

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DEVIN F. PRICE,

Petitioner,

vs.

Case No. 21-1249MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

FINAL ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings (“DOAH”) for final hearing by Zoom conference on June 7, 2021.

APPEARANCES

For Petitioner: Floyd B. Faglie, Esquire
Staunton & 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 is to determine the amount payable by Petitioner, Devin F. Price (“Petitioner”), to Respondent, Agency for Health Care Administration (“AHCA”), out of the \$3,025,000 gross personal injury settlement proceeds, as reimbursement for past Medicaid expenditures pursuant to section 409.910, Florida Statutes.

PRELIMINARY STATEMENT

On April 7, 2021, Petitioner filed a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien pursuant to section 409.910(17)(b). On April 19, 2021, the undersigned entered an Order setting the final hearing for June 7, 2021. The final hearing was held on June 7, 2021, with counsel for the parties appearing on behalf of their clients. At hearing, Petitioner presented the expert testimony of attorneys Jeanmarie Whalen and R. Vinson Barrett. Petitioner's Exhibits 1 through 9 were received into evidence. AHCA did not call any witnesses or offer any exhibits into evidence.

The one-volume final hearing Transcript was filed on July 2, 2021. The parties were granted an unopposed extension of time to file their proposed final orders. The parties timely filed proposed final orders, which have been considered in the preparation of this Final Order.

The facts set forth in the parties' Joint Pre-Hearing Stipulation, filed May 27, 2021, have been incorporated herein. References to the Florida Statutes are to the 2020 version.

FINDINGS OF FACT

1. On August 20, 2019, Petitioner was catastrophically injured when the motorcycle he was operating collided with an automobile. In this accident, Petitioner suffered a traumatic brain injury, multiple fractures to his upper and lower extremities, a degloving injury to his right arm, and injury to his lower left arm. Petitioner had multiple surgeries as a result of the accident. He is now unable to use his right arm and has only limited use of his left hand.

2. Petitioner's medical care related to the injury was paid by Medicaid. Medicaid, through AHCA, provided \$215,250.64 in benefits, and Medicaid,

through a Medicaid Managed Care Organization known as WellCare of Florida, provided \$11,625.08 in benefits. The sum of these benefits, \$226,875.72, constituted Petitioner's entire claim for past medical expenses.

3. Petitioner pursued a personal injury action against the parties allegedly liable for his injuries ("Defendants") to recover all his damages.

4. Because of issues pertaining to liability and limited insurance coverage that was available, Petitioner's personal injury action was settled through a series of confidential settlements in a lump-sum unallocated amount of \$3,025,000.

5. During the pendency of Petitioner's personal injury action, AHCA was notified of the personal injury action and AHCA asserted a \$215,250.64 Medicaid lien against Petitioner's cause of action and settlement of that action.

6. AHCA did not commence a civil action to enforce its rights under section 409.910 or intervene or join in Petitioner's action against Defendants. By letter, AHCA was notified of Petitioner's settlement. AHCA has not filed a motion to set-aside, void, or otherwise dispute Petitioner's settlement.

7. The Medicaid program, through AHCA, spent \$215,250.64 on behalf of Petitioner, all of which represents expenditures paid for Petitioner's past medical expenses.

8. Petitioner's taxable costs incurred in securing the settlement totaled \$65,366.96.

9. Application of the formula in section 409.910(11)(f) to Petitioner's \$3,025,000 settlement requires payment to AHCA of the full \$215,250.64 Medicaid lien.

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

11. At the hearing, Petitioner presented the expert testimony of attorney Jeanmarie Whalen, who represented Petitioner throughout the underlying action against the Defendants. Ms. Whalen has been an attorney for 30 years and devotes a substantial portion of her practice to plaintiff's personal injury and bad faith cases. She is a partner with the law firm of Domnick Cunningham and Whalen, P.A., in Palm Beach Gardens, Florida. Ms. Whalen is a member of numerous trial attorney associations, including the Florida Justice Association, Palm Beach County Justice Association, and the American Association for Justice. Ms. Whalen serves as a member of the Board of Governors with both the Florida Justice Association and the American Association for Justice, and routinely lectures throughout Florida and the nation regarding civil litigation matters.

12. Ms. Whalen has successfully handled jury trials, and stays abreast of jury verdicts on other personal injury cases in her area.

13. Ms. Whalen frequently represents plaintiffs who have been catastrophically injured in motorcycle accidents. As a routine part of her practice, Ms. Whalen makes assessments concerning the value of damages suffered by her clients. She is very familiar with, and routinely participates in, allocation of settlements in the context of health insurance liens, workers' compensation liens, Medicare set-asides, and the reduction of jury verdicts by trial judges post-verdict.

14. As lead attorney on Petitioner's case, Ms. Whalen was familiar with the circumstances surrounding Petitioner's injury, claims, and current condition, and gave a detailed explanation of them.

