STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARIO LARRIGUI-NEGRON,

Petitioner,

vs. Case No. 17-4276MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016),[1/] on December 12, 2017, by video teleconference with sites in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioner: John W. Staunton, Esquire
Staunton & Faglie, PL
3000 Gulf to Bay Boulevard
Clearwater, Florida 33759

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

STATEMENT OF THE ISSUE

The issue to determine in this matter is the amount of the money to be reimbursed to the Agency for Health Care

Administration for medical expenses paid on behalf of Petitioner, a Medicaid recipient, following Petitioner's recovery from a third party.

PRELIMINARY STATEMENT

On July 26, 2017, Petitioner, Mario Larrigui-Negron, a Medicaid recipient, filed a Petition to Determine the Amount Payable to the Agency for Health Care Administration in Satisfaction of Medicaid Lien ("Petition"). Through his Petition, Petitioner challenged the Agency for Health Care Administration's (the "Agency") lien for medical expenses following Petitioner's recovery from a third party. The Agency seeks reimbursement from Petitioner for medical expenses Medicaid paid on Petitioner's behalf. The Agency calculated the amount it seeks using the formula established in section 409.910(11)(f), Florida Statutes. Petitioner asserts that reimbursement of a lesser portion of Petitioner's recovery is warranted pursuant to section 409.910(17)(b).

On July 27, 2017, the Division of Administrative Hearings ("DOAH") notified the Agency of Petitioner's Petition for an administrative proceeding to determine the amount payable to the Agency to satisfy the Medicaid lien.

The final hearing was held on December 12, 2017. Prior to the final hearing, Petitioner and Respondent filed a Joint Stipulation agreeing to several facts upon which the undersigned

relied. At the final hearing, Petitioner's Exhibits 1 through 11, 13, and 14 were admitted into evidence. Petitioner presented the testimony of Weldon ("Web") E. Brennan, Esquire, and R. Vinson Barrett, Esquire. The Agency did not offer any evidence or witnesses.

A one-volume Transcript of the final hearing was filed with DOAH on January 17, 2018. At the close of the hearing, the parties were advised of a ten-day timeframe following DOAH's receipt of the hearing transcript to file post-hearing submittals. Both parties filed Proposed Final Orders which were duly considered in preparing this Final Order.

FINDINGS OF FACT

1. This administrative matter centers on the amount the Agency is entitled to be paid to satisfy its Medicaid lien following Petitioner's recovery of a $700,000 settlement from a third party.

2. On November 7, 2010, Petitioner was involved in a devastating automobile accident. While stopped awaiting for oncoming traffic to pass, another vehicle, driven by Nahun Garcia, struck Petitioner from behind at a high rate of speed. Mr. Garcia was cited for careless driving. No evidence indicates that any negligence on the part of Petitioner caused or contributed to the accident or his injury.

3. Petitioner suffered catastrophic injuries from the collision. Immediately following the accident, Petitioner was transported to St. Joseph's Hospital in Tampa, Florida. There, Petitioner was diagnosed with fractures of his C4-C5 vertebra. Petitioner is now quadriplegic. Petitioner was 26 years old on the date of the incident.

4. Because of the automobile accident, Petitioner is severely disabled and totally dependent on others for his care and well-being. Petitioner's injuries are continuing and permanent. In addition, Petitioner is no longer able to care for his minor daughter.

5. Petitioner's medical expenses from the accident equal $264,541.69. Of this amount, the Agency, through the Medicaid program, paid a total of $249,197.80 for Petitioner's past medical care.

6. Petitioner pursued a personal injury claim against Mr. Garcia. Weldon ("Web") E. Brennan, Esquire, represented Petitioner in the lawsuit.

7. According to Mr. Brennan's testimony at the final hearing, initially, Petitioner recovered $10,000 from Mr. Garcia's automobile insurance company, Progressive Insurance, which was the limit of the property damage liability insurance policy. However, Mr. Brennan was not able to identify any other

source of insurance to cover Petitioner's injuries. Mr. Garcia had no collectible assets.

