STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MITCHELL MILLER,

Petitioner,

vs. Case No. 20-3511MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

The final hearing in this matter was conducted before Administrative Law Judge Jodi-Ann V. Livingstone of the Division of Administrative Hearings (DOAH), pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019),[1] on September 23, 2020, by Zoom Conference.

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 330
Tallahassee, Florida 32317

STATEMENT OF THE ISSUE

The issue in this proceeding is how much of Petitioner's settlement proceeds received from a third party should be paid to Respondent, Agency

[1] All statutory references are to Florida Statutes (2019), as the parties agreed.

for Health Care Administration (AHCA), to satisfy AHCA's Medicaid lien under section 409.910, Florida Statutes.

PRELIMINARY STATEMENT

On August 7, 2020, Petitioner, Mitchell Miller, filed a Petition to Determine Medicaid's Lien Amount to Satisfy Claim Against Personal Injury Recovery by the Agency for Health Care Administration (Petition) to challenge AHCA's placement of a Medicaid lien in the amount of $108,456.65 on Petitioner's $1,110,000.00 settlement proceeds from a third party.

The parties filed a Joint Pre-Hearing Stipulation that contained 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 relevant.

The final hearing was held on September 23, 2020, with both parties present. At hearing, Petitioner's Exhibits 1 through 4 were admitted. Petitioner presented the testimony of Mitchell Miller and two expert witnesses: Kevin McLaughlin, Esquire, and Adam Fernandez, Esquire. AHCA did not call any witnesses and did not offer any exhibits at the hearing.

The parties did not order a transcript. Both parties timely filed Proposed Final Orders, which have been duly considered in preparing this Final Order.

FINDINGS OF FACT

Stipulated Facts

1. On July 13, 2018, Mr. Miller was involved in an automobile accident in Sarasota County, Florida. Mr. Miller was struck from behind while stopped

at a red light on Bee Ridge Road. At the time of the crash, the tortfeasor was driving under the influence of alcohol.

2. Immediately after the accident, Mr. Miller was treated at Sarasota Memorial Hospital for multiple serious injuries including a T2 complete spinal cord injury, C5-C7 incomplete spinal cord injury, brachial plexus injury, loss of majority of function to dominant left hand, intracranial hemorrhage, acetabular fracture, basilar skull fracture, femur fracture, thoracic spine fracture, rib fractures, as well as a closed fracture of the pelvis.

3. As a result of the accident, Mr. Miller cannot control his blood pressure, cannot sweat, and lacks control of his bowels and bladder due to the spinal cord injury. While hospitalized, he underwent a PEG placement and tracheostomy.

4. As a result of the accident, Mr. Miller was rendered a paraplegic. Due to the severity of his injuries, Mr. Miller has required intermittent medical care for his significant injuries.

5. Mr. Miller brought a personal injury action to recover for all the damages related to the incident. This action was brought against various defendants.

6. Since this incident and the resulting spinal cord injury, Mr. Miller has been in a permanently disabled state, requiring assistance with most activities of daily living.

7. In May of 2020, after litigation was commenced, Mr. Miller settled his tort action.

8. AHCA was properly notified of Mr. Miller's lawsuit against the defendants. AHCA indicated it had paid benefits related to the injuries from the incident in the amount of $108,456.65. AHCA has asserted a lien for the full amount it paid, $108,456.65, against Mr. Miller's settlement proceeds.

9. AHCA has maintained that it is entitled to application of the formula in section 409.910(11)(f), to determine the lien amount.

10. Application of the statutory formula to Mr. Miller's $1,110,000.00 settlement would result in no reduction of the lien, given the amount of the settlement.

11. AHCA paid $108,456.65 for medical expenses on behalf of Mr. Miller, related to his claim against the liable third parties.

12. The parties stipulated that AHCA is limited in this section 409.910(17)(b) proceeding to the past medical expenses portion of the recovery.

Evidence at the Hearing

13. Mr. Miller testified about the extent of the injuries he suffered as a result of the automobile accident that was the subject of the personal injury lawsuit. As a 23 year old, who is confined to a wheelchair, Mr. Miller testified about the severe, permanent injuries he endures and the tremendous and permanent impact it has and will have on his life. His testimony was detailed and compelling. He explained his recent and upcoming surgeries. He also explained the effects that his accident has had on his family, particularly his mother who helps him meet life's daily routines.

