

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JONATHAN TOUCHTON,

Petitioner,

vs.

Case No. 20-3907MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

FINAL ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (Division), conducted the final hearing in this case on November 13, 2020, in Tallahassee, Florida, by Zoom video conference.

APPEARANCES

For Petitioner: Jason Dean Lazarus, Esquire
Special Needs Law Firm
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For Respondent: Shena Grantham, Esquire
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Alexander R. Boler, Esquire
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STATEMENT OF THE ISSUE

What amount of the personal injury claim settlement of Petitioner, Johnathan Touchton, must be paid to Respondent, Agency for Health Care Administration (Agency), to satisfy the Agency's Medicaid Lien?

PRELIMINARY STATEMENT

On August 31, 2020, Mr. Touchton filed a Petition to Determine Medicaid's Lien Amount to Satisfy Claim against Personal Injury Recovery by the Agency for Health Care Administration. The matter was assigned to the undersigned to conduct a formal administrative hearing and issue a final order. The matter was set for hearing to begin on November 13, 2020. It was held as scheduled. The parties filed a pre-hearing stipulation that included a statement of nine admitted and undisputed facts. They are adopted in Findings of Fact one through nine, without substantive alteration.

At the final hearing, Mr. Touchton testified and presented testimony from Douglas R. Beam, and Ken McKenna. Mr. Touchton's Exhibits 1 through 5 were admitted into evidence without objection. The Agency did not offer any evidence, advising that any exhibits it needed were among those offered by Mr. Touchton. The parties timely filed Proposed Final Orders. They have been considered in the preparation of this Order.

FINDINGS OF FACT

Admitted and Stipulated Facts

1. On November 2, 2014, Mr. Touchton was punched in the face while outside the Debauchery Bar in downtown Melbourne. After being struck in the face, Mr. Touchton fell backwards hitting his head. Immediately after the assault, he was treated at Holmes Regional Medical Center for a skull fracture and brain bleed. Brain surgery, a right ventriculostomy, was performed that same day by Dr. Paine. Dr. Paine performed two more

surgeries on Mr. Touchton's brain including removal and reattachment of part of the skull to relieve pressure from swelling.

2. As a result of the accident, Mr. Touchton suffered the following injuries: traumatic brain injury; trauma induced epilepsy; seizure disorder; short-term memory loss; slurred speech; ataxia; fatigue; and low testosterone.

Mr. Touchton was treated at Brooks Rehabilitation after his release from Holmes Regional on December 22, 2015. He was fully discharged on February 25, 2015. Since that time, he has had continuing medical care for his significant injuries.

3. Mr. Touchton brought a personal injury action to recover for all the damages related to the incident. This action was brought against various defendants.

4. As a result of the alleged negligence of the defendants, Mr. Touchton suffered a severe traumatic brain injury and other physically disabling conditions. Since this incident and the resulting severe brain injury, Mr. Touchton has been in a permanently disabled state requiring assistance with many activities of daily living.

5. In December 2019, Mr. Touchton, after litigation was commenced, settled his tort action.

6. The Agency was properly notified of Mr. Touchton's lawsuit against the defendants and indicated it had paid benefits related to the injuries from the incident in the amount of \$112,938.81. The Agency has asserted a lien for the full amount it paid, \$112,938.81, against Mr. Touchton's settlement proceeds.

7. The Agency has maintained that it is entitled to application of the formula in section 409.910, Florida Statutes (2019), to determine the lien amount.¹ Applying the statutory reduction formula to this particular settlement would result in no reduction of the lien given the amount of the settlement.

¹ All citations to Florida Statutes are to the 2019 codification unless noted otherwise.

8. Mr. Touchton suffered serious injuries as a result of the accident from which he will not fully recover and will continue to require medical treatment for the rest of his life. Mr. Touchton's permanent injuries have left him unable to adequately care for himself and in need of assistance and supervision of all activities of daily living.

9. The Agency paid \$112,938.81 on behalf of Mr. Touchton, related to his claim against the liable third parties.

Unrebutted and Unimpeached Testimony

10. Mr. Touchton relies upon the opinion testimony of two witnesses to prove what portion of the settlement amount is fairly allocable to past medical expenses.

11. One witness, Douglas R. Beam, represented Mr. Touchton. Mr. Beam has been a lawyer for 35 years. Mr. Beam served as President of the Brevard County Bar Association and the Florida Council of Bar Association Presidents. He is on the Executive Council of the National Trial Lawyers and is a member of the Florida Justice Association. He handles serious, catastrophic personal injury and death cases in Florida, representing the injured parties. His practice includes regular representation in premises security liability claims. He has testified many times as an expert witness on valuation of claims. Mr. Beam also regularly informs himself about the damages recovered for personal injuries by reviewing information from a Lexis data base containing national information about settlements and verdicts, talking to other lawyers, and talking to mediators.

12. As part of his practice, Mr. Beam regularly evaluates the damages suffered by injured parties like Mr. Touchton. He evaluated Mr. Touchton's damages in his usual way, going through the elements of damages identified in standard jury instructions and applying them to the facts of the case. As Mr. Touchton's lawyer, he became intimately familiar with Mr. Touchton's

damages. His opinions on the value of Mr. Touchton's damages and allocation of them to past medical expenses were well-informed, credible, persuasive, and conservative.