8. Because the only available insurance was the property damage liability policy, Mr. Brennan evaluated the possibility of pursuing a bad faith claim against Progressive. Mr. Brennan concluded that, based on the circumstances of Petitioner's initial coverage demand to Progressive, a bad faith claim was a viable option. Therefore, Mr. Brennan's litigation strategy shifted. First, he would obtain a judgment against the tortfeasor (Mr. Garcia) in trial court. Then, he would seek to impose responsibility for the verdict on Progressive, including an assessment of punitive damages.

9. In May 2017, following six years of litigation, Mr. Brennan was able to negotiate a $700,000 settlement with Progressive. Mr. Brennan represented that Progressive tendered the amount to avoid the risk of a successful bad faith claim.[2/] Mr. Brennan explained that in finalizing the settlement with Progressive, he recognized that obtaining additional funds, by fully litigating the bad faith claim, would involve lengthy and intensive litigation. Consequently, Mr. Brennan believed that it was in his client's best interests to timely settle his lawsuit.

10. On May 9, 2017, Petitioner and Progressive executed a Release of All Claims (the "Release") formalizing the settlement. In the course of the settlement negotiations, Petitioner and

Progressive agreed that the true value for Petitioner's injuries equaled at least $15 million. The Release specifically stated:

> The parties were both willing to agree to a consent judgment for $15,000,000 prior to settlement and so they therefore agree that [Petitioner's] alleged damages have a value in excess of $15,000,000, of which $264,541.69 represents [Petitioner's] claim for past medical expenses. Given the facts, circumstances, and nature of [Petitioner's] alleged injuries and this settlement, the parties have agreed to allocate $12,354.10 of this settlement to [Petitioner's] claim for past medical expenses and allocate the remainder of the settlement towards the satisfaction of claims other than past medical expenses.

11. Under section 409.910, the Agency is to be repaid for its Medicaid expenditures from any recovery from liable third parties. Accordingly, when the Agency was notified of Petitioner's personal injury settlement, it asserted a Medicaid lien against the amount Petitioner recovered. The Agency claims that, pursuant to the formula set forth in section 409.910(11)(f), it should collect the full amount of the medical costs it paid on Petitioner's behalf ($249,197.80). The Agency maintains that it should receive the full amount of its lien regardless of the fact that Petitioner settled for less than what he represents is the full value of his damages. (As discussed below, the formula in section 409.910(11)(f) allows the Agency to collect the full Medicaid lien.)

12. Petitioner asserts that pursuant to section 409.910(17)(b), the Agency should be reimbursed a lesser portion of Petitioner's settlement than the amount it calculated using the section 409.910(11)(f) formula. Petitioner specifically argues that the Agency's Medicaid lien should be reduced proportionately, taking into account the full value of Petitioner's likely recovery in the underlying negligence and bad faith lawsuits. Otherwise, the application of the default statutory formula would permit the Agency to collect more than that portion of the settlement that fairly represents compensation for past medical expenses. Petitioner maintains that such reimbursement violates the federal Medicaid law's anti-lien provision (42 U.S.C. § 1396p(a)(1)) and Florida common law. Petitioner contends that the Agency's allocation from Petitioner's recovery should be reduced to the amount of $11,637.54.

13. To establish the full value of Petitioner's injuries, Petitioner presented the testimony of Mr. Brennan, as well as Vinson Barrett, Esquire. Mr. Brennan opined on what he considered to be the "true" value of Petitioner's damages. Mr. Brennan heads a plaintiff's injury firm and has represented plaintiffs in personal injury cases for over 28 years. Mr. Brennan has extensive experience handling cases involving automobile accidents, including catastrophic injury claims and

spinal cord injuries. Mr. Brennan expressed that he routinely evaluates damages suffered by injured parties as part of his practice. He stays current on jury verdicts and settlements throughout Florida and the United States. Mr. Brennan was accepted as an expert in the valuation of damages suffered by injured parties.