14. Petitioner called two experts to testify on his behalf: Mr. Fernandez, Petitioner's personal injury attorney in the underlying case; and Mr. McLaughlin, an experienced board-certified civil trial attorney. Both Mr. Fernandez and Mr. McLaughlin were accepted as experts on the valuation of personal injury damages, without objection by AHCA.

15. Mr. Fernandez is an attorney at Maney & Gordon, P.A., in Tampa, Florida. He is admitted to practice law in Florida and has been practicing for 12 years. In addition to Petitioner's case, he has represented clients in personal injury matters, including cases involving catastrophic injuries similar to that of Mr. Miller's.

16. Mr. Fernandez regularly evaluates the damages suffered by injured people such as Mr. Miller. He is familiar with Mr. Miller's damages from his representation of Mr. Miller in his personal injury lawsuit.

17. Mr. Fernandez testified as to the difficulties he encountered in the personal injury suit on behalf of Mr. Miller, which included the inherent difficulties of dram shop claims[2] and the limited insurance coverage available to fully compensate Mr. Miller for his injuries.

18. Through his investigation, Mr. Fernandez sought out all of the available insurance coverage and filed a complaint in Sarasota County circuit court on behalf of Mr. Miller. As part of his work-up of the case, he evaluated all elements of damages suffered by Mr. Miller. After litigating the case for some time, Mr. Fernandez negotiated a total settlement for the insurance limits of $1,110,000.00 against the defendants.

19. Mr. Fernandez provided detailed testimony regarding how Mr. Miller's accident occurred and the extent of his injuries. Mr. Fernandez testified regarding the process he followed to evaluate and arrive at his opinion on the total value of the damages suffered in Mr. Miller's case. Through the course of his representation, he reviewed all the medical information; evaluated the facts of the case; determined how the accident occurred; reviewed all records and reports regarding the injuries Mr. Miller suffered; analyzed liability issues and fault; developed economic damages figures; and also valued non-economic damages such as past and future pain and suffering, loss of capacity to enjoy life, scarring and disfigurement, and mental anguish.

20. Mr. Fernandez testified about the impact of the accident on Mr. Miller's life. As a result of his injuries, Mr. Miller can no longer perform many of the normal activities of daily living for himself and he has limited mobility.

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[2] Florida's dram shop law, as set forth in section 768.125, Florida Statutes, provides that "[a] person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person."

21. Based on Mr. Fernandez's evaluation of Petitioner's case, he opined that the total value of Mr. Miller's damages was conservatively estimated at $35 million. The valuation of the case includes past medical expenses, future medical expenses, economic damages, loss of quality of life, and pain and suffering. Mr. Fernandez testified that the non-economic damages were the greatest element of loss or damage sustained by Mr. Miller, and therefore the largest driver of the valuation and greatest portion of damages recovered in the settlement.

22. Mr. Fernandez testified that his estimation of total damages is based upon his experience as a trial lawyer, and would be what he would have asked a jury to award related to Mr. Miller's damages had the case gone to trial.

23. Mr. Fernandez opined that in comparing the $35 million valuation of the damages in the case to the total settlement proceeds of $1,110,000.00 (that is, by dividing $1,110,000.00 by $35,000,000.00), Mr. Miller recovered only 3.17 percent of the full value of his claim.

24. Mr. Fernandez opined that, as a result, the allocation formula is 3.17 percent. Mr. Fernandez went on to testify that he routinely uses a pro-rata approach with lien holders in his day-to-day practice of resolving liens in Florida. The past medical expenses of Mr. Miller are $108,456.65.[3] That figure multiplied by 3.17 percent would result in recovery of $3,438.07[4] allocated to past medical expenses.

25. Mr. Fernandez's testimony was not contradicted by AHCA, and, mathematical error aside, was persuasive on this point.

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[3] There is no competent substantial evidence in the record that Mr. Miller's past medical expenses amount to more than the sum of AHCA's Medicaid lien.

[4] The undersigned finds that 3.17 percent of $108,456.65 is $3,438.07, not $3,433.07, as testified to by Petitioner's witnesses and presented in Petitioner's Proposed Final Order.

