STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSEPH PINTO DOMINGO, A MINOR, BY AND THROUGH HIS PARENTS AND NATURAL GUARDIANS, AURILEIA DOS REIS PINTO AND NILTON PINTO,

Petitioner,

vs. Case No. 17-5417MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice to all parties, a final hearing was held in this case before the Honorable R. Bruce McKibben, Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on February 26, 2018, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Floyd B. Faglie, Esquire
Staunton and Faglie, P.L.
189 East Walnut Street
Monticello, Florida 32344

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

STATEMENT OF THE ISSUE

The issue to be decided in this proceeding is the amount to be paid to Respondent, Agency for Health Care Administration ("AHCA" or the "Agency"), from the proceeds of a personal injury settlement received by Petitioner, Joseph Pinto Domingo, referred to herein as either "Petitioner" or "Domingo," to reimburse Medicaid for expenditures made on his behalf.

PRELIMINARY STATEMENT

On September 29, 2017, Domingo filed a Petition to Determine Amount Payable to AHCA in satisfaction of its Medicaid lien. The case was assigned to the undersigned. On December 26, 2017, Domingo filed a motion to abate the proceedings due to pending appeals in Federal and state courts addressing some of the issues in the instant proceeding. The motion was denied and a final hearing was held as set forth above.

At the final hearing, Domingo called two witnesses, each of whom was accepted as an expert in the valuation of damages: Edward Ricci, Esquire; and R. Vinson Barrett, Esquire. Petitioner's Exhibits 1 through 13 were admitted into evidence. AHCA did not call any witnesses; its Exhibit A was admitted into evidence. A prehearing stipulation was filed by the parties; the stipulated facts contained therein are also admitted into evidence.

A transcript of the final hearing was ordered. It was filed at DOAH on April 5, 2018. The parties initially requested that proposed final orders ("PFOs") be filed on or before 15 days from the filing of the transcript at DOAH, but later asked for an extension until May 14, 2018, which was granted. Each party timely filed its PFO and each was duly considered in the drafting of this Final Order.

FINDINGS OF FACT

The following findings of fact are derived from the exhibits and oral testimony at final hearing, as well as from the stipulated facts between the parties.

1. On July 13, 2012, Domingo's parents took him to a hospital emergency room ("ER") with complaints of a persistent fever, runny nose, congestion and a cough. He was 24 months old at the time and had been sick for a few days. After evaluation by hospital ER staff, Domingo was found to have a fever of 103 degrees Fahrenheit. He was treated with Tylenol, but minutes later began to have seizures. He experienced on-going seizure activity that compromised his ability to breathe, resulting in a catastrophic hypoxic ischemic brain injury. As a result of his brain injury, Domingo is permanently disabled and unable to stand, walk, ambulate, speak, eat, toilet or care for himself in any manner.

2. As a result of Domingo's injuries, he suffered both economic and non-economic damages, including but not limited to:

pain and suffering, mental anguish, loss of ability to enjoy life, disability, disfigurement, lost ability to earn money, and extensive medical expenses, past and future. Of course Domingo's parents also suffered extensively because of Domingo's injuries.

3. The medical care Domingo received for treatment of his injuries was paid for by Medicaid. The amount paid by Medicaid for his treatment was $641,174.03 (the "Lien Amount").

4. Domingo's parents brought medical malpractice claims against the ER physician, the ER nurse practitioner, a professional association to which the doctor belonged, and the hospital. During the course of litigation, it was determined that a conservative value of Domingo's claim for damages would be thirty million dollars ($30,000,000.00), referred to herein as the "Claim Amount." After years of litigation, a settlement was reached wherein Domingo was to be paid ten million dollars ($10,000,000), which will be called the "Settlement Amount." An undisclosed portion of the Settlement Amount, presumably 25 percent or $2,500,000, was paid for attorneys' fees. Domingo's recovery was therefore less than $10,000,000.

5. The Settlement Amount was paid by two separate entities: 1) the physician, nurse practitioner, and their professional associations (collectively the "Association"); and 2) the hospital where Domingo presented to the ER for treatment.

The Association paid $2,000,000 of the Settlement Amount and the hospital paid $8,000,000. Both entities entered into settlement agreements with Domingo (through his parents). Domingo offered into evidence a Complete Liability Release from the Association and a General Release from the hospital which Domingo's representatives had signed. In the releases, the Association and the hospital were released from further liability for and in consideration of payments made to Domingo in the amounts described above. The releases, by their terms, are considered "settlement agreements" between the parties thereto. The hospital's settlement agreement indicated that $170,937 was being allocated for Domingo's past medical expenses, recognizing that the Settlement Amount was less than the perceived value of Domingo's claim. The Association's settlement agreement did not allocate any of the $2,000,000 sum specifically to past medical expenses; it did acknowledge that the Settlement Amount was less than the value of the Claim Amount.

