

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

SHIRLEY MCBRIDE, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
ROBIN MCBRIDE,

Petitioner,

Case No. 20-5258MTR

vs.

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

FINAL ORDER

The final hearing was held in this case by Zoom Video Conference in Tallahassee, Florida, on February 10, 2021, before Brian A. Newman, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

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 for the undersigned to determine is the amount payable to Respondent, Agency for Health Care Administration (AHCA or Respondent), as reimbursement for medical expenses paid on behalf of Robin McBride,

pursuant to section 409.910, Florida Statutes (2020),¹ from settlement proceeds the estate received from third parties.

PRELIMINARY STATEMENT

On December 4, 2020, Petitioner filed a Petition to Determine Medicaid's Lien Amount to Satisfy Claim Against Personal Injury Recovery by the Agency for Health Care Administration (Petition). The Petition challenged AHCA's placement of a Medicaid lien in the amount of \$41,250.00² on Petitioner's \$110,000 settlement proceeds from third parties.

Prior to the final hearing, the parties filed a Joint Pre-hearing Stipulation in which they stipulated to certain facts and law. To the extent relevant, the parties' stipulated facts and law have been incorporated below.

At the final hearing, Petitioner presented testimony from two witnesses, Louis Blanco, Esquire, and Malcom Purow, Esquire. Petitioner's Exhibits 1 through 4 were admitted in evidence. Respondent did not call any witnesses or offer any exhibits.

The parties timely filed Proposed Final Orders, which have been considered in preparing this Final Order.

FINDINGS OF FACT

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

¹ All references to Florida Statutes are to the 2020 codification, unless otherwise indicated.

² At the final hearing, the parties stipulated that the total amount recoverable under the lien pursuant to the statutory formula found in section 409.910(11)(f) should be reduced to \$39,265.00, to give Petitioner credit for additional taxable costs.

2. On July 12, 2019, Robin McBride was catastrophically injured and died as a result of being struck by a vehicle (a Hummer 2) while riding a bicycle on the sidewalk. The vehicle struck Mrs. McBride after the driver failed to stop at a stop sign.

3. Mrs. McBride was knocked off the bicycle and struck her head on the pavement. Following the accident, Mrs. McBride was initially conscious but incoherent, and was transported by fire rescue to the hospital.

4. After she was admitted to the hospital, Mrs. McBride was placed in a medically-induced coma. Unfortunately, Mrs. McBride did not recover and died at the hospital on August 3, 2019, following a 22-day hospital stay.

5. Mrs. McBride was survived by her husband, adult children, and grandchildren. She had been married to her husband for 35 years. At the time of her death, Mrs. McBride was a homemaker, but she was not employed elsewhere and earned no income.

6. The McBride estate brought a personal injury action to recover for her wrongful death against the tortfeasor and his insurer.

7. In 2020, the McBride estate settled the tort action for a total recovery of \$110,000, representing the insurer's policy limits of \$100,000, and \$10,000 contributed directly by the tortfeasor from his own funds.

8. The tortfeasor had additional insurance under a commercial policy issued by another insurer. The commercial policy limits were \$1 million, but coverage was denied because the vehicle that struck Mrs. McBride was not registered in the name of the tortfeasor's business.

9. AHCA was properly notified of the lawsuit and indicated it had paid benefits related to the injuries from the accident in the amount of \$87,828.24. AHCA has asserted a lien, pursuant to the statutory formula reduction, of \$39,265.00, against the settlement proceeds of \$110,000.

10. AHCA stipulated that Mrs. McBride's estate suffered significant economic and non-economic damages due to Mrs. McBride's injury and death, but did not stipulate as to the value of these damages.

11. Petitioner presented claim valuation testimony from Louis Blanco, Esquire, the attorney who represented the McBride estate in the claim asserted against the tortfeasor and his insurer.

12. Mr. Blanco has practiced personal injury law in Florida since 1994. Mr. Blanco placed a “conservative” value on the McBride claim of \$1.1 million.

13. Mr. Blanco estimated that economic damages for loss of support and services to the surviving spouse would range between \$150,000 and \$200,000 based on Mrs. McBride’s economic value as a homemaker. Economic damages also include past medical care, which was \$87,828.24, the amount of the Medicaid lien.