26. Mr. McLaughlin is a 23-year practicing plaintiff's attorney with Wagner & McLaughlin. Mr. McLaughlin and his firm specialize in litigating serious and catastrophic personal injury cases throughout central Florida.

27. As part of his practice, Mr. McLaughlin has reviewed numerous personal injury cases in so far as damages are concerned. Mr. McLaughlin has worked closely with economists and life care planners to identify the relevant damages in catastrophic personal injuries, and he regularly evaluates the types of damages suffered by those who are catastrophically injured.

28. Mr. McLaughlin testified as to how he arrived at his valuation opinion in this case by explaining the elements of damages suffered by Mr. Miller. Similar to Mr. Fernandez, he stated that the greatest element of loss Mr. Miller suffered was non-economic damages. He testified that his estimates for the future care and pain and suffering damages of Mr. Miller would be in the high eight figures.

29. Mr. McLaughlin testified that, in his opinion, the total damages suffered by Mr. Miller are conservatively estimated at $38,350,000.00. Mr. McLaughlin testified that it is a routine part of his practice to conduct round-table discussions about cases with other attorneys at his firm. His discussions regarding Mr. Miller's case with attorneys in his firm resulted in a consensus that Mr. Miller's total damages had a value in excess of $38 million. He agreed with the $35 million total valuation testified to by Mr. Fernandez for purposes of the lien reduction formula.

30. Mr. McLaughlin also testified that he believed that the standard accepted practice when resolving liens in Florida was to look at the total value of damages compared to the settlement recovery (that is, dividing $1,110,000.00 by $35,000,000.00). This resulted in Mr. Miller recovering only 3.17 percent of the full value of his claim, and, as such, a 3.17 percent ratio may be used to reduce the lien amount sought by AHCA.

31. Both Mr. Fernandez and Mr. McLaughlin testified about the ultimate value of the claim, measured in damages, for Mr. Miller's personal injury liability case. They also testified as to a method that, in their opinions, reasonably allocated a percentage of the settlement amount to past medical expenses. Both witnesses reviewed Mr. Miller's medical information and other information before offering an opinion regarding his total damages.

32. Both Mr. Fernandez and Mr. McLaughlin's approaches to evaluating the damages suffered by Mr. Miller and the resulting ratio for reducing past medical expenses were conservative. The undersigned finds that both were credible, persuasive, and well qualified to render their opinions.

33. The valuation opinions by Mr. Fernandez and Mr. McLaughlin as to the total value of the claim were not rebutted or contradicted by AHCA on cross examination or by any other evidence. AHCA offered no evidence to question the credentials or opinions of either Mr. Fernandez or Mr. McLaughlin, or to dispute the methodology they proposed which would reduce Mr. Miller's claim.

34. AHCA did not offer any alternative expert opinions on the damage valuation or allocation method proposed by Mr. Fernandez or Mr. McLaughlin.

35. The undersigned finds that Petitioner has established by persuasive, unrebutted, and uncontradicted evidence that the $1,110,000.00 recovery is 3.17 percent of the total value ($35 million) of Petitioner's total damages.

36. Applying the proportionality methodology, Petitioner has established that 3.17 percent of $108,456.65, or $3,438.07, is the amount of the recovery fairly allocable to past medical expenses and is the portion of the recovery payable to AHCA, pursuant to its Medicaid lien.

37. Petitioner proved by a preponderance of the evidence that Respondent should be reimbursed $3,438.07, which is the portion of the settlement proceeds fairly allocable to past medical expenses.

CONCLUSIONS OF LAW

38. DOAH has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), and 409.910(17)(b).

39. The parties stipulated that Petitioner's burden of proof in this proceeding is by a preponderance of the evidence.

40. AHCA is the state agency responsible for administering Florida's Medicaid program. § 409.910(2), Fla. Stat.

41. 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). Though participation is optional, once a State elects to participate in the Medicaid program, it must comply with federal requirements. *Id.*

42. One of the conditions, under federal law, requires that participating states 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).

43. To carry out this federal requirement, the Florida Legislature enacted section 409.910, 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 or settlement from a third party. *Smith v. Ag. for Health Care Admin.*, 24 So. 3d 590 (Fla. 5th DCA 2009).

