STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KIMIKIA MOLINA,

Petitioner,

vs. Case No. 18-1995MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.
_______________________________/

FINAL ORDER

On August 22, 2018, Administrative Law Judge Hetal Desai with the Division of Administrative Hearings (DOAH) conducted the final hearing by video conference with sites in Tallahassee and Sarasota, Florida.

APPEARANCES

For Petitioner: Robert J. Healy, Esquire
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For Respondent: Alexander R. Boler, Esquire
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STATEMENT OF THE ISSUES

The issue for determination is the amount Petitioner, Kimikia Molina, must pay to Respondent, Agency for Health Care Administration (the Agency or AHCA), out of her settlement proceeds as reimbursement for past Medicaid expenditures

pursuant to section 409.910, Florida Statutes (2017).[1/] More specifically, it must be determined whether Petitioner owes the default amount, $41,250, pursuant to section 409.910(11)(f); and, if not, what portion of her $110,000 settlement proceeds is due to AHCA.

PRELIMINARY STATEMENT

On April 16, 2018, Petitioner, a Medicaid recipient, filed a "Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid lien" (Petition) with DOAH. Upon receiving the Petition, DOAH notified AHCA of the Petition and assigned it to an Administrative Law Judge.

The Petition argues that the Medicaid lien asserted by AHCA against her settlement proceeds should be reduced because she received less than the "settlement value" of her claim. The Agency argues it must be reimbursed for its Medicaid lien in the amount of $41,250, as calculated pursuant to section 409.910(11)(f).

The final hearing was held on August 22, 2018.[2/] Petitioner offered the testimony of Frank Currie, Esquire, and Petitioner's Exhibits 1 through 9 were admitted into evidence without objection. The Agency did not offer any witnesses, but offered Respondent's Exhibit 1, which was admitted into evidence.

At the conclusion of the hearing, the parties indicated a transcript would not be filed. The parties were ordered to file

post-hearing submittals no later than 5:00 p.m. on September 4, 2018. Both parties timely filed proposed final orders (PFOs), and both PFOs have been considered.

FINDINGS OF FACT

Underlying Accident and Injuries

1. Although there was no testimony regarding Petitioner's accident or injuries, the following information can be gleaned from her medical records. On February 3, 2017, Petitioner, then age 22, was admitted to a medical facility after being involved in a motor vehicle accident. Petitioner had been a passenger in the car and was not wearing her seatbelt; the driver of the car was declared "signal 7" (or deceased) by the emergency responders at the scene of the accident.

2. Petitioner was treated for neurological and orthopedic injuries, including surgical care to her left knee, right ankle and fibula.

3. After numerous surgeries, on March 8, 2017, Petitioner was released from the medical facility to return home. At the time of her release, she still had splints on her left arm and right leg and dressings on her wounds, but was otherwise stable and alert.

4. Upon discharge, Petitioner was placed on restrictions that included the following:

- No driving.

- No tub baths.
- No heavy lifting (over 10 pounds).
- No lifting, pulling, pushing, or straining.
- No weight bearing on the lower right side.

These restrictions were to remain in effect until lifted by a doctor. Petitioner was also given instructions to follow up with physical and occupational therapy.

5. The parties stipulated that Medicaid provided $55,042.63 toward Petitioner's past medical expenses arising out of the February 2017 car accident.

6. Additionally, Amerigroup Community Care has a lien against the settlement amount for $3,199.59.

7. Petitioner submitted billing records establishing she incurred $3,865 for services provided by Rehab Consultants of Central Florida from March 16 to August 24, 2017. There was no evidence if this amount remains unpaid, what kinds of services were provided, or whether they were effective in Petitioner's rehabilitation.

8. There was no evidence as to whether Petitioner suffered from any emotional injuries.

9. There was no evidence as to whether the accident had a permanent impact on her physical abilities.

10. There was also no evidence as to whether Petitioner, who is relatively young, suffered from memory or other cognitive injuries that would prevent her from working in the future.

11. There was no evidence how the accident affected Petitioner's daily life functions, or her ability to maintain normal family, social, and work relationships.

Petitioner's Sources of Recovery

12. The parties stipulated that in total, Petitioner received $110,000 in gross settlement proceeds. These proceeds came from two sources. The bulk of the proceeds were provided as a result of a unilateral "Bodily Injury Release" (Release) with Progressive American Insurance Company (Progressive), executed by Petitioner on March 22, 2018. The release indicates Petitioner would receive $100,000 in exchange for forfeiting her rights to pursue any claims arising out of the February 2017 accident against the estate of Loron Michael Turner (presumably the driver and/or owner of the vehicle).

