STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JESSICA N. TORESCO,

Petitioner,

vs. Case No. 18-3107MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.
_______________________________/

FINAL ORDER

Administrative Law Judge June C. McKinney of the Division of Administrative Hearings ("DOAH") heard this case by video teleconference at locations in Tallahassee and Lauderdale Lakes, Florida, on August 27, 2018.

APPEARANCES

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

For Respondent: Alexander R. Boler, Esquire
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STATEMENT OF THE ISSUE

The issue is the amount payable to Respondent, Agency for Health Care Administration ("Respondent" or "AHCA"), in satisfaction of Respondent's Medicaid lien from a settlement

received by Petitioner, from a third party, pursuant to section 409.910, Florida Statutes (2017).

PRELIMINARY STATEMENT

On or about June 15, 2018, Jessica N. Toresco ("Toresco") filed a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien ("Petition"), pursuant to section 409.910(17)(b), protesting the lien claim and requesting a hearing.

On June 18, 2018, the Petition was filed at DOAH and assigned to the undersigned administrative law judge. The case proceeded as scheduled on August 27, 2018.

At hearing, Petitioner presented the testimony of two witnesses: Joseph Scott Thomas McCullough ("McCullough") and Vinson Barrett ("Barrett"). Petitioner's Exhibits 1 through 7 were received into evidence without objection. Respondent did not present any witnesses or proffer any exhibits for admission into evidence.

The proceedings of the hearing were recorded and transcribed. A one-volume Transcript of the hearing was filed at DOAH on September 24, 2018. On October 15, 2018, the parties filed a Joint Motion for Extension of Time to File Proposed Final Orders by October 23, 2018, which the undersigned granted. Both parties filed timely proposed final orders that the undersigned has considered in the preparation of this Final Order.

The parties stipulated to the facts in the Joint Pre-hearing Stipulation, and the relevant facts stipulated therein are accepted and made part of the Findings of Fact below. Unless otherwise noted, all statutory references are to the Florida Statutes (2017).

FINDINGS OF FACT

1. On May 1, 2009, Toresco, who was then 18 years old, was involved in a car accident. In the accident, Toresco suffered severe personal injury, including numerous fractures and a closed head injury resulting in brain damage. Toresco is now permanently disabled, has limited use of her left arm and leg, and cannot walk without assistance.

2. Toresco's accident occurred when she turned her vehicle left in an intersection, in front of a 3000-pound truck. The truck hit her vehicle's passenger side, and her vehicle went over a concrete curb and into two palm trees.

3. After the accident, Toresco was in a coma for approximately two months and suffered skull fractures and brain damage. Toresco's injuries included kidney failure, hemorrhages, and cognitive loss. She was fed by a feeding tube.

4. Toresco lost full use of her right side due to a brain injury. She is no longer able to work, horseback ride, dance, or participate in many of the activities she had participated in before the accident.

5. Toresco's medical care related to the injury was paid by Medicaid, and the Medicaid program provided $116,549.10 in benefits associated with her injury. The $116,549.10 represented the entire claim for past medical expenses.

6. Toresco brought a personal injury lawsuit against the driver/owner of the truck that caused the accident to recover all of her damages associated with her injuries.

7. McCullough, a 23-year civil trial attorney with the law firm of McCullough and Leboff, P.A., in Davie, Florida, represented Toresco in her personal injury action. He was her third attorney handling the case and took over from the two previous attorneys because of the difficult liability issues in the personal injury action.

8. During the pendency of the personal injury action, AHCA was notified of the action, and AHCA asserted a $116,549.10 Medicaid lien against cause of action and settlement of that action.

9. McCullough handled the case through settlement. The personal injury lawsuit was settled for the lump-sum unallocated amount of $750,000.00.

10. AHCA has neither filed an action to set aside, void, or otherwise dispute the settlement nor started a civil action to enforce its rights under section 409.910.

11. AHCA, through its Medicaid program, spent $116,549.10 on behalf of Toresco, all of which represents expenditures paid for Toresco's past medical expenses.