44. 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.

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

> (6) When the agency provides, pays for, or becomes liable for medical care under the Medicaid program,

> it has the following rights, as to which the agency may assert independent principles of law, which shall nevertheless be construed together to provide the greatest recovery from third-party benefits:
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> * * *
>
> (a) The agency is 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.
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> * * *
>
> (c) The agency is entitled to, and 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 for which a third party is or may be liable, upon the collateral, as defined in s. 409.901.

46. The amount to be recovered by AHCA from a judgment, award, or settlement from a third party is initially 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). 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:
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> 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.

47. Here, the parties agreed that application of the formula in section 409.910(11)(f) to Petitioner's settlement would require payment to AHCA of $108,456.65, the full amount of its Medicaid lien. However, section 409.910(17)(b) provides a method by which a Medicaid recipient may contest the amount designated as recovered medical expenses payable under section 409.910(11)(f).

48. Following the United States Supreme Court's decision in *Wos v. E.M.A.*, 568 U.S. 627, 633 (2013), the Florida Legislature created an

administrative process to challenge and determine what portion of a judgment, award, or settlement in a tort action is properly allocable to medical expenses and, as a result, what portion of a petitioner's settlement may be recovered to reimburse the Medicaid lien held by AHCA. Section 409.910(17)(b) states:

> 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,[5] 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. If Petitioner can demonstrate by a preponderance of the evidence, that the portion of Mr. Miller's settlement agreement fairly allocable as payment for past medical expenses is less than the amount the agency seeks, then the amount Petitioner is obligated to pay to AHCA for its lien would be reduced.

50. The Florida Supreme Court has determined that the state's recovery of certain portions of settlement funds received by a Medicaid recipient to be the amount in a personal injury settlement fairly allocable to past medical expenses. *Giraldo v Ag. for Health Care Admin.*, 248 So. 3d 53, 56 (Fla. 2018). The parties stipulated that AHCA is restricted to recovery from past medical expenses, which the undersigned accepts.

51. In this case, there was no evidence presented by AHCA to contest or contradict the reduced amount presented by Petitioner's experts as the fair allocation of past medical expenses from Petitioner's settlement.

52. AHCA cross-examined Petitioner's experts, but elicited no compelling information or persuasive evidence to refute their opinions that a fair allocation of past medical expenses recovered from the Petitioner's settlement was $3,438.07. In short, Petitioner's expert testimony concerning a fair allocation of the settlement agreement was unchallenged by AHCA, without any contrary or contradictory facts or evidence in the record.

53. 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 (quoting *Wald v. Grainger*, 64 So. 3d 1201, 1205-06 (Fla. 2011)). Here, the testimony was clear, credible, and uncontradicted: there is no reasonable basis to reject the testimony of either Mr. Fernandez or Mr. McLaughlin.

54. The full amount of all past medical expenses, totaling $108,456.65, must be considered in calculating the amount payable to AHCA.

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[5] Petitioner and AHCA agreed that the burden of proof for a Medicaid recipient to successfully contest the amount payable to AHCA in this section 409.910(17)(b) proceeding is a preponderance of the evidence.

The only evidence at the hearing was offered by Petitioner and supported a finding that the past medical expenses amounted to Medicaid's lien of $108,456.65. Petitioner proved by a preponderance of the evidence that the settlement proceeds of $1,110,000.00 represent only 3.17 percent of Petitioner's claim valued at $35 million, which both testifying experts reasonably believed was a conservative valuation. Therefore, AHCA's Medicaid lien should be reduced to the ratio of Petitioner's actual recovery to the total value of his claim.

55. The application of the 3.17 percent ratio to Petitioner' total past medical expenses of $108,456.65 results in a sum of $3,438.07, which is the portion of the settlement proceeds reasonably and proportionately allocable to Mr. Miller's past medical expenses to satisfy AHCA's lien.

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 $3,438.07 from Petitioner's settlement proceeds in satisfaction of its Medicaid lien.

DONE AND ORDERED this 19th day of October, 2020, in Tallahassee, Leon County, Florida.

JODI-ANN V. LIVINGSTONE
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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.