13. The remaining $10,000 was provided to Petitioner by State Farm Insurance under a policy held by Jesmarie and Mirian Perez. There was no evidence or testimony identifying the relationship of the Perezes to Petitioner or the driver of the vehicle.

Allocation of Past Medical Expenditures

14. The key factual issue in this case is how much of the $110,000 settlement funds are available to ACHA for payment of the Medicaid lien. One way to determine this amount is through a default formula set forth in section 409.910(11)(f). The parties stipulated that under this default formula, Petitioner is required to pay AHCA $41,250 for its Medicaid lien from the $110,000 total settlement proceeds.[3/]

15. Alternatively, Petitioner can show that a lesser amount than the default amount "should be allocated as reimbursement" for past medical expenses. See § 409.910(17)(b), Fla. Stat. Here, Petitioner urges the reduction of the Medicaid lien by the ratio of the actual settlement recovery to the "settlement value" amount. Using this formula, Petitioner claims AHCA can only recover 5.5 percent of the past medical expenses, or a total of $3,208.72 from the $110,000 settlement proceeds. Petitioner offered only the Release and the opinion of Frank Currie in support of using this formula.

16. The Release, signed only by Petitioner (not Progressive or the Turner estate), states in relevant part:

> The parties to this release agree that the total value of Kimikia Molina's claim is $2,000,000.00 that of that $58,340.35 is allocated for past medical bills, $41,659.70 is allocated to past lost wages, $720,000.00 is allocated to future loss of earning

> capacity, $590,000.00 is allocated to past pain and suffering and $590,000.00 is allocated to future pain and suffering.

17. There was no evidence as to how the parties arrived at the monetary allocations in the Release. Petitioner provided no evidence supporting the Release's allocations of past lost wages, future loss earnings, or noneconomic damages, such as pain and suffering.

18. AHCA was not a party to the Release.

19. There was no evidence as to how the $10,000 State Farm proceeds were to be allocated among the damage categories.

20. Regarding Mr. Currie's testimony, although he may have had litigation experience in personal injury lawsuits, his testimony did not establish why an alternative to the default formula should be used in Petitioner's case.

21. Mr. Currie testified Petitioner's "settlement value" would have been $2 million, but it was not clear from his testimony that the "settlement value" is equivalent to the "total value of Kamikia Molina's claim," as referenced in the Release. See Smathers v. Ag. for Health Care Admin., Case No. 16-3590MTR, 2017 Fla. Div. Adm. Hear. LEXIS 540, at *7-8 (Fla. DOAH Sept. 13, 2017) (defining total provable damages as "all components of a plaintiff's recoverable damages, such as medical expenses, lost wages, and noneconomic damages (e.g., pain and suffering)").

22. Moreover, according to Mr. Currie, the terms "settlement value" and "jury award" are different from each other and do not necessarily establish the total value of Petitioner's claim or the amount of damages suffered by Petitioner. He explained, the factors in determining a "settlement value" include the best interest of the client, as well as the cost and risk of going to trial.

23. In contrast, a "jury award" is the amount of damages that can be proven at trial, and can be influenced by a jury's emotions. In this case, Mr. Currie admitted a hypothetical jury could have been influenced by a number of facts, including: the defendant was an estate (as opposed to an individual); Petitioner failed to use her seat belt; and alcohol contributed to the accident.

24. Regardless of whether the $2 million figure cited by Mr. Currie was a "settlement value" or potential "jury award," there was insufficient evidence establishing this figure because there was no evidence establishing the elements other than past medical expenses, such as an amount attributable to future medical expenses, lost wages, or pain and suffering. Thus, Mr. Currie's opinion as to the medical expenses portion of the settlement is purely speculative and inconsistent with the Release. For example, Mr. Currie testified Petitioner previously made approximately $18,000 a year in salary.[4/] But

using this figure, Petitioner's past lost earnings from February 2017 (the date of the accident) to March 2018 (the date of the settlement) would total approximately $20,000, not the $42,000 agreed to in the Release.

25. Moreover, Mr. Currie's opinion regarding the value of Petitioner's case was not based on an established methodology or verifiable facts. Although Mr. Currie testified he reviewed the Release and Petitioner's medical records in reaching the $2 million figure, there was no evidence at the hearing that he was sufficiently familiar with the facts of Petitioner's current economic situation, her work history, or current employability. There was no evidence that he met with Petitioner or knew any information other than what was in Petitioner's exhibits.

