demonstrating such factors.

17. Petitioner prevailed in the underlying case, even though its recovery of total overpayments and a fine was about \$1700 less than the

corresponding amounts in the third FAR. It is the responsibility of the trial judge to determine if a litigant prevailed "on the significant issues" that were tried. *Moritz v. Hoyt Enters., Inc.*, 604 So. 2d 807, 810 (Fla. 1992). In *Port-a-Weld, Inc. v. Padula & Wadsworth Constr., Inc.*, 984 So. 2d 564 (Fla. 4th DCA 2008), the parties customized a prevailing-party provision in their construction contract by requiring that, to qualify for its attorney's fees, a party must prevail on at least 75% of its claim. The trial court enforced the provision and declined to award attorney's fees against the general contractor. The appellate court reversed, holding that the "significant issues" test cannot be contractually modified. After analyzing the claims and counterclaims, the appellate court determined that the subcontractor had prevailed on 60-80% of its claim, which clearly satisfied the "significant issues" test.

18. Undoubtedly, Petitioner's prevailing on 99% of its demand in the third FAR constitutes prevailing on the significant issues in the underlying case.

19. Section 409.913(23) has been amended, so as now to describe recoverable costs to "include ... costs related to the time spent by an attorney and other personnel working on the case, and any other expenses incurred by the agency or contractor that are associated with the case, including any ... attorney fees incurred on behalf of the agency or contractor."

Ch. 2020-156, § 42, Laws of Fla. This provision took effect July 1, 2020.

Ch. 2020-156, § 61, Laws of Fla. However, during the hearing, Petitioner correctly advised the administrative law judge that this new language does not apply to the present proceeding. *See, e.g., Antunez v. Whitfield*, 980 So. 2d 1175 (Fla. 4th DCA 2008) (statutory change to attorney's fee provision substantive, so applies prospectively).

20. As noted above, Respondent failed to present evidence in mitigation.

RECOMMENDATION

It is

RECOMMENDED that Petitioner enter a final order determining that Respondent owes \$45,101.42 in investigative, legal, and expert witness costs.

DONE AND ENTERED this 3rd day of December, 2020, in Tallahassee, Leon County, Florida.



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ROBERT E. MEALE  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 3rd day of December, 2020.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.