

STATE OF INDIANA ) IN THE MARION SUPERIOR COURT  
 ) SS:  
 COUNTY OF MARION ) CAUSE NO. 49D01 9309 MI 952

SHELLY GORKA, a minor b/n/f her Mother)  
 SAUNCEY GORKA, *et al.*, )

Plaintiff, )

v. )

CHERLY SULLIVAN, in her individual )  
 capacity as Secretary of the Indiana Family )  
 and Social Services Administration, et al., )

Defendants. )

**FILED**  
 NOV 21 2005  
*Doris Anne Scheller*  
 CLERK OF THE  
 MARION CIRCUIT COURT

145

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**  
**FOLLOWING BENCH TRIAL ON NOVEMBER 3, 2005**

**I. INTRODUCTION**

This action was filed on September 3, 1993 by ten (10) providers of Medicaid transportation services and by five (5) Medicaid recipients. Findings of Facts, Conclusions of Law, Judgment Entry and Order, entered on June 24, 2004, pp 1 and 3. Subsequently, a class of Medicaid transportation providers was certified, with the class defined as follows:

All commercial ambulatory transportation service ["CAS"] providers and all non-ambulatory transportation service ["NAS"] providers who, as of May 1, 1993, were certified common carriers pursuant to the Indiana Motor Carrier Act, I.C. § 8-2.1-22 *et seq.*, and had rates for such services on file with the Indiana Department of Revenue, who also are certified Indiana Medicaid providers under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, and who submitted claims for reimbursement to the Indiana Family and Social Services Administration, through its fiscal contractor, EDS ("Electronic Data Systems Corporation"), for services provided after May 1, 1993.

Bracketed material added. Agreed Order Modifying Findings of Fact, Conclusions of Law, Judgment Entry and Order, entered February 2, 2005, p. 2.

A class of plaintiff Medicaid recipients has not been certified, although a motion for certification is pending.

All plaintiff providers supply either or both of two kinds of transportation services:

1. commercial ambulatory services (“CAS”) for recipients who are able to walk to a vehicle for transportation; or
2. non-ambulatory services (“NAS”) for recipients who are not able to walk to a vehicle for transportation.

The Plaintiffs, both plaintiff providers and plaintiff recipients, challenged, among other things, the Defendants’ changes in reimbursement rates paid to the plaintiff providers, effective May 1, 1993 and currently continuing. At a bench trial held on April 8 and 19, 2004, the issue for trial was whether the State’s change in reimbursement rates, effective May 1, 1993, violated a section of the federal medical assistance (i.e. Medicaid) act, specifically 42 U.S.C. § 1396a(a)(30)(A), commonly known as the “equal access” provision of the act. Findings of Fact, Conclusions of Law, Judgment Entry and Order, dated June 24, 2004, p. 3. That statute provides:

§ 1396a. State plans for medical assistance

(a) Contents

A State plan for medical assistance must—

....

(30)(A) provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area;

After a bench trial on April 8 and 19, 2004, the Court entered its “Findings of Fact, Conclusions of Law, Judgment Entry and Order” on June 24, 2004. That entry contained, *inter alia*, the following order:

IT IS THEREFORE ORDERED:

Defendants are ORDERED to, within one hundred twenty (120) days of this judgment entry, recalculate Medicaid transportation provider reimbursement rates, consider costs of provider operations when establishing new rates, and to report to this Court the new rates, the methodology used and the basic data underlying Defendants’ conclusions[.]

Findings of Fact, Conclusions of Law, Judgment Entry and Order, dated June 24, 2004, p. 25. A bench trial on the foregoing issue was originally scheduled for November 3, 2004. However, due to the amount of time needed for research and for gathering and analyzing data from the transportation providers, and due also to the complexity of the rate-setting process, the bench trial was subsequently re-set for November 3, 2005.

