STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID BROWN, AN INDIVIDUAL, AND TONJA JENKINS, HIS WIFE,

Petitioners,

Case No. 19-3727MTR

vs.

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, on September 11, 2019, Administrative Law Judge Yolonda Y. Green of the Florida Division of Administrative Hearings ("Division"), held a hearing in Tallahassee, Florida.

APPEARANCES

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

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

STATEMENT OF THE ISSUE

The issue to be determined is the amount payable to Respondent, Agency for Health Care Administration ("AHCA"), as reimbursement for medical expenses paid on behalf of David

Brown ("Mr. Brown") pursuant to section 409.910, Florida Statutes (2018),[1/] from settlement proceeds he received from a third party.

PRELIMINARY STATEMENT

On November 16, 2017, Petitioners, David Brown, an Individual, and Tonja Jenkins, His Wife ("Ms. Jenkins"), filed a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien ("the Petition") to challenge AHCA's placement of a Medicaid lien in the amount of $181,975.75 on Petitioners $2,500,000 settlement proceeds from a third party.

The parties filed a Joint Pre-Hearing Stipulation that contained a statement of admitted and stipulated facts for which no further proof would be necessary. Those stipulated facts have been incorporated into the Findings of Fact below, to the extent necessary.

The final hearing commenced as scheduled on September 11, 2019. At hearing, Petitioners' Exhibits 1 through 9 were admitted. Petitioners presented the testimony of two expert witnesses: Brett Rosen, Esquire, and R. Vinson Barrett, Esquire. AHCA did not call any witnesses and did not offer any exhibits at the hearing.

The Transcript of the hearing was filed with the Division on October 17, 2019. AHCA timely filed its Proposed Final Order

("PFO") by the initial designated date. On October 29, 2019, Petitioners filed an Unopposed Motion for Extension of Time to File Proposed Final Order, which the undersigned granted. Petitioners timely filed their PFO on November 4, 2019. The PFOs filed by the parties have been considered in preparation of this Final Order.

FINDINGS OF FACT

The following Findings of Fact are based on exhibits accepted into evidence, testimony offered at the hearing, and admitted facts set forth in the pre-hearing stipulation.

Facts Pertaining to the Underlying Personal Injury Litigation and the Medicaid Lien

1. Mr. Brown is the recipient of Medicaid for injuries he sustained in an automobile accident.

2. AHCA is the state agency charged with administering the Florida Medicaid program, pursuant to chapter 409.

3. On February 25, 2015, Mr. Brown, then 46 years old, was involved in a T-bone automobile accident. In the accident, Mr. Brown suffered a fractured wrist, torn shoulder, skin abrasions, a grade 4 bilateral pulmonary contusion, and a right middle cerebral artery infarct (commonly referred to as a stroke) with hemorrhagic contusion. Due to complications related to placement of a trachea, he underwent reconstructive surgery of his throat. Mr. Brown suffered permanent severe

brain damage causing him to suffer left hemiparesis and difficulty swallowing or speaking. As a result of the accident, Mr. Brown is now disabled and has difficulty ambulating, eating, and caring for himself without assistance.

4. Mr. Brown's medical care related to the injury was paid by Medicaid. AHCA provided $181,975.75 in benefits. A Medicaid Manage Care Plan, known as WellCare, provided an additional $110,559.15 in benefits. The sum of these benefits, $292,534.90, constituted Mr. Brown's entire claim for past medical expenses.

5. Petitioners pursued a personal injury action against the owner and operator of the car that caused the accident ("Defendant") to recover all their damages.

6. AHCA did not commence a civil action to enforce its rights under section 409.910 or intervene in Petitioners' action against the Defendant.

7. During the pendency of Mr. Brown's personal injury action, AHCA was notified of the action and AHCA asserted a Medicaid lien of $181,975.75 against Petitioners' cause of action and settlement of that action.

8. There were liability issues with the case including the degree of comparative negligence that could be attributed to each driver. Specifically, there was a question of which driver

had the green light. The personal injury claim ultimately settled for a lump-sum unallocated amount of $2,500,000.

9. By letter, AHCA was notified of settlement of Petitioners' claim.

10. AHCA has not filed a motion to set-aside, void, or otherwise dispute Petitioners' settlement.

11. The Medicaid program through AHCA spent $181,975.75 for Mr. Brown's past medical expenses.

12. Application of the formula set forth in section 409.910(11)(f) to Petitioners' $2,500,000 settlement authorizes payment to AHCA of the full $181,975.75 Medicaid lien.