14. Mr. Blanco testified that the non-economic damages due to the estate—including the loss of companionship and pain and suffering—would exceed \$800,000. Mr. Blanco also noted that liability was not an issue in the case given that the vehicle struck Mrs. McBride after the driver ran a stop sign. Mr. Blanco conducted an asset search of the tortfeasor and determined that an excess judgment against the tortfeasor would be uncollectible. Mr. Blanco testified that the tortfeasor contributed \$10,000 of personal funds to settle the claim because he was very remorseful that he had caused the accident.

15. Mr. Blanco emphasized the fact that the insurer paid its policy limits of \$100,000 immediately after the death certificate was provided, an indication that the insurer valued the claim above its policy limits. The commercial insurer also requested the death certificate, but refused to pay after it was determined that there was no coverage due to the vehicle registration. Mr. Blanco testified that he believes the commercial insurer would have quickly tendered its policy limits of \$1 million—had the claim been covered—because there was no liability defense and Mrs. McBride was survived by her husband of 35 years.

16. Using the pro rata allocation methodology, Mr. Blanco testified that \$8,782.82 of the \$110,000 settlement proceeds should be allocated to past medical expenses because the personal injury claim was settled for ten percent of its conservative value.

17. Mr. Blanco's testimony was credible and persuasive and is accepted.

18. Petitioner also presented valuation testimony from Malcolm Purow, Esquire, an attorney who has practiced personal injury law in Florida for 30 years. Mr. Purow is board certified in Civil Trial Law by the Florida Bar.

19. As to economic damages, Mr. Purow valued the damages for loss of support and services to the surviving spouse at \$180,000, and damages for past medical care at \$87,828.24, the amount of the Medicaid lien.

20. Mr. Purow testified that adding non-economic damages to the economic damages raises the total value of the claim to \$2 million. Mr. Purow conceded, however, that \$1.1 million is an acceptable conservative value for the claim.

21. Mr. Purow used the pro rata allocation methodology and found that that \$8,782.82 of the \$110,000 settlement proceeds should be allocated to past medical expenses because the personal injury claim was settled for ten percent of its conservative value of \$1.1 million.

22. AHCA did not present any expert valuation testimony and did not propose a valuation that was less than \$1.1 million. There is no reasonable basis to reject the testimony of Mr. Blanco or Mr. Purow, and their testimony that \$1.1 million is a reasonable and conservative value for the McBride estate's claim is accepted.

23. The undersigned finds that the value of the McBride estate's claim is \$1.1 million, and that \$8,782.82 of the \$110,000 settlement proceeds should be allocated to past medical expenses.

CONCLUSIONS OF LAW

24. DOAH has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.57(1) and 409.910(17), Florida Statutes. *Giraldo v. Ag. for Health Care Admin.*, 248 So. 3d 53 (Fla. 2018).

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

26. Petitioner's burden of proof to challenge the statutory lien is clear and convincing evidence. § 409.910(17)(b), Fla. Stat.; *Gallardo by & through Vassallo v. Dudek*, 963 F.3d 1167, 1182 (11th Cir. 2020)(finding no conflict between the clear and convincing standard and federal law).

27. Medicaid is a cooperative federal-state medical assistance program. *See* 42 U.S.C. § 1396, *et seq.* Florida has elected to participate in the program, and thus must comply with federal Medicaid statutes and regulations. *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990); *Public Health Trust of Dade Cty. v. Dade Cty. Sch. Bd.*, 693 So. 2d 562, 564 (Fla. 3d DCA 1997).

28. The federal Medicaid program requires every participating state to implement a third-party liability provision that authorizes a state to seek reimbursement for Medicaid expenditures from third parties when those resources become available. *See* 42 U.S.C. § 1396a(a)(25); § 409.910(4), Fla. Stat.; *Giraldo*, 248 So. 3d at 55. To accomplish this, section 409.910(6) establishes that AHCA is automatically assigned any rights a Medicaid recipient has to third-party benefits. Section 409.910(1) states, in part:

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 paid in full from, and to

the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid.

29. In addition, section 409.910(7) authorizes AHCA to recover payments paid from any third party, the recipient, the provider of the recipient's medical services, or any person who received the third-party benefits.