12. The formula at section 409.910(11)(f), as applied to the entire $750,000.00 settlement, requires payment in the full amount of the $116,549.10 Medicaid lien, and AHCA is demanding payment of $116,549.10 from the $750,000.00 settlement.

13. Toresco has deposited the section 409.910(11)(f) formula amount in an interest-bearing account for the benefit of AHCA, pending an administrative determination of AHCA's rights; and this constitutes "final agency action" for purposes of chapter 120, Florida Statutes, pursuant to section 409.910(17).

14. At the final hearing, Petitioner presented, without objection, the expert valuation of damages testimony of her Florida trial attorney, McCullough. McCullough practices exclusively personal injury law and always represents individuals who are injured. The majority of his cases involve automobile accidents.

15. McCullough's expertise also encompasses evaluation of personal injury cases. He stays abreast of all State of Florida jury verdicts by reviewing jury verdict reporters and discussing personal injury verdicts and valuations with other attorneys in his geographical area.

16. At hearing, McCullough explained that as a routine part of his practice, he makes assessments concerning the value of damages suffered, and he detailed his process for making those assessments.

17. McCullough credibly made clear the process he took to develop an opinion concerning the value for the damages suffered in Toresco's case. McCullough testified that he reviewed Toresco's automobile report, medical records, Life Care Plan, Economist Report, and met with his client, Toresco, numerous times.

18. McCullough testified that prior to the accident, Toresco was a champion horseback rider, and she spent most of her time at the stables. The accident "tremendously affected her" because she is unable to work, ride horses, and participate in daily activities due to her injury from the automobile accident.

19. McCullough analyzed how the accident occurred and detailed that Toresco turned left in front of a 3000-pound truck, which hit the passenger side of Toresco's car and pushed her into two palm trees. Toresco was found to have significant head injury, with facial fractures, and a closed head injury when she was taken to the hospital. McCullough testified that the brain damage from the head injury caused Toresco to lose use of her full right side.

20. McCullough further testified at hearing that the medical care related to the accident was paid by Medicaid in the amount of $116,549.10, which constituted Toresco's claim for past medical expenses.

21. McCullough explained that Toresco sued the individual driver and driver's company because even though Toresco turned left in front of the driver's vehicle, if the driver had not been moving at a rate of speed above the speed limit, Toresco would not have been as seriously injured because she would not have been hit squarely in the middle of the vehicle. A slower lawful speed would not have resulted in as significant of an injury, or the truck might have even missed her.

22. McCullough further stated that the defense's position was that Toresco was liable for her own injuries because she turned in front of the vehicle, and, ultimately, the case hinged on a battle of engineering experts and accident reconstructionists.

23. McCullough explained that during the mediation of Toresco's case, the damages were presented to the defendant. He detailed how the economic damages were outlined for the defendant, including the $116,549.10 for past medicals and noneconomic pain and suffering of around $7,000,000.00. Ultimately, the case settled during mediation with the liable third parties for $750,000.00.

24. McCullough opined that the settlement was not the full value of Toresco's damages and that the settlement only represents about ten percent of the full measure of her damages. McCullough's testimony was uncontradicted and compelling.

25. McCullough explained that he based his valuation of Toresco's economic damages on the life care plan, which included the following claims: past medical expenses of $116,549.10; lost earnings of $68,106.00; future lost earnings of $976,186.00; and future medical expenses $2,154,509.00. He added the past medicals, past lost wages, future lost wages, and future medical expenses together, which totaled $3,300,000.00.

26. Based on his training and experience, McCullough also credibly testified that the noneconomic damages would have significant value under the circumstances and that Toresco's economic and noneconomic damages together have a value that totals between a conservative $7,500,000.00 and $10,000,000.00.