14. Mr. Brennan valued Petitioner's damages conservatively at $15 million, and possibly as high as $45 million. In deriving this figure, Mr. Brennan considered Petitioner's medical expenses, his lost wage capacity, his past and future pain and suffering, and his life expectancy. Finally, Mr. Brennan testified that, in placing a dollar value on Petitioner's injuries, he reviewed a number of jury verdicts involving catastrophic injuries similar to Petitioner's.

15. Mr. Brennan commented that Petitioner faces a meager future. Other than slight movement in his left arm, he is paralyzed from the neck down. Mr. Brennan relayed how the injuries have caused Petitioner to experience depression. He cannot eat independently, nor can he control his bodily functions. Neither is Petitioner able to care for or support his daughter.

16. Mr. Brennan testified that the $700,000 settlement did not fully or fairly compensate Petitioner for his injuries. Therefore, he urged that a lesser portion of Petitioner's

settlement be allocated to reimburse Medicaid instead of the full amount of the lien ($249,197.80). Mr. Brennan proposed applying a ratio based on the true value of Petitioner's injuries ($15 million) compared to the amount Petitioner actually recovered ($700,000). Using his estimate of $15 million, the settlement represents a 4.67 percent recovery of the total value of all Petitioner's damages. In like manner, the amount of medical expenses should also be reduced to 4.67 percent or approximately $11,637.54. Therefore, in Mr. Brennan's professional judgment, $11,637.54 is the portion of Petitioner's settlement that represents his compensation for past medical expenses. Mr. Brennan expressed that allocating $11,637.54 for Petitioner's past medical expenses is "logical," "rational," and "reasonable" under the circumstances.

17. Mr. Barrett also testified on Petitioner's behalf. Mr. Barrett is a trial attorney with over 40 years' experience and works exclusively in the area of plaintiff's personal injury, medical malpractice, and medical products liability cases. Mr. Barrett has handled a number of catastrophic injury matters involving traumatic spinal cord injuries. Mr. Barrett commented that, as a routine part of his practice, he makes assessments concerning the value of damages suffered by injured parties. Mr. Barrett was accepted as an expert in the valuation of damages suffered by injured persons.

18. Prior to the final hearing, Mr. Barrett reviewed Petitioner's exhibits, including Petitioner's medical records, the accident report, and Petitioner's Release of All Claims executed with Progressive. He also reviewed the sample jury verdicts Petitioner presented at the final hearing as Exhibit 13.

19. Based on his valuation of Petitioner's injuries and his professional training and experience, Mr. Barrett expressed that injuries similar to Petitioner's would result in jury awards averaging between $15 and $30 million dollars. In light of Petitioner's horrific injuries, Mr. Barrett conservatively valued Petitioner's injuries at $15 million. Mr. Barrett opined that Mr. Brennan's valuation of $15 million was appropriate, if not undervalued.

20. Mr. Barrett supported Mr. Brennan's pro rata methodology of calculating a reduced portion of Petitioner's $700,000 settlement to equitably and fairly represent past medical expenses. With injuries valued at $15 million, the $700,000 settlement only compensated Petitioner for 4.67 percent of the total value of his damages. Therefore, because Petitioner only recovered 4.67 percent of his damages, the most "reasonable" and "rational" manner to apportion the $700,000 settlement is to apply that same percentage to determine Petitioner's recovery for past medical expenses. Petitioner asserts that applying the same ratio to the total amount of medical costs produces the

definitive value of that portion of Petitioner's $700,000 settlement that represents compensation for past medical expenses, i.e., $11,637.54 ($249,197.80 times 4.67 percent).

21. The Agency was not a party to Petitioner's negligence lawsuit or Petitioner's Release with Progressive.

22. All of the expenditures Medicaid spent on Petitioner's behalf is attributed to past medical expenses. No portion of the $249,197.80 Medicaid lien represents future medical expenses.

23. The undersigned finds that the competent substantial evidence establishes the value of Petitioner's injuries from his auto accident at $15 million. However, based on the evidence in the record, Petitioner failed to prove, by a preponderance of the evidence, that a lesser portion of Petitioner's total recovery should be allocated as reimbursement for medical expenses than the amount the Agency calculated pursuant to the formula set forth in section 409.910(11)(f). Accordingly, the Agency is entitled to recover $249,197.80 from Petitioner's recovery of $700,000 from a third party to satisfy its Medicaid lien.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this matter pursuant to sections 120.569, 120.57(1), and 409.910(17)(b), Florida Statutes.