30. Section 409.910(11)(f) provides a formula to establish the amount AHCA may recover from a settlement, as follows:

(f) Notwithstanding any provision in this section to the contrary, in the event of an action in tort against a third party in which the recipient or his or her legal representative is a party which results in a judgment, award, or settlement from a third party, the amount recovered shall be distributed as follows:

1. After attorney's fees and taxable costs as defined by the Florida Rules of Civil Procedure, one-half of the remaining recovery shall be paid to the agency up to the total amount of medical assistance provided by Medicaid.

2. The remaining amount of the recovery shall be paid to the recipient.

3. For purposes of calculating the agency's recovery of medical assistance benefits paid, the fee for services of an attorney retained by the recipient or his or her legal representative shall be calculated at 25 percent of the judgment, award, or settlement.

4. Notwithstanding any provision of this section to the contrary, the agency shall be entitled to all medical coverage benefits up to the total amount of medical assistance provided by Medicaid. For purposes of this paragraph, "medical coverage" means any benefits under health insurance, a health maintenance organization, a preferred provider arrangement, or a prepaid health clinic, and the portion of benefits designated for medical

payments under coverage for workers' compensation, personal injury protection, and casualty.

31. As the parties stipulated, application of the formula set forth in section 409.910(11)(f) to the \$110,000 settlement proceeds recovered by Petitioner results in AHCA being owed \$39,265.00 to satisfy the Medicaid lien. Petitioner contends, however, that a lesser amount is owed because the personal injury claim was settled for less than its full value.

32. Section 409.910(17)(b) provides an administrative procedure to determine whether a lesser portion of the total recovery should be allocated as reimbursement for past medical expenses, instead of the amount calculated pursuant to section 409.910(11)(f). Section 409.910(17)(b) provides, in pertinent part, that a recipient:

[M]ay 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 20 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 In order to successfully challenge the amount designated as recovered medical expenses, the recipient must prove, by clear and convincing evidence, that the portion of the total recovery which should be allocated as past and future medical expense 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.

33. The formula set forth in section 409.910(11)(f) provides an initial determination of AHCA's recovery for past medical expenses paid on a

Medicaid recipient's behalf, and section 409.910(17)(b) sets forth an administrative procedure for an adversarial challenge to that recovery. "[W]hen AHCA has not participated in or approved a settlement, the administrative procedure created by section 409.910(17)(b) ... serves as a means for determining whether a lesser portion of the 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)." *Eady v. Ag. for Health Care Admin.*, 279 So. 3d 1249, 1255 (Fla. 1st DCA 2019) (quoting *Delgado v. Ag. for Health Care Admin.*, 237 So. 3d 432, 435 (Fla. 1st DCA 2018)). To challenge successfully the amount payable to AHCA, the Medicaid recipient must prove that a lesser portion of the total recovered should be allocated as reimbursement for past medical expenses than the amount AHCA has calculated pursuant to section 409.910(11)(f).

34. The undersigned concludes that Petitioner proved, by clear and convincing evidence, that the \$110,000 settlement proceeds represent ten percent of the value of Petitioner's wrongful death claim.

35. Mrs. McBride's past medical expenses, which have been stipulated to by the parties, consist of the amounts provided by Medicaid of \$87,828.24. When applying the percentage allocation of ten percent to the past medical expenses of \$87,828.24, the result is \$8,782.82, which constitutes the share of the settlement proceeds properly allocated to Petitioner's recovery of past medical expenses under the pro rata allocation methodology.

36. Although imperfect, the pro rata allocation methodology Petitioner relies upon here has been accepted as an appropriate methodology, and must be accepted when there is no reasonable basis in the record to reject it. *See Giraldo*, 248 So. 3d at 56; *Bryan v. State*, 291 So. 3d 1033, 1036 (Fla. 1st DCA 2020); *Mojica v. Ag. for Health Care Admin.*, 285 So. 3d 393, 398 (Fla. 1st DCA 2019); *Eady*, 279 So. 3d at 1259. Because there is no reasonable basis to reject the pro rata allocation methodology in this case, AHCA's Medicaid lien

must be reduced to \$8,782.82, representing ten percent of the stipulated amount of past medical expenses.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Agency for Health Care Administration is entitled to \$8,782.82 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 9th day of March, 2021, in Tallahassee, Leon County, Florida.



BRIAN A. NEWMAN
Administrative Law Judge
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Filed with the Clerk of the
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this 9th day of March, 2021.

COPIES FURNISHED:

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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.