STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEIDRA MULLINS, AS GUARDIAN FOR JESSE THOMAS,

Petitioner,

vs.

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

Case No. 20-3856MTR
*AMENDED AS TO LIEN AMOUNT IN ¶23

AMENDED FINAL ORDER

On November 9, 2020, Administrative Law Judge Hetal Desai of the Division of Administrative Hearings (DOAH) conducted the final hearing by Zoom web conferencing.

APPEARANCES

For Petitioner: Jason Dean Lazarus, Esquire
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For Respondent: Alexander R. Boler, Esquire
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STATEMENT OF THE ISSUE

The issue in this proceeding is how much of Petitioner's settlement proceeds should be paid to Respondent, the Agency for Health Care

Administration (AHCA or Agency), to satisfy AHCA's Medicaid lien under section 409.910, Florida Statutes (2019).[1]

PRELIMINARY STATEMENT

On August 25, 2020, pursuant to section 409.910(17)(b), Deidra Mullins, as Guardian for Jesse Thomas (Petitioner or Mr. Thomas), filed a "Petition to Determine Medicaid's Lien Amount to Satisfy Claim against Personal Injury Recovery by the Agency for Health Care Administration" with DOAH. Shortly thereafter, DOAH notified AHCA of the Petition and assigned the case to the undersigned Administrative Law Judge.

Petitioner subsequently filed two Amended Petitions without leave of the Administrative Law Judge. These subsequent petitions amended the monetary amounts received by Petitioner in settlement. AHCA did not file objections to these amendments, and therefore the parties proceeded at the hearing pursuant to the "Second Amended Petition to Determine Medicaid's Lien Amount to Satisfy Claim against Personal Injury Recovery by the Agency for Health Care Administration" filed on November 5, 2020.

Petitioner challenges the Medicaid lien asserted by AHCA against his settlement proceeds and asserts the lien should be reduced because he did not recover an amount necessary to fully compensate him for the full value of his damages. The Agency argues it must be reimbursed for its Medicaid lien in the amount of $121,870.81, as calculated pursuant to section 409.910(11)(f).

A pre-hearing conference was held on November 2, 2020, at which the parties discussed the presentation of witnesses and the sealing of the exhibits

[1] Unless referenced otherwise, all citations to state and federal statutes, rules, and regulations are to the 2019 versions.

to maintain confidentiality. The parties also submitted a Joint Pre-Hearing Stipulation containing nine stipulated facts and two undisputed legal issues. All stipulations have been incorporated into this Final Order where appropriate.

The final hearing was held on November 9, 2020. Petitioner offered the testimony of Deidra Mullins (Petitioner's daughter), Thomas Roebig, Esquire (an expert witness for valuation of personal injury claims), and Laurence Huttman, Esquire (Petitioner's personal injury attorney, and an expert in valuation of personal injury claims). Petitioner's Exhibits P1 and P3 through P12 were admitted into evidence without objection. Petitioner's Exhibit P2 was admitted over the Agency's objections. The Agency did not offer any witnesses or exhibits.

The Transcript of the final hearing was filed with DOAH on December 7, 2020, and both parties timely filed proposed final orders (PFOs) which have been considered.

FINDINGS OF FACT

Parties, Accident, and Injuries

1. Deidra Mullins brings this action on behalf of her father, Jesse Thomas. Ms. Mullins serves as Petitioner's legal guardian.

2. AHCA is the agency responsible for administering Florida's Medicaid program. *See* § 409.902, Fla. Stat.

3. On May 9, 2017, Mr. Thomas was riding a motor scooter when he was involved in an accident with a Freightliner truck.

4. The accident occurred in Putnam County, but immediately after the accident, Petitioner was transported by Air Ambulance to Orange Park Medical Center for multiple serious injuries.

5. As a result of the accident, Mr. Thomas was hospitalized for approximately 63 days, from May 9 to July 11, 2017. While hospitalized, he underwent multiple surgical procedures including spinal surgery and an above-knee amputation on his left leg.

6. Mr. Thomas suffered severe physical injuries, including the following: a spine fracture with a spinal cord injury, multiple rib fractures, neurogenic shock due to traumatic injury, traumatic hemorrhagic shock, displaced fracture of the left tibial spine, closed fracture dislocation of left sacroiliac joint, acute respiratory insufficiency, leukocytosis, acute tubular necrosis, acute blood loss anemia, acute respiratory acidosis, hyperglycemia, hemothorax, lacerations, open fracture of the lower leg, head injury, respiratory failure, cardiac arrest, and shock.