25. The Agency is the Medicaid agency for the state, as provided under federal law, and administers Florida's Medicaid program. See § 409.901(2), Fla. Stat.

26. The federal 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). While a state's participation is entirely optional, once a state elects to participate in the federal Medicaid program, it must comply with federal requirements governing the program. Id.; and 42 U.S.C. § 1396, et seq.

27. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses from Medicaid recipients who later recover from legally liable third parties. See Arkansas Dep't of Health & Hum. Servs. v. Ahlborn, 547 U.S. 268, 276 (2006). Consistent with this federal requirement, the Florida Legislature enacted section 409.910, Florida's "Medicaid Third-Party Liability Act," which authorizes and requires the Agency to be reimbursed for Medicaid funds paid for a recipient's medical care when that recipient later receives a personal injury judgment or settlement from a third party. See Smith v. Ag. for Health Care Admin., 24 So. 3d 590 (Fla. 5th DCA 2009). The Legislature expressly set forth in section 409.910(1):

> If benefits of a liable third party are discovered or become available after medical assistance has been provided by Medicaid, it is the intent of the Legislature that Medicaid be *repaid in full and prior to any other person, program, or entity*. Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. Principles of common law and equity as to assignment, lien, and subrogation are abrogated to the extent necessary to ensure *full recovery* by Medicaid from third-party resources. It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources.[3/]

28. Accordingly, by accepting Medicaid benefits, Medicaid recipients automatically subrogate their rights to any third-party benefits for the full amount of medical assistance provided by Medicaid and automatically assign to the Agency the right, title, and interest to those benefits, other than those excluded by federal law. See § 409.910(6)(a), (b), Fla. Stat.; see also 42 U.S.C. § 1396k(a)(1) (requiring states participating in the federal Medicaid program to provide, as a condition of Medicaid eligibility, assignment to the state the right to payment for medical care from any third party); see also Giraldo v. Ag. for Health Care Admin., 208 So. 3d 244 (Fla. 1st DCA 2016).[4/] Section 409.910 creates an automatic lien on any such judgment or settlement with a third party for the full amount of medical

expenses Medicaid paid on behalf of the Medicaid recipient. See § 409.910(6)(c), Fla. Stat.

29. The obligation to reimburse the Agency (and Medicaid) following recovery from a third party, however, is not unbounded. Pursuant to 42 U.S.C. §§ 1396a(a)(25)(A), (B), and (H); 1396k(a), and 1396p(a), the Agency may only assert a Medicaid lien against that portion of Petitioner's award from a third party that represents the costs of the medical assistance made available for the individual. See Ahlborn, 547 U.S. at 278; Wos v. E.M.A., 133 S. Ct. 1391, 1396 (2013); Harrell v. State, 143 So. 3d 478, 480 (Fla. 1st DCA 2014); and Davis v. Roberts, 130 So. 3d 164, 266 (Fla. 5th DCA 2013). The federal Medicaid statute's anti-lien provision, 42 U.S.C. § 1396p(a)(1), prohibits a state from attaching a lien on a Medicaid recipient's property for medical assistance paid by the state other than that portion of a Medicaid recipient's recovery designated as payment for medical care. See also section 409.910(4), (6)(b)1., and (11)(f)4., which provides that the Agency may not recover more than it paid for the Medicaid recipient's medical treatment.[5/]

30. As Ahlborn explains, the anti-lien provisions of the federal Medicaid Act circumscribe these obligations by authorizing payment to a state only from those portions of a Medicaid recipient's third-party settlement recovery allocated for payment of medical care. See also E.M.A. ex rel. Plyler v.

Cansler, 674 F.3d 290, 312 (4th Cir. 2012), where the court concluded "[a]s the unanimous Ahlborn Court's decision makes clear, federal Medicaid law limits a state's recovery to settlement proceeds that are shown to be properly allocable to past medical expenses."

