STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GAELLEN FABRE, BY AND THROUGH MARIE R. DORE, F/K/A MARIE R. ALDAJUSTE, HIS LEGAL GUARDIAN,

Petitioner,

Case No. 20-2265MTR

vs.

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 conferencing via Zoom on June 11, 2020.

APPEARANCES

For Petitioner: Jason Dean Lazarus, Esquire
Special Needs Law Firm
2420 South Lakemont Avenue, Suite 160
Orlando, Florida 32814

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

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 ("Petitioner" or

"Fabre") from a third party, pursuant to section 409.910, Florida Statutes (2019).

PRELIMINARY STATEMENT

On or about May 13, 2020, Petitioner, Marie R. Dore, legal guardian of Fabre, filed a Petition to Determine Medicaid's Lien Amount to Satisfy Claim Against Personal Injury Recovery by the Agency for Health Care Administration ("Petition") pursuant to section 409.910(17)(b), disputing the amount of the lien and requesting a hearing.

The Petition was filed at DOAH on May 13, 2020, and assigned to the undersigned administrative law judge. The case proceeded as scheduled on June 11, 2020.

The parties filed a Joint Pre-hearing Stipulation in which they identified stipulated facts for which no further proof would be necessary, and the relevant facts stipulated therein are accepted and made part of the Findings of Fact below.

At hearing, Petitioner presented the testimony of three witnesses: Maria R. Dore, Fabre's mother; Jay Wasserman, Esquire; and Mark Matovina, Esquire. Petitioners' Exhibits 1 through 5 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 but not transcribed. Both parties filed timely proposed final orders that the undersigned has considered in the preparation of this Final Order.

Unless otherwise noted, all statutory references are to the Florida Statutes (2019).

FINDINGS OF FACT

1. On March 13, 2017, Fabre, who was then 23 years old, was involved in a car accident. Fabre's accident occurred at approximately midnight when he was traveling northbound in the left-hand inside lane of Interstate 95 in Fort Lauderdale, Florida, at or near Broward Boulevard. The collision occurred when the vehicle Fabre was operating rear-ended a Mack truck ("truck") that was improperly illuminated and traveling approximately 25 miles per hour in a 65-mile per hour speed limit zone in Fabre's lane of travel.

2. After the accident, Fabre was treated at Broward General Medical Center and remained hospitalized for several months.

3. Fabre's automobile accident caused catastrophic, significant, and debilitating injuries including: a traumatic brain injury; open knee fracture; left humerus fracture; comminuted distal femur fracture; right distal radius fracture; right frontal lobe encephalomalacia; required feeding tube; deep venous thrombosis; C7 transverse process fracture; grade three liver laceration; left olecranon fracture; T7 transverse process fracture; left one through three rib fractures; external fixator of the left open femur fracture; open reduction, internal fixation of left femur; significant skin grafting; and an open head injury.

4. Since the accident and the resulting severe brain injury, Fabre has been in a permanently disabled state requiring 24-hour a day, seven days a week care. Fabre will never fully recover from his injuries and will require assistance with his activities of daily living for the rest of his life.

5. Fabre brought a personal injury lawsuit against the various defendants from the collision, alleging dangerous obstruction since the truck was poorly illuminated and traveling at an unsafe speed.

6. Jay Wasserman ("Wasserman"), a civil trial attorney with the law firm of Katman, Wasserman, Bennardina & Rubinstein in Boca Raton, Florida, represented Fabre in his personal injury action.

7. Wasserman handled Fabre's personal injury case through settlement. The personal injury lawsuit was ultimately settled for the available insurance policy limits in the amount of $1,030,000.

8. AHCA was properly notified of Fabre's lawsuit against the defendants. AHCA paid $150,645.40 in benefits associated with Fabre's medical care related injuries and asserted a lien for the same amount against Fabre's settlement proceeds.

9. Sections 409.910(11)(f) and 409.910(17)(b), as amended, provide for recovery by Medicaid for both past and future medical expenses. Section 409.910(17)(b) also imposes a clear and convincing burden of proof on the Medicaid recipient challenging the amount of the lien calculated by AHCA.

10. However, in *Gallardo v. Dudek*, 263 F. Supp. 3d 1247 (N.D. Fla. 2017), the court held that the provisions allowing Medicaid to recover future medical expenses and imposing a clear and convincing standard on recipients contesting AHCA's calculations violate and are preempted by federal law.

11. In this matter, the parties have stipulated that *Gallardo* limits AHCA in the section 409.910(17)(b) procedure to the past medical expense portion of the recovery and that Petitioner's burden of proof is a preponderance of the evidence. *See also Giraldo v. Ag. for Health Care Admin.*, 248 So. 3d 53 (Fla. 2018)(under federal law AHCA may only reach the past medical expenses portion of a Medicaid recipient's tort recovery to satisfy its Medicaid lien).

HEARING

12. At hearing, Fabre's mother, Maria R. Dore, testified about Fabre's catastrophic injuries, hospital stay, and the extensive care Fabre requires on a daily basis. She explained that he has a short memory span, repeats

himself, cannot be left alone, and attends occupational and physical therapy three times a week.

