

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARMANDO R. PAYAS, ESQUIRE, GUARDIAN
AD LITEM FOR A.D.J., JR., CARVETTA
TAYLOR; AND ARTHUR D. JAMISON, SR.;
INDIVIDUALLY, AND ON BEHALF OF
A.D.J., JR., A MINOR,

Petitioners,

vs.

Case No. 21-1380MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

FINAL ORDER

Pursuant to notice, a hearing was conducted by Zoom Conference in this case, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2020),¹ on June 17, 2021, before Administrative Law Judge ("ALJ") Cathy M. Sellers.

APPEARANCES

For Petitioner: Carlos R. Diez-Arguilles, Esquire
 Maria D. Tejedor, Esquire
 Diez-Arguelles & Tejedor, P.A.
 505 North Mills Avenue
 Orlando, Florida 32803

For Respondent: Alexander R. Boler, Esquire
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¹ All references to chapter 120 are to the 2020 codification.

STATEMENT OF THE ISSUE

The issue to be determined is the amount to be paid, pursuant to section 409.910(17)(b), Florida Statutes, from the proceeds of a third-party settlement, in full satisfaction of the agency's Medicaid lien.²

PRELIMINARY STATEMENT

On April 23, 2021, Petitioner Armando Payas, as Guardian Ad Litem for A.D.J., Jr., and Petitioners Carvetta Taylor and Arthur D. Jamison, Sr., individually and on behalf of A.D.J., Jr., filed a Petition to Allocate the Settlement Recovery and Reduce the Amount of the Lien Asserted by the Agency for Health Care Administration (Medicaid)], to determine the amount to be paid to Respondent, the Agency for Health Care Administration ("AHCA"), in satisfaction of the Medicaid lien that AHCA has asserted against A.D.J., Jr.'s, settlement in a medical malpractice action.

The final hearing was scheduled for, and held on, June 17, 2021. Petitioners presented the testimony of Maria D. Tejedor, who testified as a fact and expert witness, and Todd E. Copeland, who testified as an expert witness. Petitioners' Exhibit Nos. 1 and 7 through 12 were admitted into evidence without objection; and Petitioners' Substitute Exhibit No. 2 and Exhibit Nos. 3, 4, 5, and 10 were admitted into evidence over objection. AHCA did not present any witnesses or tender any exhibits for admission into the record.

² All references to chapter 409 are to the 2020 version, which was in effect at the time that the underlying third-party medical malpractice case settled. AHCA's right to reimbursement from third-party benefits vests when the third-party settlement agreement is executed. The date on which AHCA's right to reimbursement vests, in turn, determines the version of section 409.910 that applies in proceedings to determine the portion of the third-party settlement payable to AHCA in satisfaction of its Medicaid lien. *See Cabrera v. Ag. for Health Care Admin.*, 315 So. 3d 140, 142 (Fla. 1st DCA 2021); *Eady v. State, Ag. for Health Care Admin.*, 279 So. 3d 1249, 1250 n.1 (Fla. 1st DCA 2019)(citing *Suarez v. Port Charlotte HMA, LLC*, 171 So. 3d 740 (Fla. 2d DCA 2015)).

Pursuant to Petitioners' motion, a Protective Order was entered on July 16, 2021, keeping confidential Petitioners' Substitute Exhibit No. 2, as required by the third-party settlement agreement.

The one-volume Transcript was filed at the Division of Administrative Hearings ("DOAH") on July 13, 2021. Pursuant to motion, the deadline for filing proposed final orders was extended to July 28, 2021. The parties timely filed their Proposed Final Orders ("PFOs") on July 28, 2021, and both PFOs have been duly considered in preparing this Final Order.

FINDINGS OF FACT

The Parties

1. Petitioner Armando R. Payas is a court-appointed guardian ad litem for A.D.J., Jr., a minor. Petitioners Carvetta Taylor and Arthur D. Jamison, Sr., are A.D.J., Jr.'s, parents.