6. Domingo's parents and legal counsel signed the releases, wherein all future claims against the defendants were barred. Neither the defendants in the malpractice case nor AHCA were signatories to the releases. The copies of the documents entered into evidence at final hearing were not signed by the Association or the hospital. Oddly, the documents do not even provide a place for the defendants to sign. Nor was there

testimony from any principal of the Association or the hospital to verify the terms of the releases-qua-settlement agreements.

7. Nonetheless, the gross Settlement Amount received by Domingo was only one-third, i.e., 33.3 percent, of the Claim Amount. All the parties hereto acknowledge that Domingo did not receive the full potential value of his claim in the Settlement Amount.

8. Domingo continues to reside with his parents, who, despite the difficulties associated with Domingo's injury and the stress related thereto, have remained married. The parents will be responsible for Domingo's care for the rest of his life. The parties do not dispute that Domingo's life situation is grave and serious. But that is not the issue in this proceeding.

9. The economic and non-economic damages for Domingo include several factors: future medical expenses, loss of income, and past medical expenses comprise the economic portion; pain and suffering, loss of consortium, mental anguish, loss of enjoyment of life, and disability, to name a few, make up the non-economic damages. Of all the postulated damages, only the past medical expenses (i.e., the Lien Amount) are finite and absolute. In fact, the parties have stipulated that "[Domingo's] medical care related to the injury was paid by Medicaid and Medicaid provided $641,174.03 associated with

[Domingo's] injury." All the other damages are estimates by experts, based on comparisons of other cases and/or their professional experience.

10. Domingo asserts that inasmuch as he received only about 33.3 percent of his Claim Amount, he should only have to pay 33.3 percent of the Lien Amount. His assertion is essentially based on a mathematical calculation which seeks to make Domingo as whole as possible. The calculation is offered as an equitable way to provide Domingo with more of the Settlement Amount than he might otherwise retain. As discussed more fully below, the mathematical calculation runs afoul of statutory provisions.

11. The amount allocated by the hospital for Domingo's past medical expenses ($170,397), is 26.6 percent of the Lien Amount. This is because the hospital's share of the $10,000,000 settlement ($8,000,000) represents 26.6 percent of the alleged value of the claim, according to Petitioner. (The undersigned could not mathematically reconcile this percentage, but based on the findings and conclusions herein, the calculation is not relevant.) The Association did not allocate a specific amount for past and medical expenses, but Domingo argues that a factor of 33.3 percent should be applied to their settlement payment, as the Settlement Amount is 33.3 percent of the Claim Amount. Other than the accuracy of

that mathematical calculation, Petitioner does not provide any basis for applying the percentage to the Lien Amount.

12. AHCA was made aware of the settlement discussions between Domingo and his healthcare providers, but chose not to be involved in the process. Rather, AHCA established the amount of the lien and asserts that the entire Lien Amount should be paid from the Settlement Amount.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569, 120.57(1) and 409.910(17)(b), Fla. Stat. DOAH has final order authority in this matter. Id. Unless stated otherwise herein, all references to Florida Statutes will be to the 2017 version.

14. AHCA is the state agency with responsibility for administering Florida's Medicaid program. § 409.902, Fla. Stat.

15. Medicaid is a joint state-federal program. States choosing to reimburse enumerated costs of treatment to its citizens may receive federal funds under the program. See Harris v. McRae, 448 U.S. 297, 301 (1980). Participation in the Medicaid program is voluntary, but states, which elect to participate, must comply with the federal requirements. Id.

16. One of the Medicaid conditions of participation to which states must agree is that the state will seek

reimbursement from persons who later recover funds from a third party, e.g., insurance or settlement proceeds. Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 276 (2006).

17. Section 409.910, Florida Statutes, mandates that a person who receives Medicaid funds must reimburse the state when the recipient receives a settlement in a personal injury case, such as Domingo received in the instant case, when there are sufficient funds available from the settlement to pay the lien. The statute creates an automatic lien against such a settlement. § 409.910(6)(c), Fla. Stat.; Smith v. Ag. for Health Care Admin., 24 So. 3d 590 (Fla. 5th DCA 2009).

18. A statutory formula was created by the Legislature to determine the distribution of any such settlement by a recipient. The formula, appearing in section 409.910, is as follows:

> (11) The agency may, as a matter of right, in order to enforce its rights under this section, institute, intervene in, or join any legal or administrative proceeding in its own name in one or more of the following capacities: individually, as subrogee of the recipient, as assignee of the recipient, or as lienholder of the collateral.
>
> * * *
>
> (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.

