STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLENN ALLEN HOLLAND,

Petitioner,

vs. Case No. 13-4951MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was held in this matter on February 27, 2014, in Tallahassee, before W. David Watkins, the assigned administrative law judge of the Florida Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Richard Lantinberg, Esquire
The Wilner Firm
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For Respondent: Adam Stallard, Esquire
Xerox Recovery Services, Inc.
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STATEMENT OF THE ISSUE

The issue in this case is the amount of Petitioner's personal injury settlement required to be paid to the Agency for Health Care Administration (AHCA) to satisfy its Medicaid reimbursement claim under section 409.910, Florida Statutes.[1/]

PRELIMINARY STATEMENT

On December 20, 2013, Petitioner filed with DOAH a Petition for Equitable Apportionment of Personal Injury Settlement to Satisfy Medicaid Lien (Petition) pursuant to section 409.910(17)(b), Florida Statutes. Thereafter, the matter was assigned to the undersigned administrative law judge to conduct a formal administrative hearing and enter a final order. The matter was set for hearing on February 27, 2014, and prior to hearing the parties filed a Joint Prehearing Stipulation, as well as a supplemental stipulation.

The hearing proceeded as scheduled, with the Petitioner calling one witness, Christopher Shakib, Esquire. At Petitioner's request, several legal authorities were officially recognized. Respondent called no witnesses and offered no documentary evidence.

The Transcript of the hearing was filed with DOAH on March 27, 2014, and both parties timely filed Proposed Final

Orders[2/] which have been carefully considered in the preparation of this Final Order.

On April 14, 2014, Respondent filed a Motion for Official Recognition of the Final Order in Debra L. Savasuk v. Agency for Health Care Administration, Case No. 13-4130MTR (Fla. DOAH Jan. 29, 2014). Petitioner did not file a response in opposition to the motion. Accordingly, the motion is granted and the undersigned has considered the cited Final Order.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

Background

1. On April 9, 2009, Petitioner, Glenn Holland, came into contact with an energized overhead electric power line owned by the local utility company. At the time of the incident, Mr. Holland was working as a professional tree trimmer. As a result of his contact with the wire, he was shocked, lost his balance and grip and fell approximately 30 feet to the ground, and sustained catastrophic bodily injuries which rendered him a wheelchair-bound paraplegic.

2. Petitioner's emergency and other medical expenses were paid by Medicaid. The parties stipulated that Medicaid has paid a total of $219,908 to treat Petitioner for his injuries.

3. Petitioner commenced a civil action against the utility company, alleging negligence in the maintenance of the power line and adjacent pole and structures. The utility company defended, claiming comparative negligence on the part of Mr. Holland. Ultimately, Petitioner settled the lawsuit for $500,000. The costs incurred by Petitioner in the underlying action were stipulated to be $65,183.49. Thereafter, AHCA, pursuant to the formula set forth at section 409.910(11)(f), Florida Statutes, asserted an entitlement to be paid $154,908.25 from the proceeds of the $500,000 settlement.

4. Petitioner objected to the Agency's demand for $154,908.25 and timely commenced this action.

Evidence Relating to Damages

5. On February 24, 2014, the parties filed with DOAH a document entitled "Stipulation #1." Through the document, the parties stipulated to the following:

> 1. The Petitioner, had the underlying matter gone to trial, would have presented and sought to prove-up the damage figures that appear on page 10 of 10 of Dr. J. Rody Borg's report as Mr. Glenn Holland, III's economic damages. These figures appear on page 3 of the Petitioner's Petition in the instant case at the Division of Administrative Hearings.
>
> 2. The figures in Dr. Borg's Report were calculated by Rody Borg, Ph.D., in consultation with the life care report of Dr. Craig Lichtblau, MD.

> 3. The Respondent agrees to not object to testimony from Petitioner's expert witnesses (i.e. Chris Shakib) at final hearing regarding the economic damages figures contained in Dr. Borg's report, including, by way of example, that Dr. Borg opined that the amount of lost past earnings was $297,741; future earnings lost were $1,139,070, that lost benefits were $113,907 and the low present value amount of future life care expenses total $4,656,614, for a total calculated economic loss (assuming low estimated figures) of $6,207,333.
>
> 4. Petitioner stipulates that he will not seek to admit into evidence Dr. Borg's report nor the Dr. Lichblau report.