2. Respondent, AHCA, is the state agency that administers the Medicaid program in Florida. § 409.902, Fla. Stat.

Stipulated Facts

3. In the underlying medical malpractice action, Petitioners alleged that the liable third-party negligently failed to provide proper prenatal care, identify and treat prenatal stress, and timely order a Caesarian section delivery. Petitioners asserted that this caused A.D.J., Jr., to suffer severe and permanent brain damage, which resulted in substantial expenses being incurred for his medical and nursing care.

4. There also is a separate cause of action asserted on behalf of A.D.J., Jr.'s, parents, Carvetta Taylor and Arthur Jamison, for their own injuries for their loss of services, earnings, companionship, society, and affection of A.D.J., Jr., and for the value and expense of A.D.J., Jr.'s, hospitalizations and medical and nursing care, in the past and future.

5. As a result of the alleged third-party negligence, Petitioner A.D.J., Jr., sustained severe and permanent brain damage, including hypoxic ischemic encephalopathy and neurodevelopment disorder. As a result of those permanent injuries, A.D.J., Jr., requires medical care and treatment for the rest of his life.

6. AHCA, through the Medicaid program, paid \$39,854.66 for A.D.J., Jr.'s, medical care related to his claim against the liable third-parties in Petitioners' medical malpractice action.

Facts Based on Evidence Adduced at the Final Hearing

7. A.D.J., Jr., is a minor child for whom Medicaid paid medical expenses for treatment for injuries resulting from third parties' failure to provide proper prenatal care, identify and treat prenatal distress, and timely order a Caesarian delivery.

8. As stated above, as the result of this negligent treatment, A.D.J., Jr., sustained severe and permanent brain damage, including hypoxic ischemic encephalopathy and neurodevelopment disorder, which results in him suffering from a seizure disorder. As a result of these injuries, he will require a certain level of medical care for the rest of his life. Additionally, his future earnings capacity is negatively affected, due to cognitive impairment resulting from his birth-related injuries.

9. Medicaid first made payments for A.D.J., Jr.'s, medical care in 2012.

10. Petitioners initiated a medical malpractice action against one or more medical providers. The action ultimately settled in 2021, for \$775,000.00.

11. AHCA has asserted a Medicaid lien, in the amount of \$39,854.66 against the portion of the settlement allocated to A.D.J., Jr.³

³ AHCA may assert a lien only on past medical expenses. *Giraldo v. Ag. for Health Care Admin.*, 248 So. 3d 53, 56 (Fla. 2018).

12. If the formula in section 409.910(11)(f) is applied to the settlement proceeds allocated to A.D.J., Jr., then the full amount of the \$39,864.66 Medicaid lien should be paid to AHCA.⁴

13. Maria Tejedor, the lead attorney representing A.D.J., Jr., and his parents in the underlying medical malpractice case, testified regarding the value of A.D.J., Jr.'s, medical malpractice claim.

14. Tejedor is a Florida Bar Board-certified attorney in civil trial practice with over 20 years of experience in medical malpractice matters, focusing primarily on civil actions involving infants and children who have sustained brain damage. She has extensive experience in the valuation of these types of cases.

15. Based on Tejedor's experience with similar cases involving children who have sustained brain damage as a result of medical malpractice, she estimated that the full value of A.D.J., Jr.'s, medical malpractice case was \$21,939,105.12.

16. Based on A.D.J., Jr.'s, medical history, and on Tejedor's experience in valuing similar medical malpractice cases and allocating settlement amounts, she (Tejedor) testified that the \$21,939,105.12 value of the medical malpractice case would properly be allocated as follows: \$15,694,185.50 for future medical expenses; \$1,204,418.00 for lost earnings' capacity; \$5,000,000.00 for pain and suffering; \$39,854.66 for the Medicaid lien; and \$646.96 for another medical services lien.

17. The underlying medical malpractice case settled for substantially less than its full value, in part because the treating physician was uninsured, and also because one of the birth-related injuries that A.D.J., Jr., incurred,

⁴ As discussed below, the formula in section 409.910(11)(f) creates a presumptive "default allocation" of the third-party settlement proceeds. This presumptive allocation may be rebutted in an administrative proceeding—such as this proceeding—brought under section 409.910(17)(b), to contest the amount designated as recovered medical expenses under the formula.

attention deficit hyperactivity disorder, could partially be attributed to A.D.J., Jr., having inherited the condition.

