STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIRTA AGRAS,

Petitioner,

vs. Case No. 14-2403MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

A hearing was conducted in this case pursuant to sections 120.569, 120.57(1), and 409.910(17)(b), Florida Statutes (2013),[1/] before Cathy M. Sellers, an Administrative Law Judge of the Division of Administrative Hearings, on August 14, 2014, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Christopher Klemick, Esquire
1953 Southwest 27th Avenue
Miami, Florida 33145

For Respondent: Adam Stallard, Esquire
2073 Summit Lake Drive, Suite 300
Tallahassee, Florida 32317

STATEMENT OF THE ISSUE

The issue in this proceeding is the amount payable to Respondent in satisfaction of Respondent's Medicaid lien from a

settlement received by Petitioner from a third party, pursuant to section 409.910(17), Florida Statutes.

PRELIMINARY STATEMENT

By correspondence dated January 31, 2013, Respondent, through its collections contractor ACS Recovery Services ("ACS"), notified Petitioner that she owed Respondent $35,952.47 in satisfaction of Respondent's Medicaid lien for medical benefits paid to Petitioner, to be paid from the proceeds of a settlement she received as compensation for injuries she suffered as a result of being struck by a motor vehicle. On May 19, 2014, Petitioner filed a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien ("Petition").

The final hearing initially was scheduled for July 7, 2014, but pursuant to the parties' joint motion, was rescheduled. The final hearing was held on August 14, 2014. Petitioner testified on her own behalf and Petitioner's Exhibit 1 was admitted into evidence over objection. Respondent did not present the testimony of any witnesses and did not proffer any exhibits for admission into evidence.

The parties were given ten days from the date of filing of the transcript, until September 5, 2014, to file their proposed final orders. Pursuant to Petitioner's unopposed motion for extension of time, the parties were given until September 12,

2014, to file their proposed final orders. Both parties timely filed Proposed Final Orders, and both were duly considered in preparation of this Final Order.

FINDINGS OF FACT

1. Petitioner is a 35-year-old female who currently resides in Homestead, Florida.

2. Respondent is the state agency authorized to administer Florida's Medicaid program. § 409.902, Fla. Stat.

3. On or about February 15, 2012, Petitioner was struck by a motor vehicle and severely injured while attempting to rescue her young son, who had run into a busy street in front of her home in Hollywood, Florida.

4. Petitioner suffered a fractured skull and broken leg. She was hospitalized and received medical care for her injuries.

5. Subsequently, she was treated by an orthopedic physician and a neurologist. She estimated that she last received care or treatment from these physicians in August 2013.

6. The Florida Medicaid program paid $35,952.47 in medical assistance benefits on behalf of Petitioner.

7. Petitioner filed a lawsuit against the owners of the vehicle that struck her.

8. On January 11, 2013, Petitioner and the owners of the vehicle that struck Petitioner ("Releasees") entered into a "Release and Hold Harmless Agreement" ("Settlement") under which

the Releasees agreed to pay Petitioner $150,000 to settle any and all claims Petitioner had against them. Attached to the Settlement was a document titled "Addendum to Release Signed 1/11/13" ("Addendum"), which allocated liability between Petitioner and the Releasees and provided a commensurate allocation of the Settlement proceeds for past and future medical expense claims. The Addendum stated in pertinent part:

> The parties agree that a fair assessment of liability is 90% on the Releasor, Mirta B. Agras, and 10% on the Releasees.
>
> Furthermore, the parties agree that based upon these injuries, and the serious nature of the injuries suffered by the Releasor, Mirta B. Agras, that $15,000.00 represents a fair allocation of the settlement proceeds for her claim for past and future medical expenses.

9. Petitioner testified that she primarily was at fault in the accident. She acknowledged that the statement in the Addendum that she was 90% at fault for the accident and the Releasees were 10% at fault was an estimate that she formulated entirely on her own, without obtaining any legal or other informed opinion regarding the apportionment of respective fault.

10. Petitioner is not a physician, registered nurse, or licensed practical nurse. There was no evidence presented establishing that she has any medical training or expertise. Thus, there is no professional basis for Petitioner's position that 10% of the Settlement proceeds represents a fair, accurate,

or reasonable allocation for her medical expenses. Rather, her position appears to be based on the intent to maximize the Settlement proceeds that are allocated to non-medical expenses, so that she is able to retain a larger portion of the Settlement proceeds.

11. Respondent did not participate in discussions regarding the Settlement or Addendum and was not a party to the Settlement.