6. Page 3 of the Petition referenced in the first stipulation above sets forth estimated (past) and projected (future) economic damages suffered by Petitioner, as follows:

> 8. At hearing on this matter, plaintiff will submit proof of:
>
> > i. the amount of Medicaid's lien $219,108.80—by reference to Medicaid's lien demand amount.
> >
> > ii. Mr. Holland's total injuries, medical and otherwise, by reference to Craig H. Lichtblau, M.D.'s life care plan pertaining to medical damages and a summary of medical bills.
> >
> > iii. The present dollar value of Mr. Holland's injuries by reference to Dr. Borg's expert report. Total future medical damages, those not paid by AHCA exceed $4.65 million on a present value basis. (See e.g. table below from Dr. Borg's Economic Damages Report.)

LIFE CARE PLAN TOTALS			
	LOW	**MID**	**HIGH**
Actual Future Expected	$16,708,080.52	$19,121,210.31	$21,534,340.10
Present Value	$4,656,614.47	$5,388,683.20	$6,120,751.93

ECONOMIC DAMAGES SUMMARY			
Glenn Holland III			
OVERALL LOSS TOTALS			
	LOW	**MID**	**HIGH**
Past Earnings	$297,741.27	$297,741.27	$297,741.27
Future Earnings	$1,139,070.35	$1,518,760.47	$1,898,450.59
Future Benefits	$113,907.04	$227,814.07	$379,690.12
Future Life Care	$4,656,614.47	$5,388,683.20	$6,120,751.93
OVERALL TOTALS	**$6,207,333.14**	**$7,432,999.02**	**$8,696,633.91**

7. Dr. Craig Lichtblau is a physiatrist (a physician specializing in physical medicine) retained by Mr. Holland in the underlying action to evaluate his condition and to render an opinion regarding the future care and treatment needs of Mr. Holland as a result of injuries. Dr. Lichtblau prepared a report of his findings and projections, referred to as the Life Care Plan.

8. Rody Borg, Ph.D., is an economist and professor at Jacksonville University. He was retained by Petitioner to evaluate the Life Care Plan and to calculate what it would cost to provide the services outlined in the plan. Dr. Borg prepared an "Economic Damages Report" that reduced to present value the cost of future medical expenses and other damages sustained by Mr. Holland, as outlined by Dr. Lichtblau.

9. Christopher Shakib, Esquire, was called as Petitioner's only witness. Mr. Shakib has practiced law for more than 20 years, and has experience in personal injury, civil trial, and catastrophic injury cases. Prior to testifying, Mr. Shakib reviewed the pleadings in the underlying tort action, discovery, deposition testimony, and the expert reports prepared by Dr. Lichtblau and Dr. Borg.

10. Mr. Shakib first discussed the economic damages that Petitioner has, and will, continue to suffer as a result of the accident. Those categories of economic losses include past earnings, future earnings, future benefits, and future life care (medical) expenses.

11. Consistent with the figures appearing on page 3 of the Petition, Mr. Shakib testified that in his opinion, the amount of economic damages sustained by Mr. Holland ranged in present value, from a low of approximately $6.2 million to a high of approximately $8.7 million. Subsumed within these projections were projected future medical expenses ranging from a low of approximately $4.6 million to a high of approximately $6.1 million.

12. Mr. Shakib further opined that in addition to economic losses, Petitioner has, and will, suffer non-economic losses. These include pain and suffering, loss of enjoyment of life, inconvenience, and mental anguish. In his opinion, the non-

economic damages sustained by Mr. Holland would range from $8.7 million to $20 million.

13. Mr. Shakib explained the approach he followed to come up with his projection of non-economic losses, as follows:

> A. Right. There are different ways to do it. Some people will amortize it and come up with a daily rate for pain and suffering. And, you know, in my opinion sometimes that ends up making the numbers too high, higher than I think are reasonable. What I do in my practice, and I've done this for many years, is when trying to evaluate what a case is worth, I will take all of the economic losses and I'll add one extra component for the medicals in the past that were billed; I won't just use the amount that was paid but I will use the actual amount that was billed to come up with the total economics, as a rule of thumb that I use.
>
> And I think it was closer to a million and the amount that was actually billed versus the $219,000 or so that was actually paid. And so I'll add the difference between the billed amount and the paid amount back in, and then I will double the economics to get my low range value of a case like this; and I'll triple the economics, and that will give me the high range for what I think the case is worth.