26. Even Mr. Currie noted the cases he relied upon to establish his $2 million settlement valuation were procedurally and factually distinguishable from Petitioner's situation. For example, some of the cases involved recovery after a jury award, others involved settlements; some involved alcohol, some did not; and unlike one of the other claimants, Petitioner was not known to have a pre-existing medical condition.

27. The undersigned rejects Mr. Currie's testimony because, although unrebutted, it was not based on a reliable methodology or sufficiently established facts. Although he relied on a number of verdict reports where the claimant had

injuries similar to Petitioner's, the underlying facts of Petitioner's accident and medical situation were never sufficiently established at the hearing to meaningfully compare them to the facts of these cases; there was no evidence regarding Petitioner's pre-accident health, her occupation, or her future ability to work.

28. Neither the Release nor Mr. Currie's testimony establish that the "actual settlement"-to-"settlement value" formula should be applied to Petitioner's Medicaid lien instead of the default formula, nor did Petitioner establish the "settlement value" of her claim was $2 million.

29. Petitioner has not proven by a preponderance of the evidence an alternative amount should be allocated for reimbursement for past medical expenses.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this case pursuant to sections 120.569, 120.57, and 409.910, Florida Statutes (the Medicaid Third-Party Liability Act). See Delgado v. Ag. for Health Care Admin., 43 Fla. L. Weekly D 245, 2018 Fla. App. LEXIS 1012, at *11-12 (Fla. 1st DCA 2018).

31. As most recently explained by the Florida Supreme Court in Giraldo v. Ag. for Health Care Admin., 43 Fla. L. Weekly S279, 2018 Fla. LEXIS 1376, at *5 (Fla. July 5, 2018), Medicaid is a

joint federal—state program designed to help participating states provide medical treatment for their residents who cannot afford to pay for treatment.[5/]

32. In order for the state of Florida to take advantage of Medicaid funds for patient care costs, it must comply with the federal regulations requiring it to recover its expenditures for the medical expenses from third-party sources such as settlement agreements. 42 U.S.C. § 1396a(a)(25)(B); Ahlborn, 547 U.S. at 284-85. At the same time, the Medicaid statute limits a state's right to collect reimbursement of expended funds to only those third-party monies that can be allocated for medical care. 42 U.S.C. § 1396p(a)(1); Ahlborn, 547 U.S. at 285-86.

33. As mentioned above, the Legislature set forth a "default formula" to determine the amount AHCA may recover for past Medicaid payments from a judgment, award, or settlement from a third-party. See § 409.910(11)(f), Fla. Stat. The statute, however, provides Medicaid recipients with a method for challenging this default amount by initiating an administrative proceeding through DOAH. See § 409.910(17)(b) (providing the procedure by which a Medicaid recipient may contest the amount designated as recovered medical expenses payable under section 409.910(11)(f)).

34. Recent federal and state court decisions have struck down portions of section 409.910(17)(b), so that this section currently is interpreted as follows:

> 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 payable to the agency, the recipient must prove, by [a preponderance of the evidence] ~~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. (strike-through and underline added).

See Giraldo, 2018 Fla. Lexis 1376, at *8 (holding "federal law allows AHCA to lien only the past medical expenses portion of a Medicaid beneficiary's third-party tort recovery to satisfy its Medicaid lien."); Gallardo, 263 F. Supp. 3d at 1260 (holding Florida's "clear and convincing" burden in section 409.910(17)(b) is preempted by federal law).[6/]

35. Again, the burden was on Petitioner--as 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 rather than the amount calculated by AHCA. The "preponderance of the evidence" standard requires some convincing testimony or evidence to lead the fact finder to choose one side's argument versus the other.

See S. Fla. Water Mgmt. v. RLI Live Oak, LLC, 139 So. 3d 869, 872 n.1 (Fla. 2014).

36. As set forth in Giraldo, there must be a "reasonable basis in the evidence" for the rejection of "uncontradicted testimony." Giraldo, 2018 Fla. LEXIS 1376, at *7-8. Such reasonable basis can include "conflicting . . . evidence, evidence that impeaches the expert's testimony or calls it into question, such as the failure of the plaintiff to give the . . . expert an accurate or complete . . . history, conflicting lay testimony or evidence, . . . or the plaintiff's conflicting testimony or self-contradictory statements." Wald v. Grainger, 64 So. 3d 1201, 1206 (Fla. 2011).