Petitioner's Damages

7. The parties stipulated that Medicaid provided $121,870.81 toward Petitioner's past medical expenses arising out of the accident. The Agency has asserted a lien for this amount against Petitioner's settlement proceeds.

8. Petitioner was rendered a paraplegic as a result of the accident. The parties have stipulated that Petitioner suffered serious injuries as a result of the accident from which he will not fully recover and will continue to require medical treatment for the rest of his life. Petitioner's permanent injuries have left him unable to adequately care for himself and in need of around the clock assistance and supervision of all of his activities of daily living.

9. At the hearing, Petitioner presented a life care plan, a rehabilitation evaluation, and an economic damages report prepared by Rody Jorb, Ph.D. All of these reports were admitted into evidence without objection.

10. Laurence Huttman and Thomas Roebig were tendered as experts regarding valuation of personal injury damages. Mr. Huttman was also a fact witness. The Agency did not object to the witnesses, their qualifications, or the underlying documentation on which they relied.

11. Both were accepted as experts in the valuation of personal injury damages. The life care plan establishes Petitioner will require life-long full-time care. The life care plan sets forth two options for Petitioner's future care: (1) an assisted living facility the remainder of his life (Option A); or (2) in-home care in a new home that can accommodate him (Option B). According to the testimony Mr. Huttman and Petitioner's daughter, Petitioner and his family prefer Option B, which would allow Petitioner to live and be cared for at home rather than in a long-term care facility.

12. As Petitioner's attorney, Mr. Huttman knew Petitioner and was familiar with his medical records, life care plan, and Dr. Jorb's report. Mr. Huttman opined that the value of Petitioner's damages was $30 million. Mr. Huttman arrived at that figure by attributing $18 million to future medical care and $12 million for past and future pain and suffering damages.

13. Mr. Roebig corroborated Mr. Huttman's estimate of the settlement value of $30 million. He felt that Mr. Huttman's valuation of the pain and suffering of $12 million was conservative. In his opinion, the non-economic damages would be approximately $13 million.

14. Neither Mr. Roebig nor Mr. Huttman included past medical expenses or past or future wages in their valuation of the settlement value.[2]

15. Mr. Huttman testified that the present value of Petitioner's future medical expenses was approximately $13 million for Option A or $18 million for Option B. Mr. Roebig also assumed the $18 million figure when forming his opinion that the case was valued at $30 million. These figures are inconsistent with the Dr. Jorb's report, which Mr. Huttman referred to in his testimony.

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[2] Petitioner argues in his PFO that this $30 million includes "*past and future lost wages*" (Pet. PFO, p.7-8, emphasis added). However, there was no evidence of past or future lost wages in this case. Rather, Mr. Huttman's testimony established that past and future lost wages were not considered because Mr. Thomas did not have verifiable past income. Mr. Roebig also testified that the $30 million valuation of Petitioner's case did not include a claim for past and future wage loss.

16. The present value figures for future medical expenses in Dr. Jorb's report are much lower than those cited by Petitioner's valuation experts. The report provides the following:

Economic Damages Summary			
JESSE THOMAS			
All Figures are in Present Value			
Future Losses			
	LOW	AVERAGE	HIGH
Future Care Option A	$5,535,121.87	$5,999,678.87	$6,464,235.87
Future Care Option B	$8,349,132.49	$10,227,917.70	$12,106,702.92

17. Given that neither Mr. Huttman nor Mr. Roebig was offered as an expert in economics, and the only credible evidence of the present value of future medical expenses is those in Dr. Jorb's report, the undersigned finds that the present value of the future medical expenses are approximately $6.5 million for Option A or $12 million for Option B.

18. The Agency did not dispute Petitioner's sincerity in his desire to live at home and leave the long-term facility where he now resides, the "low versus high" amounts estimated in the life plan for future care, or the practicality of at-home care for the rest of Petitioner's life. Therefore, the undersigned finds that future medical expenses should be calculated at the high range provided by Dr. Jorb's report for Option B at $12 million.

19. The Agency did not offer any competing testimony or evidence to question the credentials or opinions of either Mr. Huttman or Mr. Roebig.

20. Relying on Dr. Jorb's report and the life care plan (which reflect the high range of $12 million for future medical expenses for Option B); and on the credible and unimpeached expert testimony of Mr. Huttman (which establishes the value of non-economic damages in the amount of $12 million), the undersigned finds that the settlement value of Petitioner's case is $24 million.

The Settlement

21. The parties stipulated that Petitioner pursued a personal injury action against various defendants related to the accident.