At the bench trial on November 3, 2005, the Plaintiffs presented evidence consisting of the deposition of Tom O’Connor accompanied by ten (10) exhibits. O’Connor’s deposition was taken by telephone for the purposes of preserving his testimony for trial, due to his unavailability to travel from Washington, D.C., where he resides and works, to attend the hearing on November 3, 2005.

The testimony and evidence of Defendants’ witnesses, William W. McDaniel and Elizabeth Anne Jackson were also presented and heard.

On November 3, 2005, before the bench trial began, the Defendants filed “Defendants’ Motion for Special Findings of Fact and Conclusions of Law.”

Having considered all the evidence presented at the bench trial on November 3, 2005 and the proposed findings of fact and conclusions of law submitted by the parties;

and being duly advised in the premises, the Court now enters its “Findings of Fact, Conclusions of Law and Order” following the bench trial on November 3, 2005.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>1</sup>

### A. Defendants’ Witness Testimony

Defendants represented in their opening statement that they would present evidence establishing that the current Medicaid reimbursement rates are justified.<sup>2</sup> (Tr. at 7:13-15.) The Defendants have failed to meet this mark.

Defendants’ first witness, William W. McDaniel, Assistant Director of Finance of the Indiana Family and Social Services Administration, presented a cost study concluding that total operating expense for transportation providers was One Dollar and Fifty-Six Cents (\$1.56) per mile. (Def’s Ex. B, at 4.) Mr. McDaniel’s cost study intended to analyze data from the same “twenty-six” (26) providers used in Plaintiffs’ Expert Report (discussed *infra*), “otherwise, we would be talking apples to oranges.” (Tr. at 36:1-8.) However, the conclusions set forth in Plaintiffs’ Expert Report were based upon twenty-three (23) providers, with some of the providers listed in Mr. McDaniel’s cost study having been removed from Plaintiff’s Expert Report due to reporting anomalies. (Expert Report at 8, 13.)

Mr. McDaniel’s cost study omitted several essential provider cost considerations. The depreciation expense set forth in Mr. McDaniel’s cost study represents an allocation of historical cost over the asset’s estimated useful life, but evidence was presented that depreciation does not

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<sup>1</sup> Citations to the record refer to citations to the record of proceedings at the November 3, 2005 hearing.

<sup>2</sup> Defendants did not object to admission of the Report into evidence, and Defendants’ witnesses based their analysis upon the underlying data and sample set forth in Plaintiff’s Expert Report as culled from 2004 Indiana Department of Revenue Reports. Therefore, the data is accepted by the Court as a reliable indicator of the entire population of Indiana’s Medicaid transportation providers.

fully compensate the provider for the cost of new or replacement capital assets. (See, T. O'Connor Dep. at 89: 4-21; Expert Report, Attach. D at 39.) Mr. McDaniel's cost study also failed to include any fuel expense component for three (3) transportation providers, representing a total of 1,665,817, or 26%, of the study's miles. (Tr. at 39:24; Def.'s Ex. B at 1-4.) Mr. McDaniel speculated that such expenses were "probably" included in another unspecified cost category. (Tr. at 40:13-14.)

In addition, Mr. McDaniel testified that a three percent (3%) operating profit is a reasonable amount for Medicaid transportation providers (Tr. at 36:13-25), but he included no such component in his cost study. While his cost study purports to show a Medicaid transportation provider profit based on simple average revenue per mile (i.e. Medicaid *and* non-Medicaid miles), there was no calculation of the average revenue for Medicaid miles alone. (Tr. at 47:20-23) Because of the likely difference in revenue for Medicaid miles versus non-Medicaid miles, a simple average is a questionable indicator of profitability for Medicaid transportation service. It is unlikely that Medicaid transportation providers enjoy an average revenue of \$1.67 per Medicaid mile (Exhibit B at 4) based on the current Medicaid reimbursement rate of \$1.25 per mile or less. (Tr. at 76:15-16)

Defendant's second witness, Elizabeth Anne Jackson, an actuary with Milliman, presented a cost study in which she accepted that the "Average Operating Cost per Mile" for transportation providers was One Dollar and Seventy-Eight Cents (\$1.78) per mile. (Def.'s Ex. D; Tr. at 63:5-17.) Like Mr. McDaniel's cost study, Ms. Jackson analyzed data from the initial population of twenty-six (26) providers used in Plaintiffs' Expert Report rather than the final sample of twenty-three (23) providers from which Plaintiff's conclusions were drawn. (Expert Report at 8, 13.)

