STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROGER DALE WALDEN,

Petitioner,

vs.

Case No. 21-2709MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on November 29, 2021, by Zoom video-teleconference, before Robert L. Kilbride, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Diego Carlos Asencio, Esquire
Diego C. Asencio, P.A.
4440 PGA Boulevard, Suite 600
Palm Beach Gardens, Florida 33410

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

STATEMENT OF THE ISSUES

Whether the Agency for Health Care Administration's (AHCA) full Medicaid lien of $596,173.98 should be reduced to the amount of $374,584.76 from the Petitioner, Roger Dale Walden's (Petitioner or Walden), $1,000,000.00 gross settlement under the default provisions of

section 409.910(11)(f), Florida Statutes. If not, what lesser amount should be recovered by ACHA under the provisions of section 409.910(17)(b).

PRELIMINARY STATEMENT

Procedural Background

On September 8, 2021, Petitioner filed a "Petition for Reduction on Agency for Health Care Administration Presumptive Lien" with DOAH under the provisions of section 409.910(17)(b). Before the final hearing, Petitioner and Respondent filed a Joint Pre-Hearing Stipulation in which they agreed on many relevant facts.[1]

At the final hearing, Petitioner presented three witnesses: Elizabeth Walker Finizio, Esquire; Mircea Albin Morariu, M.D.; and Petitioner Walden. Petitioner submitted into evidence 14 exhibits, and AHCA noticed one exhibit (labeled A). However, based upon the stipulations and other evidence presented, AHCA decided not to submit it into evidence. Petitioner's Exhibits 1 through 14 were received into evidence without objection.

The parties filed proposed final orders. Both have been reviewed and considered by the undersigned in the preparation of this Final Order.

Respondent has argued that, unless proven otherwise, it must be reimbursed in accordance with the statutory formula in section 409.910(11)(f), which limits AHCA's recovery to the lesser of (1) its full lien, or (2) one-half of the settlement remaining after attorney fees (calculated at 25 percent) and taxable costs are subtracted. In this case, there is no dispute that the (11)(f) formula would result in AHCA recovering $374,584.76 of its full $596,173.98 Medicaid lien.

[1] The undersigned has relied on those stipulated facts, as well as additional facts adduced at the hearing.

Petitioner believes a lesser amount is owed under section 409.910(17)(b). Petitioner has already paid Respondent $374,584.76 in two nearly equal payments. In the Stipulation filed, Petitioner acknowledges AHCA's right to retain the first payment of $187,291.38. Petitioner is seeking a full refund of only the second payment he made totaling $187,293.38.

All citations to the Florida Statutes are to the 2020 version of the Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

Based on the Joint Pre-Hearing Stipulation,[2] the testimony and the documentary evidence presented, the undersigned finds:

1. On August 1, 2016, at 8:43 p.m., near Sugar Loaf Key on U.S. 1, a driver drove her SUV into the back of a motorcycle carrying driver Roger Walden and a passenger. Walden and his passenger were southbound at mile marker 15 when struck from behind by the SUV. The passenger was killed. Walden (age 56) survived but was severely injured.

2. An eyewitness saw the SUV approaching mile marker 15 "real fast" and entering the center safety zone as if to pass the motorcycle. The driver didn't stop once she hit the motorcycle. She kept driving and pushing that motorcycle while sparks flew until it came to a rest outside a business on Bay Point. She first went around a pickup truck. The pickup truck had scratches on its rear bumper from the motorcycle being knocked into it. She then drove a half-mile before stopping her SUV on the Saddle Bunch Keys Bridge.

3. The doctor who treated the driver at the Lower Keys Medical Center ordered lab tests to determine her blood alcohol level. That blood draw at Lower Keys Medical Center was done at 10:25 p.m. This was 95 minutes after the DUI crash. The serum blood alcohol at 10:25 p.m. was .265 g/dL.

[2] Findings 1 through 31 are taken directly from the Joint Pre-Hearing Stipulation with minimal alteration.