22. The tort actions were settled in July 2020, although the individual settlement amounts are confidential.[3]

23. AHCA was notified of Petitioner's personal injury action but did not intervene or join in the litigation. Instead, AHCA asserted a $121,870.81 Medicaid lien against Petitioner's personal injury action and any resulting settlement proceeds.

24. There was no evidence that AHCA made any attempts to set aside, void, or otherwise dispute Petitioner's settlements.

Allocation of Past Medical Expenditures

25. The key factual issue in this case is how much of the settlement funds are available to AHCA for payment of the Medicaid lien. One way to determine this amount is through a default formula set forth in section 409.910(11)(f). The parties stipulated that under this default formula, Petitioner is required to pay AHCA the full amount of the Medicaid lien, $121,870.81.[4]

26. Alternatively, Petitioner can show that a lesser amount than the default amount "should be allocated as reimbursement" for past medical expenses. *See* § 409.910(17)(b), Fla. Stat.

27. Here, Petitioner urges the reduction of the Medicaid lien using a "pro rata" approach. This method involves calculating the ratio of the actual settlement recovery to the "settlement value" amount, and then applying that ratio to each element of damages.

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[3] There was no evidence related to the taxable costs incurred in securing the settlement amounts.

[4] Section 409.910(11)(f) establishes the Agency's default recovery amount for a Medicaid lien: the default amount is equal to one-half of the total award, after deducting attorney's fees of 25 percent of the recovery and all taxable costs, up to, but not to exceed, the total amount actually paid by Medicaid on the recipient's behalf.

28. Based on the above finding that the settlement value ratio is $24 million, the actual settlement recovery to settlement value is 20 percent.

29. AHCA did not challenge Petitioner on the "pro rata" approach used to arrive at the amount of the settlement that could be reasonably attributed to the Medicaid lien. Rather, it argues that the "pro rata" percentage should be applied to all past medical expenses (not just the amount of past medical expenses paid by AHCA) to calculate the amount available to AHCA to satisfy the lien.

30. There is no credible evidence, however, establishing the amount for past medical expenses, other than the amount of the AHCA lien for Petitioner's past medical expenses. Contrary to AHCA's assertion in its PFO (Resp. PFO, p.7-8, n.4), there was no stipulation that the past medical expenses were $1.5 million. Rather, at the hearing, Mr. Huttman testified he thought $6 million was billed for past medical expenses but noted this amount did not include any adjustments or reductions. Mr. Huttman believed that Medicare and Medicaid paid approximately $1.5 million in past medical expenses but noted other entities also contributed toward Petitioner's past medical expenses and that there remained outstanding unpaid past medical expenses. Other than the $121,870.81 figure stipulated to by the parties, there was no evidence regarding what other amounts were still owing and to whom, or what other amounts had been paid and by whom. Had AHCA wanted to use the total past medical expenses for calculating how much was available from the settlement for the lien, it could have offered credible evidence regarding this figure. It did not.

31. Applying the "pro rata" percentage to AHCA's lien amount would result in the recovery of $24,374.16 for the Medicaid lien.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this case pursuant to sections 120.569, 120.57, and 409.910, Florida Statutes.

33. As explained by the Florida Supreme Court in *Giraldo v. Agency for Health Care Administration*, 248 So. 3d 53, 55 (Fla. 2018), Medicaid is a joint governmental program designed to help participating states provide medical treatment for their residents who cannot afford to pay for treatment.[5]

34. In order for the State of Florida to take advantage of federal Medicaid funds for patient care costs, it must comply with the federal regulations requiring it to recover its expenditures for medical expenses from third-party sources, such as settlements. *See* 42 U.S.C. § 1396a(a)(25)(B); *Ahlborn*, 547 U.S. at 284-85. At the same time, the Medicaid statute limits a state's right to collect reimbursement of expended funds to only those third-party monies that can be allocated for medical care. 42 U.S.C. § 1396p(a)(1); *Ahlborn*, 547 U.S. at 285-86.

35. As mentioned above, the Florida Legislature set forth a "default formula" to determine the amount AHCA may recover for past Medicaid payments from a judgment, award, or settlement from a third party. *See* § 409.910(11)(f), Fla. Stat.

36. Alternatively, the statute provides Medicaid recipients with a method for challenging this default amount by initiating an administrative proceeding pursuant to section 409.910(17)(b), which states:

> In order to successfully challenge the amount designated as recovered medical expenses, the recipient must prove, by clear and convincing

[5] Although participation in Medicaid is voluntary, all states take advantage of this funding source for the medical needs of its citizens. *See Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 275 (2006) ("States are not required to participate in Medicaid, but all of them do. The program is a cooperative one; the Federal Government pays between 50% and 83% of the costs the State incurs for patient care, and, 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.").