27. McCullough concluded that the low-end conservative number for the value of Toresco's damages is $7,500,000.00.

28. At hearing, Barrett also provided an expert opinion without objection regarding the value of Toresco's case. Barrett is a 40-year trial attorney who has represented plaintiffs in various types of personal injury lawsuits, including automobile accidents. He is a partner with the law firm of Barrett, Nonni, and Homola and handles jury trials.

29. Barrett routinely makes assessments concerning the value of damages suffered by injured parties in his daily practice. He is familiar with reviewing medical records, life care plans, and economist reports. He stays abreast of jury verdicts and routinely runs facts by a listserv group of approximately 25 trial lawyers to get the value of what cases are reasonably worth.

30. Barrett became familiar with Toresco's injuries after he reviewed the exhibits in this case, the report and patient summary, life care plan, economist report, and mediation summary. Barrett determined that Toresco's medical damages were severe, and she was largely at fault when she turned left in front of the vehicle that struck her.

31. Barrett detailed how severe Toresco's injuries were by explaining that she was in a coma in the hospital for about two months and suffered kidney failure because of the brain damage and that "it affected her almost in every way."

32. Barrett also explained that before the accident, Toresca was athletically built, a competitive equestrian and dancer, and was a working senior in high school, but she will never be able to work, ride a horse, dance, or do things young women do again.

33. Barrett explained that the evidence supports over $3,000,000.00 in economic damages. He testified that he relied

on the economist who had calculated the present value of Toresco's future medical expenses, lost past and future income, and claim for past medical expenses for a total of $3,315,350.00.

34. Barrett further opined that "[Toresco's] future and past pain and suffering and mental anguish, loss of enjoyment of life was worth $6,000,000.00" in noneconomic damages. Barrett added the economic and noneconomic damages and determined the total would have a value between approximately $8,000,000.00 and $10,000,000.00 with an average around $9,000,0000.00. He credibly concluded that Petitioner's total conservative value of damages is $7,500,000.00.

35. Barrett went on to explain that the $750,000.00 settlement was very conservative and did not fully compensate Toresco for the full value of her damages. Instead, he opined that the settlement only covered a ten-percent recovery of the conservative value of her damages, $7,500,000.00.

36. Barrett further explained that each element of damages should be reduced to ten percent of the amount attributable to each element, and if ten percent was applied to the $116,549.10 claim for past medical expenses, the amount is $11,654.91.

37. The evidence demonstrates that the total conservative value of the damages related to Toresco's injury was $7,500,000.00 and that the settlement amount, $750,000.00, is only ten percent of the total value. The $750,000.00 settlement

does not fully compensate Petitioner for the total value of her damages.

38. Petitioner has established by unrebutted uncontested evidence that the $750,000.00 settlement amount is ten percent of the total value ($7,500,000.00) of Petitioner's damages. Using the same calculation, Petitioner correctly established that applying ten percent to $116,549.10 (Petitioner's amount allocated in the settlement for past medical expenses) results in $11,654.91, the portion of the Medicaid lien owed.

39. Petitioner proved by a preponderance of the evidence that Respondent should be reimbursed for its Medicaid lien in a lesser amount than the amount calculated by Respondent pursuant to the formula set forth in section 409.910(11)(f).

CONCLUSIONS OF LAW

40. DOAH has jurisdiction over the subject matter and the parties in this case, and final order authority pursuant to sections 120.569, 120.57(1), and 409.910(17), Florida Statutes (2018).

41. AHCA is the agency authorized to administer Florida's Medicaid program. See § 409.902, Fla. Stat.

42. 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 a third party. See Ark. Dep't of Health & Human Servs. v. Ahlborn,

547 U.S. 268, 276 (2006). To secure reimbursement from liable third parties, the state must require a Medicaid recipient to assign to the state his or her right to recover medical expenses from those third parties. In relevant part, 42 U.S.C. § 1396a(a)(25) requires:

> (H) that to the extent that payment has been made under the State Plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, to the extent that payment has been made under the State Plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services.