Furthermore, Ms. Jackson's study asserted that operating expenses, when "weighted by Medicaid miles," were only One Dollar and Thirty-Nine Cents (\$1.39) per mile. (Def.'s Ex. D, E; Tr. at 65:1-5, 68: 19-21.) The logical basis for such a subsequent "weighting by Medicaid miles" is questionable in light of Mr. McDaniel's and Ms. Jackson's testimony that operating costs should not differ between Medicaid passenger miles and non-Medicaid passenger miles. (Tr. at 50:2-10; 74:1-9.) Therefore, unlike Mr. McDaniel's study, which failed to take into account the likely differences in Medicaid versus non-Medicaid revenues, Ms. Jackson's study asserts a difference in Medicaid versus non-Medicaid expenses where none has been shown to exist.

Ms. Jackson's review of the case consisted of one (1) day in preparing her cost study spreadsheet, and she had never undertaken transportation rate setting before. (Tr. 77:9-10; 72: 12-14)

Neither of Defendant's witnesses supports the current Medicaid reimbursement rate of One Dollar and Twenty-Five Cents (\$1.25) per mile. Neither of Defendant's witnesses presented any evidence of a reliable rate-setting methodology that can be used in establishing a new rate of reimbursement for Medicaid transportation provider as required by law.

Likewise, Defendants presented no evidence regarding the impact of a proposed reimbursement rate on the Indiana Medicaid budget, or that an increase in the rates would have any negative effect upon the Indiana Family and Social Services Administration (FSSA). Likewise, Defendants presented no evidence that the current reimbursement rates have led to a return or recovery of Medicaid transportation providers in those counties with little or no Medicaid transportation. (Order at 16-17). Finally, Defendants presented no evidence indicating a decrease in operating costs for surviving transportation providers. (See Order at 7.)

## **B. Plaintiffs' Evidence**

Plaintiffs submitted a report entitled "Indiana Medicaid Transportation Providers Service Cost Analysis" from its expert Tom O'Connor from the economic and management consulting firm of Snavelly King Majoros O'Connor & Lee, Inc. ("Expert Report"). (Pl.'s Ex. A) Using the 2004 annual reports filed by private, for-profit Medicaid transportation providers licensed in Indiana with the Indiana Department of Revenue, Mr. O'Connor concluded the following:

1. The weighted average cost per mile ranged from \$1.735 to \$1.9507 per mile;
2. The weighted average profit component per mile ranges from \$0.0046 to \$0.0528 per mile.
3. The weighted average cost per mile including return or profit component ranges from \$1.781 to \$2.0035.

(Expert Report at 24)

In addition, Mr. O'Connor's deposition testimony states that fuel costs have increased dramatically since 2004, and that operational costs should therefore be adjusted upward to reflect fuel prices as of the third quarter of 2005. (T. O'Connor Dep. at 84:9-15.)