13. Petitioner presented expert testimony from Wasserman, Fabre's Florida trial attorney. Wasserman is a 33-year Florida bar member who practices personal injury law and malpractice law and has handled numerous catastrophic personal injury plaintiff cases including cases similar to Fabre's case. His cases have ranged in damage amounts up to eight figures. Wasserman is also a member of the Academy of Trial Lawyers and Florida Justice Association and admitted to practice before all Florida courts including the Southern and Middle Districts of Florida.

14. Wasserman testified that when he was first contacted about Fabre's case, Fabre was in the hospital in a vegetative state, and Wasserman hired experts to determine how the accident occurred. Wasserman explained ordinary fault would have been placed on Fabre for running into the back of a truck, but the experts were able to determine the truck may have been traveling below the speed limit, and may have been improperly lit, opening up liability on the defendants.

15. Wasserman's expertise also encompasses the regular valuation of damages for injured parties. He reviews clients' cases daily to determine their value by accessing the economic and non-economic damages. Wasserman explained that as a routine part of his practice, he makes assessments concerning the value of damages suffered. He detailed his process for making those assessments.

16. Wasserman credibly made clear the process he took to develop an opinion concerning the value for the damages suffered in Fabre's case. Wasserman testified that he reviewed Fabre's condition, including Fabre's catastrophic brain injury; inability to walk, stand, and push a wheelchair; and memory problems where he cannot remember things two minutes later. Although Wasserman did not retain anyone to complete a life care plan, he consulted with a life care planner regarding Fabre's care needs. Wasserman

testified that Fabre's need for attendant care for the rest of his life 24 hours a day would exceed $15 million in damages.

17. Wasserman testified that he calculated the economic value by reducing the 24-hour attendant care rate of $30 an hour to the present value of $23 an hour, which added up to about $200,000 annually. Next, Wasserman explained that he multiplied the annual amount of $200,000 by Fabre's life expectancy of 50 years, which totaled $10 million in only economic damages conservatively.

18. Wasserman further explained that he evaluated Fabre's non-economic damages based on his loss of enjoyment of life and pain and suffering. He testified that the non-economic damages would have been significant because of Fabre's personal loss. He evaluated how Fabre would never shower independently, get married, or walk. Wasserman determined that a $5 million value for non-economic damages was based on his experience and research after looking at the results of similar brain injury cases.

19. Wasserman concluded that to determine the total value of Fabre's damages, he added the $10 million of economic damages and the $5 million of non-economic together for a total conservative value of $15 million in damages for Fabre.

20. Wasserman also testified to a pro rata approach for resolving Fabre's Medicaid lien. He explained that he was not advocating one way or the other way regarding the use of the pro rata formula but if the conservative valuation of $15 million is accepted, then the $1,030,000 net recovery amount is only 6.87 percent of the full measure of Fabre's damages. Wasserman further explained reasonably and persuasively that the next step in the pro rata method to reduce the Medicaid lien is to take the lien amount, $150,645.40, and multiply it by 6.87 percent, which he testified he could not do in his head but knew it came to an amount in the $10,000s, which would be the balance owed to AHCA.

21. At hearing, Mark Matovina ("Matovina") also provided an expert opinion without objection regarding the value of Fabre's case. Matovina is an 18-year personal injury, Martindale Hubbell AV rated, attorney. He is a partner at Politas and Matovina in Port Orange, Florida, who solely practices personal injury cases and routinely handles valuation of damages for traumatic brain injury cases.

22. Matovina, as part of his law practice, makes daily assessments concerning the value of damages suffered by traumatic brain injury parties and evaluates damages of those catastrophically injured. His process for determining the value of cases is to look at the past and future medical expenses, wages, and pain and suffering based on a life table.

23. During the hearing, Matovina detailed how he determined the value of Fabre's case. He reviewed the exhibits in this case, talked to the mother about Fabre's 24-hour day to day care needs, wages, reviewed past medical bills, doctor's notes, some medical documents, and a simple life care plan.[1] He computed Fabre's life expectancy at 50 years and testified that 24-hour care for 50 years is $10 million in just medical assistance. Matovina further opined that the total damages would be $15 to $20 million since the 24-hour a day medical assistance would be $10 million. Matovina testified that he did not disagree with the conservative $15 million valuation that Wasserman opined was the damages amount.

24. At hearing, Matovina acknowledged the lien reduction process and testified that the pro rata formula should be used to allocate the value of the damages to the amount actually recovered. During his testimony, Matovina also admitted he put his opinion in his affidavit, Petitioner's Exhibit 2, which further explains pro rata as a "formula with a ratio to be used to value the

[1] The undersigned finds Petitioner's experts to be credible. Wasserman testified he consulted a life care planner but did not pay for a life care planner because of the policy limits for recovery and his attempt to save money for his client. Matovina referred to a simple life care plan on direct examination and clarified on redirect examination that what he reviewed was not a formal life care plan. Matovina's testimony does not contradict Wasserman's testimony regarding a life care plan.

entire value of the case and reduce medical liens in relation to the ratio of the actual damages incurred versus the actual damages recovered." Additionally, he opined in his affidavit:

> In my opinion, based upon past experiences over the last eighteen (18) years, the Ahlborn formula is the only fair and reasonable method to determine past medical expenses as it relates to Medicaid's lien. I have reviewed numerous orders applying that type of formula and I am not aware of any other formula or way to resolve a Medicaid lien without violating the United States Supreme Court decision in Ahlborn.