31. Section 409.910(11) establishes a formula to determine the amount the Agency may recover for medical assistance benefits paid from a judgment, award, or settlement from a third party. Section 409.910(11)(f) states, in pertinent part:

> 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.

32. The section 409.910(11)(f) formula establishes that the Agency's recovery for a Medicaid lien is limited to the lesser of: (1) its full lien; or (2) one-half of the total award, after deducting attorney's fees of 25 percent of the recovery and all taxable costs, up to, but not to exceed, the total amount actually paid by Medicaid on the recipient's behalf. See Ag. for Health Care Admin. v. Riley, 119 So. 3d 514, 515 n.3 (Fla. 2d DCA 2013).

33. In this matter, using the section 409.910(11)(f) formula, Petitioner's recovery amount ($700,000) is sufficient to pay the full amount due to the Agency to satisfy its Medicaid lien ($249,197.80).[6/]

34. However, section 409.910(17)(b) provides a method by which a Medicaid recipient may contest the amount designated as recovered medical expenses payable under section 409.910(11)(f). Following the U.S. Supreme Court decision in Wos, the Florida Legislature created an administrative process to determine the

portion of the judgment, award, or settlement in a tort action representing medical expenses; and, thus, the portion the Agency's Medicaid lien that must be reimbursed. Section 409.910(17)(b) states:

> If federal law limits the agency to reimbursement from the recovered medical expense damages, a recipient, or his or her legal representative, 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. *In order to successfully challenge the amount designated as recovered medical expenses, the recipient must prove, by clear and convincing evidence, that the portion of the total recovery which should be allocated as past and future medical expenses is less than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f). Alternatively, the recipient must prove by clear and convincing evidence that Medicaid provided a lesser amount of medical assistance than that asserted by the agency.*[7/] (emphasis added).

35. Section 409.910(17)(b) establishes that the section 409.910(11)(f) formula constitutes a default allocation of the amount of a settlement that is attributable to medical costs, and sets forth an administrative procedure for an adversarial challenge of that allocation. See Harrell, 143 So. 3d at 480 ("we now hold that a plaintiff must be given the opportunity to seek reduction of the amount of a Medicaid lien established by the statutory formula outlined in section 409.910(11)(f), by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses").

36. In order to successfully challenge the amount payable to the Agency, the burden is on the Medicaid recipient to prove, by a preponderance of the evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past medical expenses than the amount the Agency calculated. § 409.910(17)(b), Fla. Stat.[8/] In other words, if Petitioner can demonstrate that the past medical expense portion of his settlement is less than the amount the Agency calculated using the section 409.910(11)(f) formula, the amount Petitioner must reimburse the Agency may be reduced below $249,197.80.

37. Petitioner proposes that the Medicaid lien be reduced using a ratio that reflects the "true" value of Petitioner's injuries. Specifically, the Agency should receive only 4.67 percent of the lien. Petitioner calculates the lesser portion

that should be allocated as past medical expenses as follows: Petitioner's witness testimony establishes that the actual value of Petitioner's injuries is $15 million. Petitioner recovered $700,000 through the settlement. The settlement amount equals 4.67 percent of the true value of Petitioner's injuries. Applying this percentage to the Medicaid lien of $249,197.80, as a matter of fairness, the Agency should only recover $11,637.54 from Petitioner's settlement funds ($249,197.80 times 4.67 percent).

38. Despite establishing a method in section 409.910(17)(b) for a Medicaid recipient to contest the amount of the Medicaid lien, the Legislature did not provide guidance as to how DOAH is to determine whether a lesser portion of the total recovery should be allocated, instead of applying the default formula. However, the Legislature emphatically and repeatedly emphasized its desire for Medicaid to "be repaid in full" from third-party resources. See § 409.910(1) and (6), Fla. Stat.