12. Petitioner acknowledged that she still receives medical bills related to the injuries she suffered as a result of the accident, and that she still owes money for ambulance transportation and physician treatment. She was unable to recall or estimate the amount she owes.

13. No evidence was presented regarding the actual amount of Petitioner's medical expenses incurred due to her injury.

14. Petitioner has not paid any of her own money for medical treatment, and no entities other than Medicaid have paid for her medical treatment.

15. Since being injured, Petitioner continues to experience medical problems, including pain, dizziness, memory loss, difficulty in walking or standing for extended periods, inability to ride in vehicles for extended periods, balance problems, and difficulty watching television or staring at a computer screen for extended periods.

16. Petitioner claims that, nonetheless, she has not been told that she would need additional medical care or treatment.

17. On or about January 31, 2013, Respondent, through ACS, asserted a Medicaid claim pursuant to section 409.910(17), seeking reimbursement of the $35,952.47 in medical assistance benefits it paid on behalf of Petitioner.

18. Petitioner instead sought to reimburse Respondent $15,000, the amount that Petitioner and Releasees agreed in the Addendum represented a fair allocation of the Settlement proceeds for Petitioner's claim for past and future medical expenses.

19. When Petitioner and Respondent were unable to agree on the amount Petitioner owed Respondent in satisfaction of its Medicaid lien, Petitioner paid ACS the $35,952.47 alleged to be owed Respondent and filed the Petition initiating this proceeding.

CONCLUSIONS OF LAW

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

21. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses incurred on behalf of beneficiaries who later recover from third-party tortfeasors. See Ark. Dep't of Health & Hum. Servs. v. Ahlborn, 547 U.S. 268 (2006). States may satisfy this

requirement by enacting statutes that impose Medicaid liens to recover the portion of settlements that represent medical expenses. See id. at 275-76. Ahlborn holds that to the extent a state statute purports to impose a Medicaid lien on settlement proceeds that are distinct from medical expenses, such as pain and suffering, lost wages, and lost future earnings, the statute runs afoul of federal Medicaid law.

22. Consistent with federal law, section 409.910 authorizes and requires the State of Florida to be reimbursed for Medicaid funds paid for medical expenses when the beneficiary subsequently receives a settlement from a third-party. Smith v. Ag. for Health Care Admin., 24 So. 3d 590 (Fla. 5th DCA 2009). The statute creates an automatic lien on any such settlement for the medical assistance provided by Medicaid. § 409.910(6)(c), Fla. Stat.

23. Section 409.910(11)(f) establishes a formula to determine the amount of Medicaid medical assistance benefits the State is to be reimbursed. This statute states:

> 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. Under this formula, the amount the State is to be reimbursed is half the amount of the total settlement recovery, after deducting taxable costs and 25% attorney fees, not to exceed the amount actually paid by Medicaid on the beneficiary's behalf. § 409.910(11)(f), Fla. Stat; Ag. for Health Care Admin. v. Riley, 119 So. 3d 514, 515 (Fla. 2d DCA 2013).

25. Applying the apportionment formula in 409.910(11)(f)1. to the $150,000 Settlement at issue in this case yields attorney's fees of $37,500, with $112,500 of the recovery amount

remaining. One-half of the remaining recovery amount is $56,250, which is greater than the $35,952.47 of Medicaid assistance that Respondent provided for Petitioner. Accordingly, if the formula in section 409.910(11)(f) applies to determine the reimbursement due in this case, Respondent is entitled to $35,952.47, which is the amount of Medicaid medical assistance it actually paid on Petitioner's behalf.

26. Section 409.910(17) makes clear that the formula in section 409.910(11)(f) constitutes a default allocation of settlement proceeds attributable to medical expenses. See Davis v. Roberts, 130 So. 3d 264, 268 (Fla. 5th DCA 2013); Roberts v. Albertson's Inc., 119 So. 3d 457, 465-466 (Fla. 4th DCA 2012), reh'g and reh'g en banc denied sub nom. Giorgione v. Albertson's Inc., 2013 Fla. App. LEXIS 10067 (Fla. 4th DCA June 26, 2013).

27. Under section 409.910(17)(b), a Medicaid recipient has the right to rebut this presumptively valid statutory default allocation in an administrative hearing. This is accomplished by establishing, through clear and convincing evidence,[2/] that either a lesser portion of the total recovery should be allocated as a medical expense reimbursement than is calculated under the statutory formula, or that Medicaid actually provided a lesser amount of medical assistance than has been asserted by Respondent.