15. Ms. Whalen met with Petitioner on many occasions; reviewed Petitioner's medical records; a life care plan, which details Petitioner's future medical needs; and an economist's report, which calculated the present value of Petitioner's future medical care and present value of Petitioner's lost future earnings.

16. Based upon Petitioner's life care plan summary and the economist report, Ms. Whalen testified that the probable present value of Petitioner's past lost wages and future earnings is \$1,660,380, and that the present value of future medical expenses is \$2,686,295. According to Ms. Whalen, the past medical expenses of \$226,875.72 would also be added to arrive at the full value of Petitioner's economic damages. Ms. Whalen testified that in addition to economic damages, a jury would also be asked to assign a value to past and future noneconomic damages (i.e., pain and suffering and loss of enjoyment of life). Ms. Whalen testified that Petitioner's claim for noneconomic damages would be significant and "dwarf" the total value of all economic damages because Petitioner would make a very good witness and had a strong story.

17. Ms. Whalen persuasively and credibly testified that the total value of all of Petitioner's damages would be in excess of \$10,000,000, and that valuing Petitioner's damages at \$10,000,000 is a very conservative and low valuation of his damages.

18. Using the pro rata allocation methodology, Ms. Whalen persuasively and credibly testified that the \$3,025,000 settlement did not fully compensate Petitioner for the full value of his damages, and that based on a conservative value of all of Petitioner's damages of \$10,000,000, the \$3,025,000 settlement represents a recovery of 30.25 percent of the value of his damages.

Ms. Whalen persuasively and credibly testified that because Petitioner only recovered in the settlement 30.25 percent of the full value of his damages, he only recovered 30.25 percent of his \$226,875.72 claim for past medical expenses, or \$68,629.90, and that it would be reasonable to allocate \$68,629.90 of the settlement to past medical expenses.

19. Petitioner also presented the expert testimony of R. Vinson Barrett. Mr. Barrett has been a trial attorney for over 43 years and is a partner with the law firm of Barrett Nonni Homola & Ferraro, P.A., in Tallahassee, Florida. His practice is devoted to plaintiff's personal injury and wrongful death cases. He has handled cases involving catastrophic injury and routinely

handles jury trials. He is a member of the Florida Justice Association and the Capital City Justice Association.

20. Mr. Barrett is familiar with reviewing medical records, life care plans, economist reports, and preparing and evaluating plaintiff's personal injury cases for trial. Mr. Barrett testified that as a routine part of his practice, he makes assessments concerning the value of damages suffered by injured parties and he explained his process for making these assessments. Mr. Barrett testified that it has been part of his law practice to, and he is familiar with, settlement allocation in the context of health insurance liens, Medicare set-asides, and workers' compensation liens. He further testified that he is familiar with the process of allocating settlements in the context of Medicaid liens and he described that process.

21. Mr. Barrett has been accepted as an expert in the valuation of damages and has testified regarding the pro rata methodology in numerous Medicaid Third-Party Reimbursement ("MTR") administrative hearings at DOAH. In addition, Mr. Barrett's expert testimony at DOAH was quoted with approval in *Eady v. Agency for Health Care Administration*, 279 So. 3d 1249 (Fla. 1st DCA 2019).

22. Prior to testifying, Mr. Barrett familiarized himself with the facts and circumstances of Petitioner's injuries. He reviewed Petitioner's medical records, exhibits, the economist's report, and testified regarding the nature and extent of Petitioner's injuries.

23. Mr. Barrett testified that the full value of Petitioner's economic damages for loss of earning capacity and future medical expenses is in the range of \$5,963,801 to \$7,435,147, and that Petitioner's claim of noneconomic damages would have a significantly high value.

24. Mr. Barrett persuasively and credibly testified that the full value of Petitioner's damages exceeded \$10,000,000, and that valuing Petitioner's damages at \$10,000,000 is conservative and a low valuation of his damages.

25. Using the pro rata allocation methodology, Mr. Barrett persuasively and credibly testified that the \$3,025,000 settlement did not fully compensate Petitioner for the full value of his damages, and that based on a conservative value of all of Petitioner's damages of \$10,000,000, the \$3,025,000 settlement represents a recovery of 30.25 percent of the value of his damages.

Mr. Barrett persuasively and credibly testified that because Petitioner only recovered in the settlement 30.25 percent of the full value of his damages, he only recovered 30.25 percent of his \$226,875.72 claim for past medical expenses, or \$68,629.90, and that it would be reasonable to allocate \$68,629.90 of the settlement to past medical expenses.

26. AHCA did not call any witnesses, present any evidence as to the value of damages, propose a different valuation of the damages, or present evidence contesting the methodology used by the Petitioner's experts to calculate the \$68,629.90 allocation to past medical expenses. The testimony of Petitioner's expert witnesses regarding the value of the case and the use of the pro rata methodology was not persuasively rebutted or contradicted by AHCA's counsel on cross-examination, or by any other evidence.