39. The undersigned is also mindful that "Medicaid is a cooperative federal-state welfare program providing medical assistance to needy people." Roberts v. Albertson's Inc., 119 So. 3d 457, 458 (Fla. 4th DCA 2012) (quoting Ag. for Health Care Admin. v. Estabrook, 711 So. 2d 161, 163 (Fla. 4th DCA 1998)); see also 42 U.S.C. § 1396a(a)(25)(A)-(B). While state participation is voluntary, once a state joins the program, it

must comply with federal Medicaid law. Roberts, 119 So. 3d at 458; see also Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 502 (1990). In light of this directive, the undersigned further notes that, as expressed in Giraldo:

> To keep the Medicaid program viable, Congress recognized that it is necessary to obtain reimbursement when a third party makes payment to the Medicaid beneficiary for medical care already paid for by Medicaid. Roberts, 119 So. 3d at 459. As Roberts explains, the goal of the reimbursement provision of the Medicaid Act was at least in part to protect tax dollars. 119 So. 3d at 459 (citing Tristani v. Richman, 652 F.3d 360, 373 (3d Cir. 2011)). This, no doubt, is at least in part so that other "needy people" may secure the care they so desperately require.

Giraldo, supra., 208 So. 2d at 18.

40. Petitioner's alternative calculation certainly apportions a more equitable portion of the settlement to Petitioner in light of the extensive injuries Petitioner suffered in the auto accident. However, the evidence does not establish that Petitioner's recovery does not include sufficient funds to cover the full amount of the medical assistance Medicaid paid on Petitioner's behalf.

41. Further, the decision between Petitioner and Progressive to allocate $12,354.10 to past medical expenses in their Release has no bearing on the section 409.910(11)(f) formula. This figure is not tied to any medical records or

prospective medical procedure. In addition, the Agency did not participate in the settlement negotiation. Nor did it approve of or otherwise indicate that it would reduce the amount of the Medicaid lien in order to facilitate Petitioner's recovery.[9/]

42. Moreover, Petitioner's independent election to settle his tort claim at less than its "true" value, rather than pursue the underlying lawsuit to fruition, does not provide a sufficiently compelling reason to compromise the amount the Medicaid program should be paid. To do so is contrary to clear Legislative mandate that "Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid." § 409.910(1), Fla. Stat; see also § 409.910(6)(a), Fla. Stat., which states that "[e]quities of a recipient . . . shall not defeat, reduce, or prorate recovery by the agency as to its subrogation rights."

43. In sum, Petitioner did not demonstrate that his alternative methodology under section 409.910(17)(b) should be used to calculate the share of his settlement that should be allotted to satisfy the Medicaid lien. Consequently, Petitioner failed to meet his burden of proving that a lesser portion of his total recovery should be allocated as reimbursement for past medical expenses, instead of the amount the Agency calculated using the section 409.901(11)(f) formula. Accordingly, the

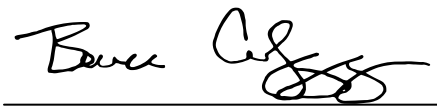
Agency is entitled to the full amount of its Medicaid expenditures ($249,197.80) from Petitioner's third-party recovery.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Petitioner, Mario Larrigui-Negron, shall pay to Respondent, Agency for Health Care Administration, the sum of $249,197.80 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 20th day of February, 2018, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of February, 2018.

ENDNOTES

[1/] All references to the Florida Statutes are to the 2016 version, unless otherwise noted.

[2/] A settlement for bad faith damages may be used to satisfy a Medicaid lien. See Willoughby v. Ag. for Health Care Admin., 212 So. 3d 516, 520 (Fla. 2d DCA 2017).

[3/] See also section 409.910(6)(a), Florida Statutes, which states that the Agency:

> is automatically subrogated to any rights that an applicant, recipient, or legal representative has to any third-party benefit for *the full amount* of medical assistance provided by Medicaid. Recovery pursuant to the subrogation rights created hereby shall not be reduced, prorated, or applied to only a portion of a judgment, award, or settlement, but is to provide *full recovery* by the agency from any and all third-party benefits. (emphasis added).

[4/] Giraldo is currently on appeal to the Florida Supreme Court. See Giraldo v. Ag. for Health Care Admin., No. SC17-297, 2017 Fla. LEXIS 1826 (Sep. 6, 2017).