37. Here, there was no evidence that Petitioner's total provable damages would be $2 million. Although Petitioner relies on the language in the Release, ACHA is not bound by the allocations set forth in the settlement amount. See Domingo v. Ag. for Health Care Admin., Case No. 17-5471MTR, 2018 Fla. Div. Adm. Hear. LEXIS 315, at *15 (Fla. DOAH May 22, 2018)("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."). In fact, the Legislature explicitly prohibits the Release from being used to establish what portion of the

settlement proceeds can be allocated for past medical expenses in section 409.910(13), which provides in relevant part:

> No action of the recipient shall prejudice the rights of the agency [AHCA] under this section. No . . . "settlement agreement," entered into or consented to by the recipient or his or her legal representative shall impair the agency's rights.

See also Deyampart v. Ag. for Health Care Admin., Case No. 17-4560MTR, 2018 Fla. Div. Adm. Hear. LEXIS 2, at *16-17 (Fla. DOAH Jan. 3, 2018).

38. Even if Petitioner had proven that an alternative to the default formula should be used to determine the portion of the settlement attributable to past medical expenses, she did not establish she could have been awarded $2 million dollars in damages. As explained above, the allocations of damages for the remaining components of future medical expenses, future lost wages, or past and future pain and suffering in the Release are not corroborated by any evidence. Without such evidence of other potential damage elements, it is impossible to determine the total "settlement value" or what amount is attributable to past medical expenses. See Mojica v. Ag. for Health Care Admin., Case No. 17-1966MTR, 2018 Fla. Div. Adm. Hear LEXIS 273, at *15 (Fla. DOAH May 3, 2018).

39. Because Petitioner has not established that ACHA should be reimbursed in an amount other than that set forth by the

default formula in section 409.910(11)(f), Petitioner is liable for the default amount of $41,250.

ORDER

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

ORDERED that the Agency for Health Care Administration may recover $41,250 from Petitioner's settlement proceeds at issue in this matter in satisfaction of its Medicaid lien.

DONE AND ORDERED this 17th day of September, 2018, in Tallahassee, Leon County, Florida.

HETAL DESAI
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of September, 2018.

ENDNOTES

[1/] Unless referenced otherwise, all citations to state and federal statutes, rules and regulations are to the 2017 versions, which were in effect at the time of Petitioner's settlement agreement. See Cabrera v. Ag. for Health Care Admin., DOAH Case No. 17-4557MTR, 2018 Fla. Div. Adm. Hear. LEXIS 43 n.1 (Fla. DOAH Jan. 23, 2018)(citing Suarez v. Port Charlotte HMA, 171 So. 3d 740 (Fla. 2d DCA 2015)).

[2/] A properly noticed telephonic pre-hearing conference was conducted on August 14, 2018, but because the Agency failed to appear for the hearing, no significant issues were discussed.

[3/] Section 409.910(11)(f) establishes the Agency's default recovery amount for a Medicaid lien: the default amount is equal to 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.

[4/] Other than Mr. Currie's testimony, there was no evidence at the hearing establishing Petitioner's past salary.

[5/] Although participation in Medicaid is voluntary, all states take advantage of this funding source for the medical needs of its citizens. See Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 275 (2006) ("States are not required to participate in Medicaid, but all of them do. The program is a cooperative one; the Federal Government pays between 50% and 83% of the costs the State incurs for patient care, and, in return, the State pays its portion of the costs and complies with certain statutory requirements for making eligibility determinations, collecting and maintaining information, and administering the program."); see also Gallardo v. Dudek, 263 F. Supp. 3d 1247, 1250 (N.D. Fla. 2017), amended on rehearing, 2017 U.S. Dist. LEXIS 112448 (N.D. Fla. 2017), rev. granted, Case No. 17-13693 (11th Cir. 2017).

[6/] In Gallardo, Judge Mark Walker enjoined ACHA from applying the clear and convincing standard in section 409.910(17)(b). Therefore, the Agency has stipulated to the preponderance of the evidence default standard under section 120.57(1)(j). See also Museguez v. Ag. for Health Care Admin., Case No. 16-7379MTR, 2017 Fla. Div. Adm. Hear. LEXIS 561, at *36-37 (Fla. DOAH Sept. 19, 2017) (explaining the default burden of proof after Gallardo pursuant to section 120.57(1)(j) is preponderance of the evidence); Lamendola v. Ag. for Health Care Admin., Case No. 17-3908MTR, 2018 Fla. Div. Adm. Hear. LEXIS 6, at *14-15 (Fla. DOAH Jan. 5, 2018) ("Notwithstanding the language of section 409.910(17)(b), because of rulings in Gallardo, . . . Petitioner's burden in this case is a preponderance of the evidence.")

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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.