> evidence, that the portion of the total recovery which should be allocated as past and future medical expenses is less than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f).

Fla. Stat. § 409.910(17)(b).

37. Petitioner erroneously argues that the statutory burden of proof of clear and convincing evidence does not apply. Instead he asserts his burden is a preponderance of the evidence, "because of the stipulation of the parties and the rulings in *Gallardo v. Senior*, U.S. District, Case No. 4:16-cv-116-MW-CAS (N.D. Fla.2017) as well as *Giraldo v. Agency for Health Care Administration*, 248 So. 3d 53 (Fla. 2018)." (Pet. PFO, p.13). AHCA does not address the burden in its PFO.

38. First, contrary to Petitioner's statement above, the parties did not stipulate to the burden of proof.

39. Second, and more importantly, the federal case cited by Petitioner, *Gallardo*, was reversed in June 2020 by the Eleventh Circuit and is no longer good law. *Gallardo by & through Vassallo v. Dudek*, 963 F.3d 1167 (11th Cir. 2020). In direct contradiction to Petitioner's assertions, the federal appellate court upheld the clear and convincing burden found in section 409.910:

> We reject the district court's assertions that Florida's allocation is "nearly impossible to rebut" and "quasi-irrebuttable." Nothing in the statute or the record supports those assertions. "Clear and convincing evidence" is not an "impossible" evidentiary standard. It is a familiar and widely used standard of proof in Florida civil proceedings, requiring evidence "of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC*, 139 So. 3d 869, 872–73 (Fla. 2014) (listing types of cases where this standard applies). Most importantly for purposes of our preemption analysis, nothing about this standard of proof stands in clear conflict with

> federal law under *Wos* [*v. E.M.A. ex rel. Johnson,* 568 U.S. 627, 133 S.Ct. 1391, 185 L.Ed.2d 471 (2013)].

Id. at 1182.

40. As such, the burden is on Petitioner to establish by clear and convincing evidence that an amount less than the default amount should be used to satisfy AHCA's lien.

41. Although not the only method, Florida courts have consistently held that where there is competent, substantial evidence supporting the value of the various elements of damages, the "pro rata" approach employed by Petitioner's experts is one way to support the allocation of a smaller portion of a settlement for past medical expenses than the portion claimed by AHCA. *See Giraldo*, 248 So. 3d 53 (Fla. 2018); *Ag. for Health Care Admin. v. Rodriguez*, 294 So. 3d 441 (Fla. 1st DCA 2020); *Mojica v. Ag. for Health Care Admin.*, 285 So. 3d 393 (Fla. 1st DCA 2019).

42. This case is factually similar to *Eady v. State*, 279 So. 3d 1249 (Fla. 1st DCA 2019). In *Eady*, the Medicaid recipient settled his lawsuit, but, as in this case, the terms of the settlement were confidential. The petitioner presented unrebutted expert testimony regarding the total value of his damages and the appropriate share of the settlement funds that should be allocated to past medical expenses. *Id.* at 1252-53. The First District Court of Appeal held that despite the Administrative Law Judge's finding that the expert spoke in "generalities, speculations, and reasonableness as to the settlement in relation to the Medicaid lien," the petitioner had met his burden. Relying on *Giraldo*, the *Eady* court noted that the Agency had not put on any contradictory evidence, and the Administrative Law Judge could not ignore the expert's testimony establishing the appropriate share of settlement funds properly allocated to past medical expenses.

43. Similarly, in *Mojica*, the court held that a pro rata methodology is appropriate where a petitioner presents "unrebutted and unimpeached expert testimony concerning the full value of her damages ... [and] AHCA did not

present any evidence contesting the pro rata methodology used to calculate the [ ] allocation to past medical expenses." *Mojica*, 285 So. 3d at 396 (citations omitted).

44. Here, Petitioner's experts' testimony regarding future medical expenses was contradicted by Dr. Jorb's report, but otherwise their testimony was not impeached or rebutted. The Agency presented no witnesses or evidence of its own. As such, Petitioner has proved that $24,374.16 represents the amount that can be fairly attributable to past medical expenses and is available to the Agency for repayment on its Medicaid lien.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Agency for Health Care Administration may recover $24,374.16 from the settlement proceeds paid to Jesse Thomas in satisfaction of its Medicaid lien.

DONE AND ORDERED this 7th day of January, 2021, in Tallahassee, Leon County, Florida.

HETAL DESAI
Administrative Law Judge
Division of Administrative Hearings
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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.