4. After obtaining a search warrant a Florida Highway Patrol trooper and Drug Recognition Expert required the driver to submit to a forensic blood draw too. A nurse drew that forensic blood at 12:13 a.m., on August 2, 2016, which is more than three hours after the DUI crash. The results were .182 g/dL.

5. Walden was brought to the Ryder Trauma Center by helicopter on August 1, 2016. The Ryder Trauma Center is the only Level 1 trauma center in Miami-Dade-County verified by the American College of Surgeons. Walden had no idea earlier that day that he would become a resident at Ryder ICU for the next six months, released on January 23, 2017. He arrived at Ryder with a Glasgow Coma Scale (GCS) score of 3. That is a low GCS score. The GCS is the most common scoring system used to describe the level of consciousness in a person following a traumatic brain injury.

6. Ryder had a neurosurgery consult as Walden was not waking during his ICU stay. A brain CT showed bilateral subdural hygromas. A subdural hygroma is a collection of cerebrospinal fluid, without blood, located under the dural membrane. An EEG demonstrated moderate encephalopathy.

7. When first brought to Ryder, Walden was found to have blunt injury to the pelvis, road burn to his chest and abdomen, a right open elbow fracture, a right open knee fracture, a fracture of his right ankle, multiple lacerations to his lower extremities, and a left-hand degloving injury.

8. Walden also lost a lot of blood. Walden was transfused with 4 units of PRBC (packed red blood cells) in resuscitation. A drop in his blood pressure after initial resuscitation caused the trauma doctors to take him emergently to an operating room for an exploratory laparotomy. The surgeons found a pelvic hematoma, a right sacroiliac joint dislocation, and left superior and inferior pubic ramus fractures.

9. The pelvic and ramus fractures were surgically repaired with closed reduction and percutaneous fixation. The right sacroiliac joint was fixated

using a "synthes 7.3 mm x 85 mm partially threaded cannulated screw and washer."

10. The Ryder trauma doctors also addressed a number of other orthopedic injuries. The doctors found right comminuted distal tibia and fibula fractures and a closed pilon fracture. The ankle fracture was stabilized with external fixation. That external fixation was later removed on December 6, 2016. Inter-operatively, doctors closed his left wrist degloving injury. It was repaired with application of Integra skin substitute. They also found a right open medial condyle fracture (the condyle here is the protuberance of bone below knee cap) with an open knee joint, right open elbow joint fracture, and a left subcondylar fracture (jaw fracture). Damage to ulna collateral ligament of right elbow also had to be surgically repaired. Oral and Maxillofacial Surgery (OMFS) was considered for his subcondylar fracture (broken jaw bone) but surgical intervention was not undertaken at that time. Doctors elected to allow the jaw to heal on its own.

11. As an unconscious patient, Walden had to be intubated and kept breathing on a ventilator. He required multiple chest tubes for bilateral traumatic pneumothorax. "Traumatic pneumothorax" means both of his lungs collapsed from trauma. The tubes were inserted to get his lungs inflated again. He was on a ventilator for months. Walden developed acute respiratory distress syndrome (ARDS) that occurs in those who have significant injuries.

12. Walden also developed a bronchopleural fistula of left lung.

13. Due to hemodynamic instability and septic status for pseudomonas pneumonia infections, doctors chose antibiotic treatment instead of bronchopleural fistula surgery.

14. Walden was hooked up to an extracorporeal membrane oxygenation (ECMO) machine on August 20, 2016. This requires insertion of a wire into the jugular vein. The ECMO machine replaces the function of the heart and lungs.

15. Walden developed RUL (right upper lobe) loculated pleural effusion.

16. On January 18, 2017, he was weaned from the ventilator and was on a trach collar. Walden was stable enough for transfer to a "step down unit" on January 23, 2017, and transferred to inpatient rehabilitation. He stayed in impatient rehab for weeks.

17. Walden's injuries and intubation not only caused lung infections, he developed problems from his foley catheter. He had purulent drainage from his urethra.

