STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEE ANN BARNES,

Petitioner,

vs. Case No. 19-6863MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a formal administrative hearing was conducted before Garnett W. Chisenhall, Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), via video teleconference at sites in Pensacola and Tallahassee, Florida, on March 10, 2020.

APPEARANCES

For Petitioner: Scott C. Barnes, Esquire
Ward and Barnes, P.A.
222 West Cervantes Street
Pensacola, Florida 32501

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

STATEMENT OF THE ISSUE

The issue to be determined is the amount Respondent, Agency for Health Care Administration ("AHCA"), is to be reimbursed for medical expenses paid

on behalf of Dee Ann Barnes ("Ms. Barnes"), pursuant to section 409.910, Florida Statutes (2019).[1]

PRELIMINARY STATEMENT

If a Medicaid recipient receives a personal injury settlement from a third party, then section 409.910 mandates that those settlement proceeds shall be used to reimburse the Medicaid program for medical expenses paid on the Medicaid recipient's behalf. This mandate is facilitated by a statutory lien in AHCA's favor on the settlement proceeds, and federal law mandates that Medicaid's lien only applies to past medical expenses that the Medicaid recipient *actually recovered through the settlement*. When a Medicaid recipient's settlement proceeds are less than the recipient's total damages (which may consist of multiple components, such as past medical expenses, economic damages, and noneconomic damages), a question can arise as to how much of the past medical expenses were actually recovered by the Medicaid recipient and thus subject to the Medicaid lien. Section 409.910(11)(f), sets forth a formula to determine the amount Medicaid shall recover from the settlement proceeds, and section 409.910(17)(b), provides that a Medicaid recipient can request a formal administrative hearing to demonstrate that the past medical expenses *actually recovered through the settlement* were less than the amount calculated via section 409.910(11)(f).

On December 30, 2019, Ms. Barnes filed a "Petition to Determine the Amount of Medicaid's Lien" to challenge AHCA's imposition of a lien of $14,640.89 on $75,000.00 of settlement proceeds recovered in a personal injury lawsuit. Ms. Barnes valued her total damages as being at least

[1] The parties stipulated that the 2019 version of the Florida Statutes applies to the instant case. Accordingly, unless stated otherwise, all statutory references will be to the 2019 version of the Florida Statutes.

$300,000.00. Because the $14,640.89 paid by AHCA equates to 4.9 percent of her total damages, Ms. Barnes argued that AHCA was only entitled to recover 4.9 percent of her settlement proceeds, i.e., $3,675.00.

The parties filed a Joint Pre-hearing Stipulation in which they identified stipulated facts for which no further proof would be necessary. Those stipulated facts have been accepted and considered in the preparation of this Final Order.

The final hearing was held as scheduled on March 10, 2020. Ms. Barnes presented testimony from herself, Aaron Watson, Esquire, and Austin Ward, Esquire. The undersigned accepted Petitioner's Exhibit 1 into evidence without objection.

AHCA offered no witnesses and did not move any exhibits into evidence.

Neither party ordered a transcript. Both parties filed timely proposed final orders that were considered in the preparation of this Final Order.

FINDINGS OF FACT

The following findings are based on testimony, exhibits accepted into evidence, admitted facts set forth in the Pre-hearing Stipulation, and matters subject to official recognition.

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

1. Ms. Barnes was a guest at a friend's home during the evening of March 29, 2014. While leaving the friend's home early the next morning, Ms. Barnes slipped on a combination of ice and mold that was allegedly on the walkway outside the front door. The temperature had been below freezing that night, and Ms. Barnes had been aware of the freezing temperature and

had driven on icy roads on the way to her friend's home. However, she did not recall seeing or experiencing ice while entering the residence via the walkway several hours prior to her fall. During previous trips to the friend's home, Ms. Barnes had never noticed any problem with mold or slippery conditions.

2. Ms. Barnes's friend asserted that he had no knowledge of any defective condition prior to Ms. Barnes's fall and that he was unaware of any ice or mold on his walkway. Ms. Barnes gave him no notice of any dangerous conditions prior to her fall.

3. The fall resulted in Ms. Barnes suffering a fractured humerus, cervical kyphosis, a broad-based disc osteophyte, foraminal stenosis, and extensive radiculopathy. Her initial medical treatment consisted of one or more emergency room visits, orthopedic treatment, and chiropractic care. Ms. Barnes ultimately received a referral to a neurosurgeon, who performed an anterior discectomy and a two-level fusion at C5 through C7 on February 17, 2016. However, Ms. Barnes continued to experience pain and other problems due to her fall. Accordingly, Ms. Barnes's neurosurgeon recommended pain management treatment, and a pain management physician has determined that Ms. Barnes will require treatment for the rest of her life. That treatment will include facet injection and cervical rhizotomy every 6 months.