18. The \$775,000.00 settlement amount constitutes 3.5 percent of the full value of \$21,939,105.12 of the case.

19. Using the pro rata method to allocate the \$775,000.00 settlement to future medical expenses, lost earnings, pain and suffering, the Medicaid lien, and the other medical services lien, the value allocated to each of these categories of damages and expenses, discussed above, is multiplied by 3.5 percent, to determine the portion of the total settlement amount allocated to each of these categories.

20. Multiplying 3.5 percent by \$39,854.66, which is the amount of the Medicaid lien, yields \$1,394.91. Pursuant to the pro rata allocation method, this is the amount payable to Medicaid in full satisfaction of its Medicaid lien in this case.

21. Tejedor testified, and the case law bears out, that Florida courts and ALJs consistently have accepted the pro rata allocation method as a reasonable, fair, and accurate methodology, consistent with *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006), for allocating the settlement proceeds when the underlying third-party action is settled for less than the full value of the case.

22. Todd Copeland testified as an expert in the valuation of damages in medical malpractice actions and resolution of healthcare liens.

23. Copeland has practiced law for 29 years, representing injured parties in medical malpractice, personal injury, products liability, negligent security, and premises liability cases. He has testified as an expert between 10 and 20 times over the past ten years regarding the valuation of damages and liens in medical malpractice cases.

24. He testified that \$21,939,105.12 is a conservative estimate of the full value of the underlying medical malpractice case. In formulating his expert opinion, Copeland relied on the report of Petitioners' non-testifying expert,

Dr. Craig H. Lichtblau, M.D.; A.D.J., Jr.'s, medical records; his own communications with A.D.J., Jr.'s, guardian ad litem; the very conservative estimate of A.D.J., Jr.'s, pain and suffering in this case; jury verdicts in similar medical malpractice cases; and his own professional experience regarding the valuation of medical malpractice cases.

25. Copeland confirmed that the pro rata method of allocating the settlement proceeds to each specific category of damages and expenses (i.e., future medical expenses, pain and suffering, lost earnings' capacity, and the Medicaid and other medical services liens) proportional to the amount allocated to that specific category if the total value of the case had been recovered in the third-party settlement, is a fair and reasonable method for allocating the settlement proceeds. He further confirmed that the pro rata methodology is consistent with that ratified by the U.S. Supreme Court in *Ahlborn*.

26. Copeland opined, based on the application of the pro rata allocation method to this case, that AHCA is entitled to payment of 3.5 percent of \$39,854.66, which equals \$1,394.91, in satisfaction of its Medicaid lien.

CONCLUSIONS OF LAW

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

28. Petitioners bear the burden to prove, by clear and convincing evidence, that the amount payable to AHCA in satisfaction of its Medicaid lien is less than the \$39,854.66 that would be due if the formula in section 409.910(11)(f) were applied in this proceeding. *Gallardo v. Dudek*, 963 F.3d 1167, 1182 (11th Cir. 2020)(burden of proof is on the party disputing the amount to be paid in satisfaction of a Medicaid lien, by clear and convincing evidence).

29. Medicaid is a joint federal-state cooperative program that helps participating states provide medical services to residents who cannot afford treatment. *Ahlborn*, 547 U.S. at 275. The federal Medicaid Act ("Act") governs

regulation of the Medicaid program, and it mandates that states that participate in the program comply with federal Medicaid statutes and regulations. *Id.* 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. *Id.* at 276.

30. The Act contains a general anti-lien provision that protects Medicaid recipients by prohibiting state Medicaid agencies from imposing liens against a recipient's property. 42 U.S.C. § 1396p(a)(1).