13. Petitioners have deposited AHCA's full Medicaid lien amount in an interest-bearing account for the benefit of AHCA pending an administrative determination of AHCA's rights.

14. As a condition of eligibility for Medicaid, Mr. Brown assigned AHCA his right to recover medical expenses paid by Medicaid from liable third parties

Expert Witness Testimony

Testimony of Brett Rosen

15. Petitioners presented the testimony of Brett Rosen, the lead trial attorney who litigated the underlying personal injury claim. Mr. Rosen is a shareholder with the law firm of Goldberg and Rosen in Miami, Florida. Mr. Rosen has been a

trial attorney for approximately 12 years and he specializes in representing parties in catastrophic injury, personal injury, and wrongful death cases.

16. Mr. Rosen's firm takes approximately eight to ten cases to trial each year. Since the firm routinely conducts civil jury trials, Mr. Rosen continuously educates himself on jury verdicts by reviewing the Florida Jury Verdict Reporter (a publication of jury verdict reports) and conducting roundtable discussions with other attorneys. Using information found in jury verdict reports, the Daily Business Review, and his experience, Mr. Rosen makes assessments concerning the value of damages sustained by individuals.

17. Without objection, Mr. Rosen was accepted as an expert in the valuation of damages suffered by Petitioners.

18. In addition to presenting testimony as an expert, Mr. Rosen also presented factual testimony regarding the underlying personal injury claim. As the lead attorney, Mr. Rosen met with Mr. Brown monthly on average during the two years that he represented him. Mr. Rosen also consulted with a neurologist and ENT physician who both treated Mr. Brown.

19. Mr. Rosen testified that Mr. Brown's vehicle was struck on the right side (commonly referred to as T-bone accident) by a vehicle, causing the vehicle he was driving to flip over onto its side. While Mr. Brown was able to get out of

his vehicle, he suffered multiple injuries as further described in paragraph three herein. In addition to the brain injury, he had a tracheostomy that ultimately resulted in a bad outcome. As a result, he could not eat, speak, or drink for approximately two years.

20. Mr. Rosen testified that Mr. Brown's injuries had significant negative impact on Mr. Brown and his wife, Ms. Jenkins. Mr. Rosen testified that Ms. Jenkins resigned from her job to take care of her husband and assist with his recovery. Ms. Jenkins also suffered loss of consortium damages resulting from Mr. Brown's injuries. The couple was forced to live with relatives when they could not afford rent. Overall, Mr. Rosen testified that the injuries negatively impacted Mr. Brown's ability to lead a normal life.

21. Mr. Rosen testified that the litigation of the case involved factual, causation, and legal disputes. There were no eyewitnesses, and the question remained regarding which driver had the green light. In addition, the insurance policy was limited to $50,000. Mr. Rosen later brought a bad faith claim against the insurance company due to their failure to timely tender the policy limits. After fully evaluating the risks, the parties settled the case for $2,500,000.

22. Mr. Rosen testified that the full value of the claim is $10,500,000. However, Petitioners settled the claim for

$2,500,000, which represents 23.8 percent of the value of their damages. Mr. Rosen testified that since Mr. Brown only recovered 23.8 percent of his total damages, he recovered in the settlement only 23.8 percent of his $292,534.90 claim for past medical expenses, which amounts to $69,623.38. Mr. Rosen testified that it would be reasonable to allocate $69,623.38 of the settlement to past medical expenses.

Testimony of Vinson Barrett

23. Vinson Barrett was also identified as Petitioners' expert witness. Mr. Barrett, a trial attorney with 40 years of experience, is a partner with the law firm of Barrett, Nonni and Homola. His firm represents clients in medical malpractice, automobile, premise liability, and pharmaceutical products liability cases. Mr. Barrett has conducted numerous jury trials and has handled cases involving catastrophic injuries.

24. Mr. Barrett routinely reviews jury verdict reports, discusses cases with other lawyers, and makes assessments concerning the value of damages suffered by injured persons. Mr. Barrett has also served as an expert in a number of cases regarding evaluation of damages.

25. Mr. Barrett was recognized as an expert in the area of evaluation of damages.

26. To evaluate the medical damages suffered by Mr. Brown, Mr. Barrett reviewed the police report, medical records, and the

amended life care plan for Mr. Brown. Mr. Barrett also considered the overall level of pain and suffering Mr. Brown would suffer throughout the remainder of his life. Mr. Barrett testified that when compared to other traumatic brain cases, Mr. Brown is a little better off than other traumatic cases he has reviewed because he is able to ambulate using assistive devices and his mental abilities have not been compromised significantly.