27. In sum, Petitioner proved by clear and convincing evidence that 30.25 percent is the appropriate pro rata share of Petitioner's past medical expenses to be applied to determine the amount recoverable by AHCA in satisfaction of its Medicaid lien. Following Ms. Whalen's and Mr. Barrett's methodology and applying the \$10,000,000 valuation to the total past medical expenses of \$226,875.72, the settlement portion properly allocable to Petitioner's past medical expenses to satisfy AHCA's lien is \$68,629.90 ($\$226,875.72 \times 30.25 \text{ percent} = \$68,629.90$).

CONCLUSIONS OF LAW

28. DOAH has jurisdiction over the parties and subject matter of this case pursuant to sections 120.569, 120.57(1), and 409.910(17)(b), Florida Statutes.

29. Medicaid is a joint federal-state program that allows states to provide medical services to residents who cannot afford treatment. As a condition of receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses from Medicaid recipients who recover from legally liable third parties. *Giraldo v. Ag. for Health Care Admin.*, 248 So. 3d 53, 55 (Fla. 2018).

30. AHCA is the state agency authorized to administer Florida's Medicaid program. AHCA is subrogated to any rights a Medicaid recipient may have from any third party to recover the full amount of the past medical expenses paid to the Medicaid recipient. §§ 409.902 and 409.910(6), Fla. Stat.

31. Section 409.910(11)(f) provides a statutory formula that AHCA uses in determining the Medicaid lien amount. The parties agree that application of the statutory formula results in AHCA recovering the full amount of its \$215,250.64 lien.

32. Pursuant to section 409.910(17)(b), a Medicaid recipient may contest the amount payable under the statutory formula in an administrative proceeding at DOAH.

33. In order to prevail in such an action, section 409.910(17)(b) provides that the Medicaid recipient must prove, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past medical expenses than the amount calculated pursuant to the statutory formula.¹

¹ At hearing, the parties agreed the burden of proof is clear and convincing evidence. See *Gallardo v. Dudek*, 963 F.3d 1167, 1182 (11th Cir. 2020), *cert. granted*, *Gallardo v. Marsteller*, No. 20-1263, 2021 WL 2742787 (July 2, 2021).

34. The pro rata allocation methodology, relied upon by Petitioner's experts, has been accepted by the Florida Supreme Court and First District Court of Appeal as an appropriate methodology to determine what amount of an underlying settlement agreement should be fairly allocable to a petitioner's past medical expenses and must be accepted when there is no reasonable basis in the record to reject it. *Giraldo*, 248 So. 3d at 56; *Bryan v. Ag. for Health Care Admin.*, 291 So. 3d 1033, 1036 (Fla. 1st DCA 2020); *Soto v. Ag. for Health Care Admin.*, 313 So. 3d 143 (Fla. 1st DCA 2020); *Ag. for Health Care Admin. v. Rodriguez*, 294 So. 3d 441, 444 (Fla. 1st DCA 2020); *Mojica v. Ag. for Health Care Admin.*, 285 So. 3d 393, 398 (Fla. 1st DCA 2019); *Eady*, 279 So. 3d at 1259. A review of these decisions reflects that under the pro rata methodology, the total value of the case, established by expert testimony, is compared against the settlement amount resulting in a ratio or percentage of recovery. The amount of the past medical expenses is then multiplied by the resulting percentage to determine the amount properly allocable to past medical expenses.

35. As detailed above, the unrefuted, uncontradicted, and unimpeached testimony of Ms. Whalen and Mr. Barrett demonstrates that the \$3,025,000 settlement represents only 30.25 percent of Petitioner's claim valued conservatively at \$10,000,000, and that the application of the 30.25 percent ratio to Petitioner's total past medical expenses of \$226,875.72 results in \$68,629.90, which is the settlement portion properly allocable to Petitioner's past medical expenses to satisfy AHCA's lien.

36. In its Proposed Final Order, AHCA argues that Petitioner did not meet his burden because the testimony of the experts was based on hearsay (i.e. medical records, life care plan, and an economist's report). "It is axiomatic that an expert may rely upon hearsay in arriving at an opinion, provided that the hearsay is of the type reasonably relied upon by experts in the field." *Vega v. State Farm Mutual Automobile*, 45 So. 3d 43, 45 (Fla. 5th DCA 2010); *See also* § 90.704, Fla. Stat. In the present case, the documents

relied upon by Petitioner's experts are of the type reasonably relied upon by experts in the field. Accordingly, AHCA's position is without merit.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Agency for Health Care Administration is entitled to \$68,629.90 from Petitioner's settlement proceeds in satisfaction of its Medicaid lien.

DONE AND ORDERED this 23rd day of July, 2021, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of July, 2021.

COPIES FURNISHED:

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

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

Floyd B. Faglie, Esquire
Staunton & Faglie, PL
189 East Walnut Street
Monticello, Florida 32344

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

Thomas M. Hoeler, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

James D. Varnado, General Counsel
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

Simone Marstiller, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Building 3
Tallahassee, Florida 32308-5407

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.