14. Although the Medicaid program paid $219,108.80 for medical services provided to Petitioner, a total of $1,140,386.80 was billed to Medicaid for Petitioner's medical care. The remaining $921,278.00 represented the "write-off" taken by medical services providers.

15. Mr. Shakib has never met Mr. Holland, or personally evaluated his physical condition. Mr. Shakib testified that in catastrophic injury cases, he typically interviews the treating physicians, yet there is no evidence in this record that he did so in preparing to render testimony in this case. Nor did Mr. Shakib offer testimony regarding the actual degrees of pain and suffering, loss of enjoyment of life, inconvenience, and mental anguish that has been suffered, or will be suffered in the future, by Mr. Holland.

16. Mr. Shakib conducted no jury verdict research and did not compare this case to any case tried to verdict.

17. Mr. Shakib's testimony regarding Petitioner's non-economic damages was lacking in detail, and was unpersuasive. The imprecision of Mr. Shakib's projections was underscored by his projected range of non-economic damages, from $8.7 million to $20 million, a swing of more than $11 million.

18. According to Mr. Shakib, the total economic and non-economic damages sustained by Mr. Holland were in the range of $15 million to $29.5 million.[3/] Mr. Shakib opined that "regardless of any issues of liability; if 100 percent liability could be proved with no comparative fault and there was someone who could pay these damages, this case is worth between 15 million and a little less than 30 million, and I think that because of his age at the time that he became a quadriplegic,

that his actual damages are more on the higher side of that than the lower side of that."

19. Mr. Shakib's testimony regarding the total damages suffered by Petitioner is rejected, since the largest component of the total damages estimate are the non-economic damages, which are non-credible.

20. Mr. Shakib thereafter calculated the proportion that the amount of past medical expenses ($219,108.80) bore to the full value of the case. He calculated the proportion as a range of between 1.46%[4/] and 0.742%.[5/] In other words, according to Mr. Shakib, the Agency's recovery should be limited to between 1.46% and 0.742% of the settlement amount. Mr. Shakib then applied these ratios to the settlement and the amount sought by the Agency. In this regard, he testified, "[M]y opinion is that the lien recovery by the agency should be between $3700 and $7300, and my opinion would be it should really be more towards the lower end of that because of the value of the case given the fact that this is a 22-year-old who becomes a quadriplegic."

21. As noted, Mr. Shakib did not include the projected future medical expenses in his calculation of the proportion that medical expenses bore to the full value of the case. Had he done so, the following chart illustrates the impact the inclusion of future medical expenses would have on the calculation of the Medicaid lien recovery amount:

CALCULATION OF LIEN RECOVERY AMOUNT USING PETITIONER'S METHODOLOGY WITH INCLUSION OF FUTURE MEDICAL EXPENSES		
	LOW	**HIGH**
PAST MEDICALS PAID BY AHCA	$219,108.80	$219,108.80
FUTURE MEDICALS	**$4,656,614.00**	**$6,120,752.00**
TOTAL MEDICALS	$4,875,722.80	$6,339,860.80
TOTAL DAMAGES	$15,000,000.00	$29,511,063.33
PROPORTION OF MEDICAL EXPENSES TO TOTAL DAMAGES	32.505%	21.483%
SETTLEMENT AMOUNT	X $500,000	X $500,000
LIEN RECOVERY AMOUNT	$162,524.09	$107,414.98

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the parties and the subject matter of this proceeding, and Final Order authority, pursuant to section 409.910(17), Florida Statutes.

23. The Florida Legislature has codified a formula for determining the maximum amount that may be recovered by AHCA from the proceeds of a tort action brought by a Medicaid recipient. Section 409.910(11)(f), provides:

> (f) Notwithstanding any provision in this section to the contrary, in the event of an action in tort against a third party in which the recipient or his or her legal representative is a party which results in a judgment, award, or settlement from a third party, the amount recovered shall be distributed as follows:
>
> 1. After attorney's fees and taxable costs as defined by the Florida Rules of Civil