27. Mr. Barrett opined that the overall value of the damages would be more than $10,500,000. Mr. Barrett testified that his estimate was a conservative valuation of damages. Mr. Barrett concluded that, accepting Mr. Rosen's even more conservative valuation, the $2,500,000 settlement constituted 23.8 percent of the full value of Petitioners' damages. Mr. Barrett testified that allocation of $69,623.38 of the settlement would be a reasonable allocation of damages to the past medical expenses.

Ultimate Findings of Fact

28. The undersigned finds that the testimony of Mr. Rosen and Mr. Barrett was credible and persuasive as to the total damages incurred by Petitioners. While assigning a value to the damages that plaintiffs could reasonably expect to receive from a jury is not an exact science, Mr. Rosen's extensive experience with litigating personal injury lawsuits makes him a very

compelling witness regarding the valuation of damages suffered by Petitioners. As a trial lawyer who has testified in nearly 20 cases regarding valuation and allocation of damages, and 40 years of experience handling personal injury matters involving catastrophic injuries, Mr. Barrett is also a credible witness regarding the valuation and allocation of damages in a case such as Mr. Brown's.

29. The undersigned also finds that Mr. Barrett was qualified to present expert testimony as to how a damages award should be allocated among its components, such as past medical expenses, economic damages, and noneconomic damages.

30. AHCA offered no evidence to counter the expert opinions regarding Petitioners' total damages or the past medical expenses they recovered.

31. Accordingly, it is found that the preponderance of the evidence demonstrates that the total value of Petitioners' personal injury claim is $10,500,000 and that the $2,500,000 settlement resulted in Petitioners recovering 23.8 percent of Mr. Brown's past medical expenses. In addition, the preponderance of the evidence demonstrates that $69,623.38 amounts to a fair and reasonable determination of the past medical expenses actually recovered by Petitioners and payable to AHCA.

CONCLUSIONS OF LAW

32. The Division has jurisdiction over the subject matter and the parties in this case pursuant to sections 120.569, 120.57(1) and 409.910(17), Florida Statutes (2019).

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

34. The 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).

35. "The Medicaid program is a cooperative one. The Federal Government pays between 50 percent and 83 percent of the costs a state incurs for patient care. 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." Estate of Hernandez v. Ag. for Health Care Admin., 190 So. 3d 139, 141, 42 (Fla. 3rd DCA 2016)(internal citations omitted).

36. Though participation is optional, once a state elects to participate in the Medicaid program, it must comply with federal requirements. Harris, 448 U.S. at 301.

37. One condition for receipt of federal Medicaid funds is that states must seek reimbursement for medical expenses

incurred on behalf of Medicaid recipients who later recover from legally liable third parties. See Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 276 (2006); see also Estate of Hernandez, 190 So. 3d at 142 (noting that one such requirement is that "each participating state implement a third party liability provision which requires the state to seek reimbursement for Medicaid expenditures from third parties who are liable for medical treatment provided to a Medicaid recipient").

38. Consistent with this federal requirement, the Florida Legislature enacted section 409.910, designated as the "Medicaid Third-Party Liability Act," which authorizes and requires the state to be reimbursed for Medicaid funds paid for a recipient's medical care when that recipient later receives a personal injury judgment, award, or settlement from a third party. Smith v. Ag. for Health Care Admin., 24 So. 3d 590 (Fla. 5th DCA 2009); see also Davis v. Roberts, 130 So. 3d 264, 266 (Fla. 5th DCA 2013)(stating that in order "[t]o comply with federal directives the Florida legislature enacted section 409.910, Florida Statutes, which authorizes the State to recover from a personal injury settlement money that the State paid for the plaintiff's medical care prior to recovery.").

39. Section 409.910(1) sets forth the Florida Legislature's clear intent that Medicaid be repaid in full for medical care furnished to Medicaid recipients by providing that:

> It is the intent of the Legislature that Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid. 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.

40. In addition, the Florida Legislature has authorized AHCA to recover payments paid from any third party; the recipient; the provider of the recipient's medical services; or any person who received the third-party benefits. § 409.910(7), Fla. Stat.

41. Section 409.910(6)(a) outlines AHCA's procedure to recover the full amount paid for medical assistance as follows:

> [I]s 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. Equities of a recipient, his or her legal representative, a recipient's creditors, or health care providers shall not defeat, reduce, or prorate recovery by the agency as to its subrogation rights granted under this paragraph.