FINDINGS REGARDING THE TESTIMONY PRESENTED AT THE FINAL HEARING

25. The testimony of Petitioner's two experts regarding the total value of damages was credible, unimpeached, and unrebutted. Petitioner demonstrated that the settlement of $1,030,000 does not begin to fully compensate Fabre for the full value of his damages.

26. The undersigned finds that Petitioner has established by uncontested evidence that the $1,030,000 settlement amount is 6.87 percent of the total value ($15 million) of Petitioner's damages. Petitioner asserts that the same calculation, 6.87 percent of the settlement proceeds should be the portion of the Medicaid lien paid to AHCA for the past medical expenses.

27. AHCA offered no evidence to counter either Wasserman or Matovina's testimony or Petitioner's Exhibit 2 as to valuation or the pro rata formula reduction ratio. Also, AHCA failed to offer any alternative opinions on the damage valuation method suggested by Wasserman or Matovina, both of whom testified knowledgeably and credibly as experienced practitioners.

28. 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). AHCA's lien for past medical expenses is $150,645.40. Applying the 6.87 percent pro rata ratio to the Medicaid lien total yields

$10,349.33, the portion of the settlement representing reimbursement for past medical expenses and the amount recoverable by AHCA for its lien.

CONCLUSIONS OF LAW

29. 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.

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

31. 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 the Medicaid recipient assign to the state his 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.

32. To comply with this federal mandate, the Florida Legislature enacted section 409.910, Florida's Medicaid Third-Party Liability Act. Section 409.910(6)(c) establishes an automatic lien on any judgment or settlement with a third party for the full amount of medical expenses paid to the Medicaid recipient. Even so, AHCA's recovery is limited to those proceeds allocable to past medical expenses.

33. 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).

34. In this matter, 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 $150,645.40. Petitioner, however, asserts that a lesser amount is owed to Respondent because Petitioner did not recover the full value of his damages.

35. It is undisputed that Medicaid provided $150,645.40 in medical expenses for Fabre and that AHCA asserted a Medicaid lien against Petitioner's $1,030,000 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.

36. 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.

37. 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 lesser 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).

38. As the party contesting the amount of the settlement that should be payable to AHCA for past medical expenses, Petitioner must prove by the preponderance of evidence that a lesser portion of the total recovery should be allocated as reimbursement for past medical expenses than the amount calculated by AHCA pursuant to the formula. *Gallardo*, 263 F. Supp. 3d 1247.

39. 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).

40. It has been determined that 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 "must be given the opportunity to seek the reduction of the amount of a Medicaid lien established by the statutory formula outlined in section 409.910(11)(f), by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses").

41. While AHCA offered no evidence to counter Wasserman and Matovina's testimony or Petitioner's exhibits, AHCA contends in its Proposed Final Order that Petitioner argued a conclusory manner for the pro rata formula and did not present evidence to provide a method for the allocation of the $1,030,000 settlement. However, the undersigned is not persuaded by AHCA's position without AHCA presenting any evidence to rebut Petitioner's evidence.

42. In *Agency for Health Care Administration v. Rodriguez*, 294 So. 3d 441 (Fla. 1st DCA 2020), the court accepted the use of the pro rata formula as a proportional reduction if the Medicaid recipient presents unrefuted evidence of past medical expenses of a lesser amount than that calculated by AHCA under section 409.910(11)(f).

43. In *Giraldo*, the court also held that where uncontradicted testimony is presented by the recipient, the factfinder must have a "reasonable basis in the record" to reject it. *Giraldo*, 248 So. 3d at 56. In this matter, Wasserman and Matovina's uncontradicted testimony and Petitioner's exhibits were sufficient to convince the undersigned of Petitioner's side of the issue since AHCA provided no evidence or testimony to the contrary.

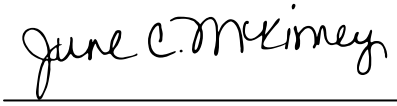
44. Petitioners proved by a preponderance of the evidence that the settlement proceeds of $1,030,000 represent only 6.87 percent of Petitioner's claim valued at $15 million, which both Wasserman and Matovina both believed was a very conservative valuation. Therefore, Petitioner's uncontroverted, unrebutted evidence demonstrates that AHCA's full Medicaid lien amount exceeds the amount recovered for past medical cost and should be reduced to the ratio of Petitioner's actual recovery to the total value of Petitioner's claim.

45. Accordingly, the application of the percentage allocation of 6.87 percent to the lien amount of $150,645.40 results in the amount of $10,349.33, which constitutes the share of the settlement proceeds fairly and proportionally attributable to Fabre's recovery of past 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 $10,349.33[2] in satisfaction of its Medicaid lien.

DONE AND ORDERED this 14th day of July, 2020, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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[2] Less $2,706.14 already received by AHCA.

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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.