31. However, the Act also contains a narrow exception to this anti-lien provision which requires states to seek reimbursement for their Medicaid expenditures by pursuing payment from third parties who are legally liable for a Medicaid recipient's medical expenses. *Ahlborn*, 547 U.S. at 284-85. States are preempted from taking any portion of a Medicaid beneficiary's third-party tort judgment or settlement not designated for medical care. *Id.*; *Wos v. E.M.A.*, 568 U.S. 627, 630 (2013).

32. The Act limits the portion of a recipient's tort recovery on which a state can impose a lien to *past medical expenses only*. *Giraldo v. Ag. for Health Care Admin.*, 248 So. 3d 53, 56 (Fla. 2018) ("*Giraldo II*") (emphasis added).

33. To comply with the Act's requirement that states seek reimbursement for Medicaid expenditures from judgments or settlements paid by third parties to Medicaid recipients, Florida enacted section 409.910, the Medicaid Third-Party Liability Act.

34. Section 409.910(6)(c) creates an automatic lien, on behalf of AHCA, on a judgment or settlement paid by a third party to a Medicaid recipient for the amount of medical care furnished by Medicaid to the recipient. The lien attaches automatically when a recipient first receives treatment for which AHCA may be obligated to provide medical assistance under the Medicaid program.

35. Section 409.910(11)(f) establishes a formula for determining the amount owed to AHCA in satisfaction of its Medicaid lien. This statute states, in pertinent part:

(11) The agency may, as a matter of right, in order to enforce its rights under this section, institute, intervene in, or join any legal or administrative proceeding in its own name in one or more of the following capacities: individually, as subrogee of the recipient, as assignee of the recipient, or as lienholder of the collateral.

* * *

(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.

36. This formula creates a presumptive "default allocation" of third-party proceeds subject to a Medicaid lien where, as here, AHCA does not participate in the settlement. *See Roberts. v. Albertson's Inc.*, 119 So. 3d 457, 465-66 (Fla. 4th DCA 2012); *Ag. for Health Care Admin. v. Riley*, 119 So. 3d 514, 516 (Fla. 2d DCA 2013).

37. Consistent with the holding in *Wos* that the Act's anti-lien provision preempts state statutes that create a conclusive presumption regarding the amount of medical expenses for which the state is entitled to reimbursement, the Florida Legislature enacted section 409.910(17)(b), which creates an administrative process under chapter 120 to contest the amount designated as recovered medical expense damages payable to AHCA pursuant to the formula in section 409.910(11)(f). *See Delgado v. Ag. for Health Care Admin.*, 237 So. 3d 432, 435 (Fla. 1st DCA 2018); *Mobley v. State, Ag. for Health Care Admin.*, 181 So. 3d 1233, 1235 (Fla. 1st DCA 2015).

38. Section 409.910(17)(b) states:

(b) 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, 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.

39. Pursuant to section 409.910(17)(b), Medicaid recipients who assert that the amount payable to satisfy AHCA's Medicaid lien should be reduced are entitled to present evidence in an administrative forum to show that the lien amount exceeds the amount recovered, in a third-party settlement or judgment, for past medical expenses. When such evidence is introduced, the ALJ must consider it in determining whether the Medicaid lien should be reduced. *See Harrell v. State, Ag. for Health Care Admin.*, 143 So. 3d 478, 480 (Fla. 1st DCA 2014).

40. The First District Court of Appeal, in *Eady v. State, Agency for Health Care Administration*, 279 So. 3d 1249 (Fla. 1st DCA 2019), determined—under circumstances comparable to those in this case, where the Medicaid recipient presented expert testimony regarding the appropriate share of settlement funds to be allocated to past medical expenses and the agency did not present evidence to refute the experts' opinions—that utilizing the pro rata allocation method for determining the amount of the third-party recovery to be allocated to past medical expenses not only was appropriate,

but was required under the circumstances. *Id.* at 1259. Citing *Giraldo II*, the court in *Eady* determined, as a matter of law, that the ALJ was not authorized to reject uncontroverted testimony where there is no reasonable basis in the evidence for doing so. *Id.*