18. The above physical trauma and injury together with the mental trauma of knowing that the passenger on his motorcycle, who was his life companion (they married on an Indian reservation according to tribal custom), was killed in a preventable drunk driving crash has caused Walden severe mental pain and suffering. Psychiatry was consulted at Ryder for sleep difficulty, stress disorder, depression, anxiety, and PTSD once Walden awoke. He continues to struggle with depression, anxiety, and PTSD and it is expected that he always will.

19. Walden was physically able bodied before the crash. Now his crash related injuries have left him with an ugly right ankle deformity. His upper extremities have partial uncoordinated movement. Only two fingers on his right-hand work at all. His left arm only bends a few inches and his left wrist has very little movement. It is very difficult for Walden to grasp any objects. He can no longer write. He can barely sign his name.

20. Walden made a claim against a restaurant on the basis that it had served alcoholic beverages to the alcohol impaired driver who caused the crash.

21. Walden reached a settlement with the restaurant in the amount of $1,000,000.00, including that Walden released any claim for the death of his passenger and life companion.

22. AHCA did not participate in the settlement.

23. There was no allocation of the past or future economic or noneconomic damages nor for the wrongful death of Walden's life companion in the settlement.

24. AHCA was properly notified of Walden's settlement and indicated it had paid benefits related to the injuries from the incident in the amount of $596,173.98. AHCA has asserted a lien for the full amount it paid, $596,173.98, against Walden's settlement proceeds.

25. Petitioner and AHCA are not aware that anyone else has paid for past medical expenses.

26. AHCA has maintained that it is entitled to application of the section 409.910 formula to determine the lien amount. Applying the statutory reduction formula to this settlement would result in $374,584.76 being payable in satisfaction of AHCA's lien.

27. Petitioner paid $187,291.38 on June 25, 2021, which represents (approximately) half of the statutory formula.

28. Petitioner concedes that AHCA is entitled to retain the $187,291.38 paid on June 25, 2021.

29. Petitioner paid an additional $187,293.38 on August 23, 2021.

30. Petitioner seeks a refund of the additional $187,293.38 paid on August 23, 2021.[3]

31. Petitioner's petition is timely and DOAH has jurisdiction to resolve the parties' dispute.

Elizabeth Walker Finizio

32. Elizabeth Walker Finizio is an attorney practicing in Ft. Lauderdale, Florida. She has been an attorney for 20 years and currently practices personal injury and medical malpractice law with the Finizio Law Group. She is admitted to practice in Florida, Pennsylvania, and New Jersey.

[3] The specific relief requested by Petitioner is also confirmed in the Proposed Final Order submitted by Petitioner.

33. She was called ostensibly to provide an expert opinion regarding (1) the total valuation of Walden's personal injury case as well as (2) providing her opinion regarding the proper methodology to determine what amount of Walden's settlement is fairly allocable to his past medical expenses.

34. Finizio reviewed Walden's case, including his discharge summary, medical records from Dr. Morariu,[4] the police report, and the Joint Pre-Hearing Stipulation filed in this proceeding. She also did research on her own utilizing 2016 CDC life tables.

35. Finizio explained her valuation of the personal injury case for Walden. She testified that it has a value of $3,493,094.53, or approximately $3.5 million.[5]

36. Finizio broke down her opinion of the total value into separate elements of damages, summarized as follows:

- $1 million for past non-economic damages
- $1 million for future non-economic damages
- $597,094.53 for past medical expense damages
- $160,000.00 for past lost wage damages
- $200,000.00 for future lost wage damages
- $536,000.00 for future medical expense damages

37. While Finizio's inclusion of Walden's past medical expense damages was based on real and readily determinable numbers, her assessment of future medical expenses was less persuasive and not based on readily ascertainable facts articulated by her.

38. Furthermore, Finizio's expertise in the area of personal injury cases, and her use of jury verdict research, lent credibility to her assessment of noneconomic damages. However, she did not outline facts adequate to prove the same expertise regarding Petitioner's future medical needs.

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[4] There were no medical records from Dr. Morariu offered into evidence or considered by the undersigned.

[5] The witness and counsel often used rounded numbers in the hearing, with the understanding that the precise numbers should be used in calculations.