28. Here, the parties stipulated that Medicaid paid the amount to which Respondent asserts entitlement to reimbursement.

29. Thus, Petitioner seeks to establish that pursuant to the Settlement and Addendum, a lesser portion of the total recovery under the Settlement——specifically, $15,000——should be allocated for medical expense reimbursement, rather than the $35,952.47 calculated under the statutory formula in section 409.910(11)(f).

30. The undersigned determines that Petitioner has not established, by clear and convincing evidence, that the $15,000 allocated in the Addendum fairly, or accurately, or reasonably reflects the medical expenses incurred in the treatment of Petitioner's injuries that are the subject of the Settlement.

31. The sole evidentiary bases in the record for Petitioner's position consist of Petitioner's own self-serving claim that she was 90% at fault for the injuries she sustained, and the Addendum's allocation of $15,000 for medical expenses pursuant to the liability apportioned between Petitioner and Releasees. This evidence does not provide a credible or substantial basis on which to determine what part of the Settlement proceeds should be allocated for medical expenses.

32. As noted above, Petitioner did not present any evidence regarding the actual medical expenses that were incurred in the treatment of her injuries.

33. Further, the evidence that was presented——consisting of Petitioner's own testimony regarding the serious nature of her injuries, her hospitalization, the subsequent extended treatment she received from an orthopedic physician and a neurologist, her continuing health problems resulting from the accident, and the medical bills that she continues to receive over a year after the accident——belies her claim that the $15,000 allocation for medical expenses in the Addendum fairly reflects the medical expenses incurred in treating her injuries.

34. Accepting Petitioner's argument that the Settlement and Addendum, standing alone, dictate the amount of medical expenses effectively would bind Respondent to the allocation made by Petitioner and Releasees in the Addendum, even though Respondent was not a party to the Settlement and Addendum. The import of that position is that the parties to a settlement agreement could, in every case, circumvent the statutory reimbursement formula in section 409.910(11)(f) simply by agreeing between themselves to a stated allocation for medical expenses in an amount less than that determined using the statutory formula. This approach is contrary to the Legislature's stated intent in section 409.910 that Medicaid be repaid in full from third-party resources. Here, Respondent was not a party to the Settlement, so is not bound by it. See Mobley v. Ag. for Health Care Admin.,

Case No. 13-4785 (Fla. DOAH May 21, 2014); Savasuk v. Ag. for Health Care Admin., Case No. 13-4130 (Fla. DOAH Jan. 29, 2014).

35. Of course, Respondent's lack of participation in a settlement does not necessarily ensure in every case that the statutory formula's default calculation of the medical expense portion of the total recovery will prevail. Indeed, the very purpose of section 409.910(17)(b) is to authorize an administrative determination that a lesser portion of the recovery should be allocated as reimbursement for medical expenses. A settlement agreement does not dictate, but may inform, that administrative determination. A settlement's allocation to medical expenses may be adopted, even when Respondent did not participate in the settlement, provided that the allocation is supported by clear and convincing evidence.

36. Here, there is no persuasive——let alone clear and convincing——evidence establishing a factual basis for Petitioner's position that the $15,000 allocation agreed to by Petitioner and Releasees represents a fair, accurate, or reasonable allocation for Petitioner's medical expenses.

37. Accordingly, it is determined that Petitioner has failed to carry her burden to establish, by clear and convincing evidence, that a lesser portion of the total settlement recovery in this matter should be allocated as reimbursement for medical

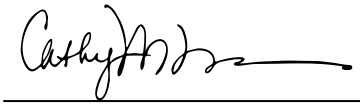
expenses than the amount calculated by the agency pursuant to the formula set forth in section 409.910(11)(f).

ORDER

Upon consideration of the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED that Respondent, Agency for Health Care Administration, is entitled to reimbursement in the amount of $35,952.47, pursuant to section 409.910(11)(f), in satisfaction of its Medicaid lien.

DONE AND ORDERED this day 30th of October, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 30th day of October, 2014.

ENDNOTES

[1/] All references are to 2013 Florida Statutes.

[2/] The "clear and convincing" evidentiary standard has been described as an "intermediate standard," requiring more proof than a preponderance of the evidence, but less than the "beyond

and to the exclusion of a reasonable doubt" standard. In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). For proof to be considered clear and convincing,

> [t]he 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 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).

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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.