4. Ms. Barnes is 56 years old, and her life expectancy is more than 27 years.

5. While Ms. Barnes believed that the value of her injuries exceeds $300,000.00, she was uncertain that a jury would have the same opinion and settled a claim against her friend for $75,000.00.

6. Florida's Medicaid program paid $14,640.89 for medical expenses associated with Ms. Barnes's fall and has imposed a lien seeking to recover that entire amount.

7. As required by section 409.910(17)(b), Ms. Barnes has deposited all of the money claimed by AHCA in an interest-bearing trust account for AHCA's benefit pending this administrative determination.

8. Applying the formula set forth in section 409.910(11)(f) would require Ms. Barnes to satisfy the full amount of AHCA's $14,640.89 lien.

Valuation of the Personal Injury Claim

9. Aaron Watson, of the Watson law firm in Pensacola, Florida, has 10 years of experience in the personal injury field and has represented thousands of personal injury plaintiffs.

10. Mr. Watson has represented clients with cervical injuries like those of Ms. Barnes and opined that $350,000.00 was a conservative valuation of her injuries. That valuation accounts for Ms. Barnes's pain and suffering, past medical expenses, and future medical expenses.

11. Mr. Watson also opined that Ms. Barnes probably settled her claim for $75,000.00 because of uncertainty about liability. In other words, Mr. Watson opined that a jury could have found that Ms. Barnes, rather than her friend, was primarily at fault and reduced her damages accordingly.

12. Austin Ward is a partner in the Ward & Barnes law firm in Pensacola. He has 12 years of experience in the personal injury field and has represented over 1,000 personal injury plaintiffs. Like Mr. Watson, Mr. Ward has represented clients with cervical injuries, and he opined that the total value of Ms. Barnes' injuries could be conservatively estimated as being between $300,000.00 and $500,000.00.

13. While the cause of Ms. Barnes's injury was clear, Mr. Ward opined that Ms. Barnes probably settled her claim for $75,000.00 because of issues regarding the assignment of liability and uncertainty about a jury's ultimate findings. For example, ice on a walkway leading to a home is an "act of God" rather than a defect with a defendant's home, and there was no evidence indicating Ms. Barnes's friend was aware of the walkway's condition prior to her fall. Also, Ms. Barnes had traversed the area where she was hurt a few

hours prior to the accident. As a result, she was probably in a better position than her friend to know about the walkway's condition.

Findings Regarding the Testimony Presented at the Final Hearing

14. Mr. Watson and Mr. Ward opined about the total value of Ms. Barnes's damages.[2] However, neither of them testified as to what portion of Ms. Barnes's $75,000.00 settlement amounts to a recovery of her past medical expenses. Also, neither Mr. Watson nor Mr. Ward presented any testimony about how one could calculate what portion of Ms. Barnes's settlement represents a recovery of past medical expenses. Therefore, Ms. Barnes failed to prove by a preponderance of the evidence that AHCA should recover less than the full amount of its $14,640.89 lien.

CONCLUSIONS OF LAW

15. DOAH 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.

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

17. 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).

18. "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."

[2] Ms. Barnes's attorney did not seek to have Mr. Watson and Mr. Ward accepted as experts in any field. However, they generally had the "knowledge, skill, experience, training, or eduction" required to allow them to offer expert testimony pursuant to section 90.702, Florida Statutes, and AHCA did not object to them offering opinions about the total value of Ms. Barnes's injuries.

Est. of Hernandez v. Ag. for Health Care Admin., 190 So. 3d 139, 141-42 (Fla. 3rd DCA 2016)(internal citations omitted).

19. 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.

20. One condition for receipt of federal Medicaid funds requires states to 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 Est. 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.").

21. 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.").

22. 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.

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

24. AHCA's effort to recover the full amount paid for medical assistance is facilitated by section 409.910(6)(a), which provides that AHCA:

> [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.

See also § 409.910(6)(b)2., Fla. Stat. (providing that AHCA "is a bona fide assignee for value in the assigned right, title, or interest, and takes vested legal and equitable title free and clear of latent equities in a third person. Equities of a recipient, the recipient's legal representative, his or her creditors, or health care providers shall not defeat or reduce recovery by the agency as to the assignment granted under this paragraph.").