> Procedure, one-half of the remaining recovery shall be paid to the agency up to the total amount of medical assistance provided by Medicaid.
>
> 2. The remaining amount of the recovery shall be paid to the recipient.
>
> 3. For purposes of calculating the agency's recovery of medical assistance benefits paid, the fee for services of an attorney retained by the recipient or his or her legal representative shall be calculated at 25 percent of the judgment, award, or settlement.
>
> 4. Notwithstanding any provision of this section to the contrary, the agency shall be entitled to all medical coverage benefits up to the total amount of medical assistance provided by Medicaid. For purposes of this paragraph, "medical coverage" means any benefits under health insurance, a health maintenance organization, a preferred provider arrangement, or a prepaid health clinic, and the portion of benefits designated for medical payments under coverage for workers' compensation, personal injury protection, and casualty.

24. Pursuant to the above formula, AHCA is entitled to payment for all medical assistance it provides for a Medicaid recipient who suffers a tort injury, up to 37.5% of the amounts recovered from third parties.

25. While the state of Florida, after providing Medicaid benefits, may seek reimbursement for "such health care items or services," there are limitations on the state's recovery that protect the Medicaid recipient's property interest. Specifically, the federal anti-lien statute at 42 U.S.C.

§ 1396p(a)(1) states "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid," and the federal anti-recovery statute at § 1396p(b)(1) states "[n]o adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made." Pursuant to these federal directives, Florida enacted the "Medicaid Third-Party Liability Act" (FTPLA). See § 409.910, Fla. Stat.

26. Citing Arkansas Department of Health and Human Services v. Ahlborn, 547 U.S. 268, 126 S. Ct. 1752 (2006), and Wos v. E.M.A. ex Rel. Johnson, 133 S. Ct. 1391 (2013), Petitioner contends that unless the Florida Statutes are interpreted and applied so as to reduce AHCA's Medicaid lien claim in accordance with its theory, those statutes are preempted by federal law that prohibits states from imposing a lien against the property of a Medicaid recipient prior to the death of the recipient. Specifically, Petitioner argues that Florida has established an arbitrary sum due to AHCA regardless of the proportion that medical expenses paid by AHCA bears to the total damages sustained.

27. As an alternative to the formula set forth in section 409.910(11)(f), Petitioner urges the application of a formula which compares the amount of past medical expenses (here, the amount of Medicaid's lien) to the total damages, and then an

application of that same proportion to the settlement amount, to determine the amount to be reimbursed to the Agency. As authority for its proposed formula, Petitioner cites Smith v. Agency for Health Care Administration, 24 So. 3d 590, 590 (Fla. 5th DCA 2009) (at n.1 and dissent at 593 explaining formula to determine ratio of medical expenses to total damages for purposes of complying with Ahlborn). Petitioner also cites several Florida circuit court decisions which have applied a past-medical-expense-to-total-damages ratio to calculate the Medicaid lien recovery amount.

28. Petitioner's argument ignores the fact that the 2013 Florida Legislature amended section 409.910 to specifically address the concerns voiced by the Court in Ahlborn and Wos. The Staff Analysis on CS/CS/HB 939 prepared by the Health and Human Services Committee of the Florida House of Representatives on April 12, 2013, clearly indicates that the intended effect of the statutory changes was to address the U.S. Supreme Court decision in Wos.

> Section 409.910, F.S., creates an irrebuttable presumption that the amount that the AHCA is entitled to from a Medicaid recipient's judgment, award or settlement in a tort action is the lesser of 37.5% of the total recovery or the total amount of medical assistance paid by Medicaid. This provision is similar to the North Carolina provision recently struck down by the Supreme Court in Wos v. E.M.A. To ensure compliance with federal law, the bill amends

> this section to create a presumption of accuracy as to the AHCA's determination of the reimbursement amount but allows this determination to be rebutted by clear and convincing evidence. The bill establishes the mechanism for these challenges by providing Medicaid recipients with the right to an administrative hearing at DOAH to contest the amount of AHCA's recoupment. The bill establishes Leon County as venue for these hearings and the First District Court of Appeal as venue for any related appeals. The bill also provides that each party is to bear its own attorney fees and costs.

29. Effective July 1, 2013, section 409.910(17(b), provides in relevant part:

> (b) A recipient 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. (footnote omitted).

30. Section (17)(b) of the 2013 amendment also establishes the evidentiary burden that must be satisfied by a challenger to the statutory formula:

> In order to successfully challenge the amount payable to the agency, the recipient must prove, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f) or that Medicaid provided a lesser amount of medical assistance than that asserted by the agency. (footnote omitted).