Mr. O'Connor's curriculum vitae demonstrates ample education and experience in economics, statistics and transportation ratemaking to render an expert opinion in this matter (Expert Report, Attach. A at 3), and Mr. O'Connor's expert deposition testimony clearly demonstrates that the truckload cost model permits wide latitude in the specific vehicle configuration, and that capital and operating costs can be readily adjusted for the types of vehicles at issue in this matter. (T. O'Connor Dep. at 17:18-25; 18:1-17.) The capital and operating costs contained in the Report were not based on Mr. O'Connor's assumptions based on past experience with other types of vehicles, but rather upon actual data reported by Indiana

transportation providers in their 2004 Indiana Department of Revenue report. (Expert Report at 3)

Mr. O'Connor's deposition testimony and Expert Report clearly demonstrate that the Kelly Blue Book and TTS Blue Book are reasonable and reliable indicators of vehicle costs. (Expert Report, Attachment F, at 6-21; T. O'Connor Dep. at 92:14-25; 93:1-25; 94:1-25; 95:1-9.)

The Expert Report sets forth a clearly-defined methodology (see Expert Report, at 3-24, Workbook 1-7 and Attach. D-F), utilizing 2004 Indiana Department of Revenue Reports ("IDOR"). The underlying data contained in the IDOR reports is subject to verification and audit by Defendants. The underlying data was screened by Mr. O'Connor to identify reporting anomalies which underreport or overreport operating expenses.

The Court finds Tom O'Connor of Snavelly King Majoros O'Connor & Lee, Inc. to be a credible and reliable witness qualified and experienced to render an expert opinion on matters of transportation industry rate-making and reimbursement. The Court further finds the Indiana Department of Revenue form MCS-3 (Motor Carrier Services Annual Report Form) to be a reasonable and reliable source of data from which to determine operational costs of Medicaid transportation providers.

The Court finds that the costing model and methodology used in the Expert Report to determine the weighted average reimbursable costs of Medicaid transportation providers ("Cost"), and weighted average profit component for Medicaid transportation providers ("Profit") is reasonable and reliable and in accordance with industry custom.

The Court finds that an estimated average Cost in the range of \$1.735 to \$1.9507 per mile is reasonable and reliable.



The Defendants' evidence further substantiated this Court's previous findings that the present rates are inadequate and do not meet the standards required by 42 U.S.C. §1396a(a)(30)(A). (Order at 21.) The Defendants' evidence demonstrated that even using their less restrictive data sample and calculations, the rates should be in the range of \$1.58 to \$1.78 per mile. The current rate of reimbursement is \$1.25 or less.

The Court finds that fuel costs since 2004 have increased.

The Court finds that an estimated average profit in the range of \$0.046 to \$0.0528 per mile is a reasonable and minimal amount of return on investment to attract sufficient transportation providers to meet the needs of Medicaid recipients in Indiana.

The Court finds that cost and profit are reasonable, reliable and necessary components of an adequate Medicaid transportation provider reimbursement rate that considers costs of provider operations.

The Court finds that a Medicaid transportation provider reimbursement rate less than one dollar and eighty-five cents (\$1.85) per mile violates 42 U.S.C. Section 1396a(a)(30)(A), is not consistent with efficiency, economy and quality of care, and is not sufficient to enlist enough providers so that care and services are available to eligible Medicaid recipients to the extent they are available to the general public.

The Court reaffirms the findings and conclusions stated in its order of June 24, 2004.


**IT IS THEREFORE ORDERED:**

Defendants are ORDERED to establish, or direct the appropriate administrative agencies, departments, contract agents and/or personnel to establish and pay new Medicaid transportation provider reimbursement rates for NAS and CAS transportation providers incorporating provider costs of one dollar and eighty-five cents (\$1.85) per mile, with the base rates of ten dollars (\$10.00)

for Commercial Ambulatory Service (CAS), twenty dollars (\$20.00) for Non-Ambulatory Service (NAS), and a wait time rate of eight dollars and fifty cents (\$8.50) per hour (excluding the first one half hour) recoverable only upon trips which are in excess of fifty (50) miles one way.

The effective date of this rate shall be established along with the issue of attorneys fees at a hearing already scheduled on December 5, 2005, at 1:00 p.m.

IT IS SO ORDERED, this 21 day of Nov, 2005.

  
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Honorable Cale Bradford, Judge  
Marion County Superior Court  
Civil Division, Room One

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