25. AHCA's efforts are also facilitated by the fact that AHCA has "an automatic lien for the full amount of medical assistance provided by Medicaid to or on behalf of the recipient for medical care furnished as a result of any covered injury or illness by which a third party is or may be liable, upon the collateral, as defined in s. 409.901." § 409.910(6)(c), Fla. Stat.

26. The amount to be recovered by AHCA 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, 515 n.3 (Fla. 2d DCA 2013).

27. 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.

28. Applying the formula in section 409.910(11)(f) to the $75,000.00 settlement in the instant case results in AHCA being owed $14,640.89, the full amount of its Medicaid lien.

29. With regard to the instant case, Ms. Barnes made the following argument in her Proposed Final Order:

> 21. Payment to AHCA of the full amount of past medical charges of [$14,640.89] in this case of limited recovery, runs afoul of Federal law and the holdings of *Gallardo* and *Giraldo*. The evidence demonstrates clearly that Medicaid's past medical charges equate to approximately 4.9% (rounded up) of the total conservative value of [Ms. Barnes'] injuries of $300,000. However, AHCA is seeking reimbursement of the full amount, which equates of 19.5% of the entire recovery made by [Ms. Barnes]. As such, in this case, the application of the formula contained in Florida Statute § 409.910(11)(f) would result in a payment amount that is arbitrary and that does not take into account the proportionality required by applicable law. Payment of such amount would amount to an overpayment to AHCA of the amount of settlement that was actually due for past medical bills, and such overpayment would be from funds due to [Ms. Barnes] as compensation for other areas of her injury claim, including her overwhelming future medical costs.
>
> 22. In order to not run afoul of Federal law in this case, it must be determined what portion of the limited $75,000 recovery made by [Ms. Barnes] was actually for the past medical expenses. The evidence demonstrates clearly that Medicaid's past medical charges equate to approximately 4.9% (rounded up) of the total conservative value of [Ms. Barnes'] injuries of $300,000. AHCA is thus entitled to 4.9% of the amount of recovery actually made of $75,000, which equates to $3,675.00. Notably, this amount of reimbursement is

> approximately 25% of AHCA's total reimbursement claim, which is likewise consistent with proportionality as the evidence has demonstrated that [Ms. Barnes's] recovery of $75,000 was 25% of the $300,000 conservative value of the claim.
>
> 23. Pursuant to applicable law, AHCA is entitled to reimbursement in the amount of $3,675.00 from [Ms. Barnes's] personal injury settlement.

30. AHCA presented the following argument in its Proposed Final Order:

> [Ms. Barnes] presented no testimonial evidence or exhibits to prove by any standard of evidence what amount of the $75,000 settlement recovery should be allocated as past medical expenses. While the evidence may establish $350,000 or $300,000, or even $500,000 as the value of Ms. Barnes's damages, this figure is useless without sufficient evidence to provide a method for the allocation of the settlement. [Ms. Barnes] merely argued in a conclusory manner for a pro-rate methodology. This diverges from the intent of the statute ("[I]t is the intent of the Legislature that Medicaid be repaid in full . . . from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole . . ." Section 409.910(1).) and is wholly insufficient to prove that it is the correct approach. "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." *Id.*

31. As correctly noted by AHCA, neither Mr. Watson nor Mr. Ward testified about what portion of Ms. Barnes's $75,000.00 settlement amounts to a recovery of her past medical expenses. Also, neither witness testified about how one could calculate what portion of Ms. Barnes's settlement represents a recovery of past medical expenses. Instead, Ms. Barnes's argument as to her recovery of past medical expenses is limited to a computational argument set forth in her Proposed Final Order that is

unsupported by expert testimony opining that her computational argument is a reasonable method by which to determine what portion of the $75,000.00 settlement amounts to a recovery of past medical expenses.[3] In that regard, the outcome of the instant case is controlled by *Gray v. Ag. for Health Care Admin.*, 288 So. 3d 95 (Fla. 1st DCA 2019).

32. In *Gray*, an ALJ ruled that AHCA was entitled to recover the full amount of its Medicaid lien. The *Gray* appellant argued, in part, that the ALJ erred by failing to use a pro rata formula to calculate AHCA's portion of the recovery. In rejecting that argument, the Court ruled as follows:

> Gray argued that the $10,000 recovery represented 0.349% of the value of his $2.8 million verdict, so AHCA's lien should be limited to 0.349% of the

[3] Ms. Barnes's argument differs from those of other petitioners who have predominantly relied on expert testimony to justify a pro rata reduction in AHCA's Medicaid lien. The detailed opinion in *Eady v. State*, 279 So. 3d 1249 (Fla. 1st DCA 2019), describes how petitioners typically argue for a pro rata reduction. The *Eady* petitioner called two attorneys as witnesses, and both were accepted as experts in the valuation of damages. *Id.* at 1251. The first expert witness conservatively estimated the value of the petitioner's damages as being at least $15,000,000. *Id.* at 1252. That witness then testified that the petitioner's $1,000,000 settlement represented approximately 6.66 percent of his total estimated damages.