31. None of the cases cited by Petitioner addressed the newly amended version of section 409.910. Rather, those cases addressed the old version of section 409.910, which included no provision or procedure by which a recipient could challenge section 409.910(11)(f)'s determination as to the medical expense portion of a recipient's settlement. The most recent Florida appellate case cited by Petitioner, Davis v. Roberts, 130 So. 3d 264 (Fla. 5th DCA 2013), makes this perfectly clear. At footnote 8 of that decision, the court specifically mentions the new, amended version of section 409.910. This footnote is preceded by a lengthy discussion of the flaw in the appellee's position in that case, to wit, AHCA's assertion that Medicaid recipients have no right to attempt to rebut the Medicaid reimbursement determination made by the formula at section

409.910(11)(f). Id. at 269. The flaw noted by the court in Davis has been remedied by the addition of section 409.910(17)(b).

32. Pursuant to section 409.910(17)(b), a challenger must prove "by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses than the amount calculated by the agency pursuant to the formula."

33. Clear and convincing evidence is an "intermediate standard," "requir[ing] more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered "'clear and convincing'"

> The evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Adoption of Baby E.A.W., 658 So. 2d 961, 967 (Fla. 1995) ("The evidence [in order to be clear and

convincing] must be sufficient to convince the trier of fact without hesitancy."). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1st DCA 1991). In this instance, Petitioner failed to carry its burden of proof.

34. At the outset, the undersigned notes that the projections of non-economic damages (which were factored into total damages for purposes of applying Petitioner's formula) did not rise to the level of "clear and convincing" evidence. While the undersigned is aware that the valuation methods used by counsel in personal injury and wrongful death cases may vary, and are not an exact science, in this instance, the high and low end valuations provided by Petitioner's witness were imprecise, lacked an adequate foundation, and were so widely disparate as to be rendered non-credible.

35. The second fatal shortcoming in Petitioner's case was the failure to include both past and future medical expenses in the application of its alternative formula. As the chart at Finding of Fact No. 21 illustrates, in a case where the injuries are catastrophic, and are suffered by a young person, future medical expenses will be significant and will radically alter the product of Petitioner's formula.

36. If the language of a statute "is clear and unambiguous and conveys a clear and definite meaning, the statute should be given its plain meaning." Fla. Hosp. v. Ag. for Health Care Admin., 823 So. 2d 844, 848 (Fla. 1st DCA 2002).

37. Here, a plain reading of "past and future medical expenses" cannot, as Petitioner asserts, limit the term to "past medical expenses." See Debra L. Savasuk v. Ag. for Health Care Admin., Case No. 13-4130MTR (Fla. DOAH Jan. 29, 2014). Accordingly, the undersigned is obliged to apply the statute as written.

38. When future medical expenses are factored into Petitioner's formula (and assuming, arguendo, that Petitioner's projections of total damages are credible), the result is not appreciably different than the result rendered when the statutory formula is applied. As stipulated by the parties, application of the section 409.910(11)(f) formula renders a Medicaid lien recovery of $154,908.25, while Petitioner's alternative formula renders a lien recovery amount of between $107,414.98 and $162,524.09. Thus, the statutory lien recovery amount falls within the range determined using Petitioner's formula, when future medical expenses are included.

39. Petitioner has failed to prove by clear and convincing evidence that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses

than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f), or that Medicaid provided a lesser amount of medical assistance than that asserted by the agency.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is DETERMINED that the amount of AHCA's Medicaid lien payable from the Petitioner's $500,000.00 settlement is fixed at $154,908.25, as claimed by AHCA.

DONE AND ORDERED this 2nd day of May, 2014, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of May, 2014.

ENDNOTES

[1/] Unless otherwise indicated, all references are to the 2013 version of the Florida Statutes.

[2/] While denominated a Proposed Recommended Order, the undersigned considered Petitioner's filing to be a Proposed Final Order.

[3/] The exact figure calculated by Mr. Shakib was $29,511,063.33.

[4/] $219,108.80 divided by $15,000,000.00=0.0146 (1.46 percent).

[5/] $219,108.80 divided by $29,511,063.33=0.00742 (0.742 percent).

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 one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.