41. Since *Eady*, Florida courts consistently have held that where a Medicaid recipient presents unrebutted competent substantial evidence to show that the pro rata allocation method supports a reduction of the Medicaid lien as calculated under the formula in section 409.910(11)(f), it is reversible error for an ALJ to reject the use of such methodology in determining the amount of the Medicaid lien pursuant to section 409.910(17)(b), unless there is a reasonable basis in the evidentiary record for doing so. *See, e.g., Bryan v. State, Ag. for Health Care Admin.*, 291 So. 3d 1033, 1036 (Fla. 1st DCA 2020); *Mojica v. State, Ag. for Health Care Admin.*, 285 So. 3d 393, 398 (Fla. 1st DCA 2019); *Larrigui-Negron v. State, Ag. for Health Care Admin.*, 280 So. 3d 550 (Fla. 1st DCA 2019).

42. The pro rata allocation method also consistently has been applied in Medicaid third-party reimbursement challenges brought at DOAH under section 409.910(17)(b), to reduce the amount of AHCA's Medicaid lien. *See, e.g., Armando R. Payas, as Guardian Ad Litem for E.R., a Minor, Jennett Camacho, Individually and on Behalf of E.R., a Minor v. Ag. for Health Care Admin.*, Case No. 21-0442MTR (Fla. DOAH Jun. 1, 2021); *Shirley McBride, as Personal Representative of the Estate of Robin McBride v. Ag. for Health Care Admin.*, Case No. 20-5258MTR (Fla. DOAH Mar. 9, 2021); *Gregory McElveen, through the Personal Representative of his Estate, Daniel Hallup v. Ag. for Health Care Admin.*, Case No. 20-4223MTR (Fla. DOAH Feb. 2, 2021); *Misty Mobley and Tavarious Sanders, Individually and on Behalf of Tavarion Sanders, a Minor v. Ag. for Health Care Admin.*, Case No. 20-4033MTR (Fla. DOAH Dec. 21, 2020); *Mitchell Miller v. Ag. for Health Care Admin.*, Case No. 20-3511MTR (Fla. DOAH Oct. 19, 2020); *Mary Bishop, by and through Her Guardian Nicole Milstead v. Ag. for Health Care Admin.*, Case

No. 20-1526MTR (Fla. DOAH Sept. 23, 2020); *Amy Lopez, Individually and as Parent and Natural Guardian of A.F., a Minor v. Ag. for Health Care Admin.*, Case No. 20-2124MTR (Fla. DOAH Sept. 3, 2020); *Valeria Alcala, a Minor, by Yobany E. Rodriguez-Camacho and Manuel E. Alcala, as Natural Guardians and Next Friends v. Ag. for Health Care Admin.*, Case No. 20-0605MTR (Fla. DOAH Aug. 18, 2020).

43. Here, the competent substantial evidence establishes that the pro rata allocation method is a reasonable methodology for allocating Petitioners' third-party settlement proceeds, including the amount payable to AHCA in satisfaction of its Medicaid lien.

44. As noted above, AHCA did not present any countervailing evidence at the final hearing. Thus, there is no evidentiary basis in the record for rejecting Petitioners' evidence, which, as found above, credibly and persuasively shows that the pro rata allocation method is a fair and reasonable method for determining Petitioners' past medical damages, for purposes of determining the amount payable to satisfy AHCA's Medicaid lien.

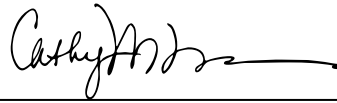
45. Pursuant to *Eady* and other case law cited above, it would be reversible error for the undersigned to reject application of the pro rata allocation method to Petitioners' third-party settlement recovery in this case, for purposes of the amount of the settlement proceeds payable to AHCA in satisfaction of its Medicaid Lien.

46. Based on the foregoing, it is concluded that AHCA is entitled to a payment of \$1,394.91 in satisfaction of 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 is entitled to payment of \$1,394.91 from Petitioners' third-party settlement proceeds in satisfaction of its Medicaid lien.

DONE AND ORDERED this 3rd day of August, 2021, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
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Filed with the Clerk of the
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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.