> "Applying that same percentage difference to the $177,747.91 in past medical expenses claimed by AHCA, [the first witness] testified that $11,838 *would be a reasonable allocation of the confidential settlement agreement for past medical expenses*. In other words, the $11,838 represented a pro rata share of the million dollar settlement." *Id.* (emphasis added)

The second expert witness agreed that $15,000,000 was a conservative estimate of the petitioner's total damages. *Id.* at 1253. The second expert witness also agreed that the petitioner's $1,000,000 settlement represented a 6.66 percent recovery of his total damages.

> "[The second expert] also agreed that if [the petitioner] recovered only 6.66% of the full value of his case, that same percentage should be allocated to past medical expenses recoverable by AHCA. Furthermore, he added that applying that ratio was not only reasonable, but was common practice in the legal proceedings with which he historically had been associated. Again, [the second expert witness] approved of the notion that applying a pro rata formula to the settlement amount would result in $11,838 allocated to past medical expenses." *Id.*

Expert testimony of a similar nature was not provided in this case.

total amount Medicaid expended in medical benefits ($65,615.054), which would equate to $229.49. AHCA argued that, under the statutory formula, it was entitled to $3,750 from Gray's recovery and that Gray failed to prove that AHCA should be entitled to a lesser amount. Gray conceded that no case law or other statute authorized the ALJ to apply a pro rata formula instead of the formula provided in the statute.

The ALJ found that Gray failed to show by clear and convincing evidence that AHCA was entitled to less than the presumptive amount under the statute - $3,750. The ALJ found no evidence in the record to show that "the $10,000 recovery does not include at least $3,750 that could be attributed to [Gray's] medical costs. Neither does the evidence indicate that the $3,750 amount includes payments for expenses other than [Gray's] medical care and services." The ALJ ruled that AHCA was entitled to $3,750 from the $10,000 recovery.

* * *

The evidence offered by Gray consisted of the verdict form, the final judgment, and letters providing the amount of the liens imposed by Florida's Medicaid Program, Georgia's Medicaid Program, and Florida's Brain and Spinal Cord Injury Program. None of these records showed that the $10,000 recovery was allocated in any way between different categories of damages, costs, or attorney's fees. Gray could not show – even by a preponderance of the evidence – that an amount other than the total recovery of $10,000 should be considered when applying the statutory formula to determine the amount of the Medicaid lien. Thus, the ALJ did not err in ruling that Gray failed to meet his burden to show that the lien should be reduced.

Even though he failed to produce evidence or present testimony to meet his burden to show that the lien amount should be reduced, Gray maintains

> that the ALJ should have used a pro rata formula to calculate AHCA's share of the tort recovery. Gray acknowledges that nothing in the statute authorizes the ALJ to use a pro rata formula to calculate the lien amount. Rather, *in situations such as this case, when the plaintiff fails to produce evidence or present testimony showing that the lien amount should be reduced, the plain language of section 409.910(11)(f) requires the ALJ to apply the statutory formula. The ALJ did exactly that here and did not err in calculating the lien amount*.

Gray, 288 So. 3d 95. (emphasis added)

33. Like the appellant in *Gray*, Ms. Barnes failed to demonstrate by a preponderance of the evidence that AHCA's Medicaid lien should be reduced. There is no competent, substantial evidence on which the undersigned could base a finding that Ms. Barnes's recovery of past medical expenses was, or should be calculated to be, less than $14,640.00.

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 $14,640.00 from the third-party settlement at issue in this matter in satisfaction of its Medicaid lien.

DONE AND ORDERED this 7th day of April, 2020, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
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 7th day of April, 2020.

COPIES FURNISHED:

Scott C. Barnes, Esquire
Ward and Barnes, P.A.
222 West Cervantes Street
Pensacola, Florida 32501
(eServed)

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

Shena Grantham, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Austin Reeves Ward, Esquire
Ward and Barnes, P.A.
222 West Cervantes Street
Pensacola, Florida 32501
(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)

Richard J. Shoop, Agency Clerk
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.