43. To comply with this federal mandate, the Florida Legislature enacted section 409.910, Florida's Medicaid Third-Party Liability Act. This statute authorizes and requires the State, through AHCA, 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. Smith v. Ag. for Health Care Admin., 24 So. 3d 590 (Fla. 5th DCA 2009). The statute creates an automatic lien on any such judgment or settlement for the medical assistance provided by Medicaid. § 409.910(6)(c), Fla. Stat.

44. The amount to be recovered for Medicaid medical expenses from a judgment, award, or settlement from a third party

is determined by the formula in section 409.910(11)(f). Ag. for Health Care Admin. v. Riley, 119 So. 3d 514 n.3 (Fla. 2d DCA 2013).

45. The parties stipulated that the amount due to AHCA in satisfaction of its lien, pursuant to the formula set forth in section 409.910(11)(f), is $116,549.10. Petitioner, however, asserts that a lesser amount is owed to Respondent because Petitioner did not recover the full value of her damages.

46. It is undisputed that Medicaid provided $116.549.10 in medical expenses for Toresco and that AHCA asserted a Medicaid lien against Petitioner's $750,000.00 settlement and the right to seek reimbursement for its expenses. AHCA is utilizing the mechanism set forth in section 409.910(11)(f) to enforce its right.

47. Section 409.910(13) provides that AHCA is not automatically bound by the allocation of damages set forth in Petitioner's settlement agreement. Section 409.910(13) provides, in pertinent part, that:

> (13) 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.

48. Section 409.910(17)(b) provides a method whereby a recipient may challenge AHCA's presumptively correct calculation of medical expenses payable to the agency. The mechanism is a means for determining whether a lessor portion of total recovery should be allocated as reimbursement for medical expenses in lieu of the amount calculated by application of the formula in section 409.910(11)(f). Section 409.910(17)(b) provides, in pertinent part, that:

> 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.

49. An administrative procedure for adversarial testing of the fair allocation of the amount of the settlement that is attributable to medical costs includes considering the evidence used to rebut the section 409.910(11)(f) formula when determining whether AHCA's lien amount should be adjusted. See Harrell v. State, 143 So. 3d 478, 480 (Fla. 1st DCA 2014)(holding that petitioner "should be afforded an opportunity to seek the reduction of a Medicaid lien amount established by the statutory default allocation by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses").

50. Notwithstanding the language of section 409.910(17)(b), the parties stipulated that Petitioner's burden in this case is a preponderance of the evidence and that any settlement proceeds attributed to future medical expenses shall not be considered in calculation of AHCA's lien.

51. The Florida Supreme Court defines "preponderance of the evidence" as follows:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

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

52. The undersigned is not persuaded by Respondent's position in its Proposed Final Order that Petitioner's pro rata allocation methodology is inaccurate because Respondent failed to provide any evidence or an alternative to rebut Petitioner's method. Instead, the record demonstrates that the allocation process in this matter is rational, proper, and reasonable.

53. In this matter, Petitioner challenged AHCA's calculation and demonstrated by a preponderance of the evidence that the settlement amount is ten percent of the total value of damages suffered by Toresco. All the testimony and other evidence offered proved that a lesser portion of the total recovery should be allocated as reimbursement.

54. Specifically, the evidence presented at hearing demonstrated that the settlement recovered in this matter was only ten percent of the value of damages and that the lien

recovery should be allocated and reduced in each damage category based on ten percent. Applying the ten-percent ratio to the $116,549.10 claim for past medical expenses is $11,654.91 of the settlement and represents Toresco's recovery of past medical expenses, which constitutes a fair, reasonable, and accurate share of the total recovery for past medical expenses actually paid by AHCA.

55. In summary, the evidence in this case is that $11,654.91 of the total third-party recovery represents the share of the settlement proceeds fairly attributable to the expenditures that were actually paid by Respondent for Toresco's medical expenses.

ORDER

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

ORDERED that:

The Agency for Health Care Administration is entitled to $11,654.91 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 21st day of December, 2018, in Tallahassee, Leon County, Florida.

JUNE C. MCKINNEY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.