13. The second witness, Ken McKenna, has practiced law for 26 years. He is board certified in civil trial law. He and his firm specialize in representing plaintiffs in catastrophic and serious personal injury cases. He has evaluated damages in countless personal injury cases.

14. Mr. McKenna conducted a thorough and persuasive evaluation of the value of Mr. Touchton's damages. He individually considered each element of damages and the evidence to support them. His opinions on the value of Mr. Touchton's damages and allocation of them to past medical expenses were well-informed, credible, persuasive, and conservative.

15. The Agency did not present evidence of a different way of determining the value of Mr. Touchton's damages or a different analysis to determine the amount fairly allocable to past medical expenses.

Value of Damages and Settlement for Lesser Amount

16. In addition to past medical expenses, Mr. Touchton's damages included future medical expenses, pain and suffering, mental anguish, reduced quality of life, lost wages, and life care expenses.

17. A significant portion of Mr. Touchton's damages were the non-economic damages such as pain and suffering, mental anguish, and reduced quality of life. The cost of continued care that Mr. Touchton will need all his life is another significant portion of his damages. The value of the damages suffered by Mr. Touchton reasonably falls within a range of \$15,000,000 to \$28,500,000. Past medical expenses are a small part of the damages. Fifteen million dollars is a conservative and reasonable valuation of Mr. Touchton's damages.

18. Mr. Touchton settled the case for much less than the value of his damages. There were sound liability and collectability reasons to settle. The primary defendant, Debauchery Bar, was on the brink of bankruptcy, making

insurance the only source of recovery for Debauchery's portion of any damages award. Debauchery had only \$1,000,000 in insurance coverage. The person who punched Mr. Touchton was never identified and therefore not a party to the litigation. Mr. Touchton also faced a comparative negligence defense that would have reduced any recovery.

19. Mr. Touchton elected to settle his claim for \$425,000. This is far less than the value of his damages.

Allocation of Damages to Past Medical Expenses

20. Mr. Touchton's recovery of \$425,000 is 2.83 percent of the \$15,000,000 value of his damages. A fair and rational way to determine the amount of his recovery allocable to past medical expenses is to calculate a *pro rata* portion. This calculation is also consistent with the fact that past medical expenses are a small portion of Mr. Touchton's full damages due to his extensive disabilities, his lost income, the significant amount of care that he will need his entire life, and the pain and suffering he suffered and continues to suffer. The calculation results in \$3,196.17 as the amount of Mr. Touchton's damages that is fairly allocable to past medical expenses.

CONCLUSIONS OF LAW

21. Sections 120.569, 120.57(1), and 409.910(17), Florida Statutes (2020), grant the Division jurisdiction over the subject matter and parties in this case.

22. The Legislature authorized the Agency to administer Florida's Medicaid program. *See* § 409.902, Fla. Stat.

23. The Medicaid program "provide[s] federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v. McRae*, 448 U.S. 297, 301 (1980). If a state participates in the Medicaid program, it must comply with federal requirements governing the program. *Id.*

24. Federal law requires states to seek reimbursement for medical expenses incurred on behalf of Medicaid recipients who recover from third parties. *See Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 276 (2006). Florida's Legislature enacted section 409.910 to comply with that requirement. Section 409.910(7) requires the Agency to recover for Medicaid funds paid for a Medicaid recipient's medical care when the 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 imposes an automatic lien on the proceeds of any judgment or settlement for the medical services provided by Medicaid. § 409.910(6)(c), Fla. Stat.

25. The formula in section 409.910(11)(f) determines the amount the Agency may recover from a judgment, award, or settlement from a third party for Medicaid medical expenses. *Ag. for Health Care Admin. v. Riley*, 119 So. 3d 514, 515 n.3 (Fla. 2d DCA 2013). Section 409.910(17)(b) establishes the right to contest a Medicaid lien before the Division and provides that section 409.910(11) establishes the default allocation of damage amounts attributable to medical costs. The Medicaid recipient may prove that a different allocation is the correct allocation. The recipient must prove the allocation by a preponderance of the evidence. *Delgado v. Ag. for Health Care Admin.*, 237 So. 3d 432 (Fla. 1st DCA 2018).

26. Application of the statutory allocation formula in this matter results in Mr. Touchton owing the Agency \$112,938.81. The persuasive, un rebutted, unimpeached evidence in this matter proves that \$3,196.17 of the settlement amount is the amount fairly allocable to medical expenses. The evidence is clear and convincing. The First District Court of Appeal recently accepted the *pro rata* method used for this determination as sufficient proof of a fair allocation of a settlement amount. *Soto v. Ag. for Health Care Admin.*, Case No. 1D17-5387 (Fla. 1st DCA Nov. 18, 2020)(reversing *Soto v. Ag. for Health Care Admin.*, Case No. 17-4556MTR (Fla. DOAH Nov. 28 2017) for rejecting a *pro rata* allocation like the one proven in this proceeding.). *See also Bryan v.*

State, 291 So. 3d 1033 (Fla. 1st DCA 2020); *Larrigui-Negron v. Ag. for Health Care Admin.*, 280 So. 3d 550 (Fla. 1st DCA 2019).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Respondent, Agency for Health Care Administration, is entitled to recover only \$3,196.17 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 8th day of November, 2020, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of November, 2020.

COPIES FURNISHED:

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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.