42. The amount to be recovered by AHCA from a settlement, which is of relevance here, from a third party is determined by a formula in section 409.910(11)(f). Ag. for Health Care Admin. v. Riley, 119 So. 3d 514, 515 n.3 (Fla. 2d DCA 2013).

43. Section 409.910(11)(f) provides:

> 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.

44. In the instant case, applying the formula in section 409.910(11)(f) to the $2,500,000 settlement results in AHCA being owed $181,975.75 to satisfy the Medicaid lien. Petitioner, however, asserts that a lesser amount is owed to Respondent.

45. When AHCA has not participated in or approved a settlement, the administrative procedure created by section 409.910(17)(b) serves as a means for determining whether a lesser portion of a 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).

46. Section 409.910(17)(b) provides, in pertinent part, that:[2/]

> A recipient 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) . . . . In order to successfully challenge the amount payable to the agency, the recipient must prove, by 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.

47. Therefore, the formula in section 409.910(11)(f), provides an initial determination of AHCA's recovery for medical expenses paid on a Medicaid recipient's behalf, and section 409.910(17)(b) sets forth an administrative procedure for adversarial testing of that recovery. See Harrell v. State, 143 So. 3d 478, 480 (Fla. 1st DCA 2014)(stating 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").

48. Here, Petitioners proved by a preponderance of the evidence that $2,500,000 represents 23.8 percent of Petitioners' personal injury claim valued at $10,500,000. As a result, the uncontroverted evidence demonstrates that AHCA's full Medicaid lien amount should be reduced by the percentage that Petitioners' recovery represents the total value of Petitioner's claim. When applying the percentage allocation of 23.8 percent to the lien amount of $181,975.75, this results in the amount of $69,623.38, which constitutes the share of the settlement proceeds fairly and proportionally attributable to Mr. Brown's recovery of past medical expenses.

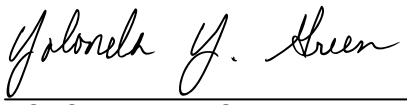
49. While AHCA offered no evidence to counter Mr. Barrett's and Mr. Rosen's testimony, AHCA argued during the final hearing and in its PFO that Mr. Barrett and Mr. Rosen were not qualified to render an expert opinion as to what portion of total damages amounts to a recovery of an individual component of damages, such as past medical expenses. Both Mr. Rosen and Mr. Barrett's testimony demonstrated that each witness had a considerable amount of experience making such determinations. More importantly, Petitioners presented sufficient and uncontradicted evidence establishing $69,623.38 as the settlement portion properly allocated to past medical expenses.

ORDER

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

ORDERED that the Agency for Health Care Administration is entitled to $69,623.38 as satisfaction of its Medicaid lien.

DONE AND ORDERED this 3rd day of December, 2019, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
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 3rd day of December, 2019.

ENDNOTES

[1/] Unless stated otherwise, all statutory references will be to the 2018 version of the Florida Statutes. That version of the Florida Statutes was in effect when Petitioners settled their personal injury claim. See Cabrera v. Ag. for Health Care Admin., Case No. 17-4557MTR (Fla. DOAH Jan. 23, 2018)(citing Suarez v. Port Charlotte HMA, 171 So. 3d 740 (Fla. 2d DCA 2015)).

[2/] The Northern District of Florida ruled that the Medicaid Act prohibits AHCA from requiring a Medicaid recipient to affirmatively disprove section 409.910(11)(f)'s formula-based allocation with clear and convincing evidence. Gallardo v. Dudek, 263 F. Supp. 3d 1247 (N.D. Fla. April 18, 2017).

However, section 120.57(1)(j) contains a default provision regarding the burden of proof and provides that "findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute." A preponderance of the evidence is defined as "the greater weight of the evidence," or evidence that "more likely than not tends to prove a certain proposition." S. Fla. Water Mgmt. v. RLI Live Oak, LLC, 139 So. 3d 869, 871 (Fla. 2014).

In addition, the Florida Supreme Court recently ruled that "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." Giraldo v. Ag. for Health Care Admin., 248 So. 3d 53, 56 (Fla. 2018).

COPIES FURNISHED:

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

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

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

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

Mary C. Mayhew, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)

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

Shena L. Grantham, Esquire
Agency for Health Care Administration
Building 3, Room 3407B
2727 Mahan Drive
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.