[5/] In cases where a Medicaid recipient only recovers a limited amount, section 409.910 protects the Medicaid recipient's interest in the non-medical expense portion of the judgment, award, or settlement. In this matter, however, Petitioner's recovery ($700,000) is sufficient to fully satisfy the Agency's Medicaid expenditures ($249,197.80). Therefore, the Agency was not required to reduce the Medicaid lien pursuant to the formula established in section 409.910(11)(f).

[6/] Petitioner recovered $700,000 in his third-party tort action. Using the section 409.910(11)(f) formula to calculate the portion of the settlement funds available to satisfy the Medicaid lien, first, 25 percent ($175,000) is subtracted from the full settlement amount, which leaves $525,000. One-half of that remaining recovery is $262,500. Therefore, up to $262,500 is available to pay the Agency for the medical assistance Medicaid provided. This pool of money is sufficient to cover the full amount of the Medicaid lien ($249,197.80).

Further, the undersigned is mindful that the issue of whether a Medicaid lien may be imposed on both "past and future medical expenses," as section 409.910(17)(b), states is currently unresolved in Florida appellate courts. See Willoughby v. Agency for Health Care Administration, 212 So. 3d 516, 521 (Fla. 2d DCA

2017), which holds that a Medicaid lien can only be satisfied from settlement funds allocable to past medical expenses because the Agency cannot impose its "lien upon settlement proceeds which are not 'designated as payments for medical care,' as those [nonmedical] proceeds qualify as a recipient's property." (citing Goheagan v. Perkins, 197 So. 3d 112, 116 (Fla. 4th DCA 2016)); *contra* Giraldo, 208 So. 3d at 248 ("we find no error in the ALJ's legal determination relating to [the Agency's] right to secure reimbursement for payments already made for medical costs from not only that portion of the settlement allocated for past medical expenses but also from that portion of the settlement intended as compensation for future medical expenses.")

At the final hearing, Mr. Brennan testified that, if Petitioner had received the full value of his damages through a trial verdict, approximately one-third of that award would fall into the category of future medical care. However, even separating out one-third from Petitioner's total settlement amount of $700,000 as "future medical expenses," sufficient money remain to satisfy the full Medicaid lien.

[7/] Recent federal case law has established that "clear and convincing evidence" is not the appropriate standard of proof by which to determine whether a Medicaid recipient rebuts the default formula in section 409.910(11)(f). See Gallardo v. Dudek, 263 F. Supp. 3d 1247, 1256 (N.D. Fla. 2017); and Gallardo v. Senior, No. 4:16cv116-MW/CAS, 2017 U.S. Dist. LEXIS 112448, at *24 (N.D. Fla. July 18, 2017). Therefore, the undersigned applies the preponderance of evidence standard to Petitioner's challenge under section 409.910(17)(b). See § 120.57(1)(j), Fla. Stat.

Further, collection of settlement funds has been limited to the amount allocated in the settlement for past (not future) medical expenses. See endnote 6 above and Gallardo v. Dudek, 263 F. Supp. 3d at 1253.

[8/] See endnote 7 above.

[9/] See Giraldo v. Ag. for Health Care Admin., 208 So. 3d 244, 247 (Fla. 1st DCA 2016); see also section 409.910(13), which states:

> No action of the recipient shall prejudice the rights of the agency under this section. No settlement, agreement, consent decree, trust agreement, annuity contract, pledge, security arrangement, or any other device,

hereafter collectively referred to in this subsection as a "settlement agreement," entered into or consented to by the recipient or his or her legal representative shall impair the agency's rights. However, in a structured settlement, no settlement agreement by the parties shall be effective or binding against the agency for benefits accrued without the express written consent of the agency or an appropriate order of a court having personal jurisdiction over the agency.

COPIES FURNISHED:

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

Kim Annette Kellum, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

John W. Staunton, Esquire
Staunton & Faglie, PL
3000 Gulf to Bay Boulevard
Clearwater, Florida 33759
(eServed)

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

Stefan Grow, General Counsel
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Justin Senior, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)

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

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.