19. Using that statutory formula, Domingo would have sufficient funds from the Settlement Amount to satisfy the AHCA Medicaid lien. However, Domingo has exercised his right to challenge the amount of the Medicaid lien pursuant to section 409.910(17)(b), which provides:

> 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.[1/]

20. There is little guidance in statute or case law as to exactly how a person proves that the total recovery amount should be less than what the agency calculated. Obviously, if a petitioner found that ACHA's math was in error or certain

components of the recovery amount were missing, it could contest the lien amount and show that a lesser portion should be allocated as reimbursement. The question, however, is whether a petitioner can simply assert that a different or lesser amount can be allocated for some reason other than AHCA error.

21. In this case, Domingo presented some evidence that the hospital may have allocated only a portion of the settlement amount to past medical expenses. That evidence, however, does not satisfy Domingo's burden of proof as there is no competent evidence that the hospital agreed to the settlement. The absence of any signatory for the hospital renders the settlement agreement inadequate as proof of the hospital's intent. While the argument posed by Domingo may have merit, there is a failure of evidence to support his position. The Association's settlement agreement does not specify an allocation of past medical expenses, although it also fails to contain signatures for the doctors.[2/] Thus, there are sufficient proceeds available from the settlement to prepay the Medicaid lien in whole.

22. The Legislature has mandated full payment of Medicaid liens whenever possible. See section 409.910, which states:

> (1) 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.
>
> * * *
>
> (6)(c)7. No release or satisfaction of any cause of action . . . settlement, or settlement agreement shall be valid or effectual against a lien created under this paragraph, unless the agency joins in the release or satisfaction or executes a release of the lien.

23. It could not be more clear that the Legislature intended all Medicaid liens to be repaid, and that absent joinder in a settlement agreement by the Agency, such agreements do not affect the amount of the lien.

24. While it is clear from the evidence that Domingo probably settled for less than the full potential value of his claim, and that AHCA was made aware of the proposed settlement and chose not to be part of the negotiations, there is no evidence that the Medicaid Lien Amount is less than what AHCA calculated. Nor did AHCA join in the settlement agreement or release so as to reduce or release its lien.

25. Domingo proved that his claim for damages could have been much more than the $10,000,000 amount paid by his health care providers in settlement. He proved that applying a mathematical percentage to his past medical expenses would reduce the Lien Amount. He did not prove that the services for

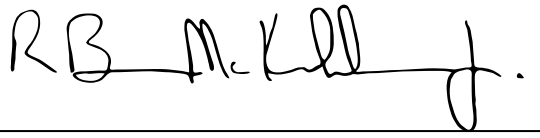
which Medicaid paid were incorrect, calculated improperly, or not provided. He did not prove that AHCA released its lien.

26. In total, Domingo failed to prove, by a preponderance of evidence, that the Lien Amount calculated by AHCA should be altered.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that Petitioner, Joseph Pinto Domingo, shall pay to Respondent, Agency for Health Care Administration, the sum of $641,174.03, in satisfaction of the Medicaid lien.

DONE AND ORDERED this 22nd day of May, 2018, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
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 22nd day of May, 2018.

ENDNOTES

[1/] It is clear from recent case law and developments that the preponderance of evidence standard, not the clear and convincing evidence standard, applies to recipients challenging

a Medicaid lien amount. Further, collection of settlement funds has been limited to the amount allocated in the settlement for past medical expenses, not past and future medical expenses. In the present case, the settlement between Domingo and the defendants was not fully allocated and the entire settlement amount is being considered for purposes of this matter. See, e.g., Gallardo v. Dudek, Case No. 4:16cv116-MW/CAS, 2017 WL 3081816 (U.S.N.D. Fla. July 18, 2017).

[2/] Petitioner offered into evidence an "Order Approving Amended Motion to Approve Minor Settlement (entered in the Circuit Court of the Nineteenth Circuit, in and for St. Lucie County, Florida, Case No. 562014-CA-002222(MS), dated September 27, 2017). The Order does not specify the documents considered by the court in entering its Order. While the Order may have approved the releases entered into evidence, the fact remains that the $2,000,000 portion of the Settlement Amount paid by the Association did not allocate a specific portion to past medical expenses.

COPIES FURNISHED:

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

Floyd B. Faglie, Esquire
Staunton and Faglie, P.L.
189 East Walnut Street
Monticello, Florida 32344
(eServed)

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

Shena Grantham, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
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.