39. For instance, Finizio explained that there was no life care plan prepared for Walden by another medical or economic expert for her to review or rely on. Nor did she consult with any doctors regarding future medical costs for Walden.

40. Instead, she testified that she estimated Walden's future medical expense damages based, in part, on the fact that his visit to Dr. Morariu cost $20,000.00. While this was certainly useful information, it fell short of being clear and convincing as a basis for predicting unknown future medical expenses.

41. She estimated $20,000.00 per year in future medicals for 21.8 years, and $100,000.00 for surgeries for Walden. Aside from knowing the cost of *one* visit to Dr. Morariu, which occurred 30 days before the final hearing, her factual basis to support the $20,000.00 figure for 21.8 additional years and $100,000.00 for surgeries, was lacking and not clear or convincing. This was due, in part, to the absence of a life care plan for her to use or rely on.

42. Her additional reliance on life care plans for *other* clients in *other* cases with *other* unexplained injuries or disabilities, is not clear or convincing evidence upon which to base her opinion regarding future medicals for Walden.

43. Further, as explained below, Dr. Morariu's broad range of surgical costs and treatments he estimated were, to a great degree, at odds with the amounts that Finizio estimated would be incurred. This also raised serious doubts about the future medical component of her valuation of Walden's case.

44. Therefore, the undersigned rejects the $536,000.00 future medical portion of Finizio's total valuation as unsupported by clear and convincing evidence.

45. Because $536,000.00 of the $3,493,094.53 total case valuation from Finizio is rejected as unsupported by clear and convincing evidence, only her remaining $2,957,094.53 can be considered as her opinion regarding the anticipated total damages. Nonetheless, as explained below, Dr. Morariu

gave sufficient and credible testimony about the future medicals. His figures were used.[6]

46. As explained below, instead of recovering 28.6 percent of his damages, Walden recovered 32.28 percent of his proven damages. The 32.28 percent represents the $1 million recovery for Walden divided by $3,097,594.53 ($2,957,094.53 plus $140,500.00 in future medicals from Dr. Morariu).

47. Finizio went on to state that AHCA is only entitled to a pro-rata share of the portion of Walden's settlement fairly allocable to past medical expenses.

48. Finizio's opinion on the propriety or use of the pro-rata methodology was not supported by any specific reasoning or facts from her. To the extent she was stating her reading of case law, her legal opinion, while helpful, is not evidence.

Roger Dale Walden

49. Roger Dale Walden is the Petitioner. He explained his background and relationship with his deceased wife, who was a passenger on the motorcycle. He explained what he remembered of the accident and his medical care after the accident. He is no longer able to work, although he wants to. Understandably, he can no longer perform many of the normal and common life activities he could before the accident.

50. Walden stood up and displayed several of his injuries. He also spent a good deal of time explaining his current pain, physical limitations, and other issues that affect him. It is clear to the undersigned that Walden suffered severe and permanent life altering injuries and disfigurement as a result of the motorcycle accident.

51. Medicaid paid for Walden's medical expenses. He was unaware of any outstanding bills or other payors for his past medical expenses.

[6] There was some brief evidence regarding the total value of the case had it gone to a jury trial. However, the Petitioner has not requested that the undersigned consider or use that value.

Doctor Micea Morariu

52. Dr. Micea Morariu is a medical doctor specializing in neurology. He came to the United States in 1970. He has been practicing neurology in Palm Beach since 1982, having previously been a staff neurologist at a major hospital. He completed his residency at a local hospital.

53. Dr. Morariu saw Walden on October 29, 2021. The doctor completed an extensive physical exam of Walden, and obtained several analytical and diagnostic tests regarding Walden's condition. He explained Walden's current condition in great detail. This included Walden's injuries, pain, muscle atrophy, physical limitations, and memory problems.[7]

54. Dr. Morariu attributed Walden's current physical and mental conditions, limitations, and disabilities to the motorcycle accident on August 1, 2016.

55. He identified several treatments that could be offered to Walden. He recommended starting with conservative treatment and increasing the complexity of those treatments, if necessary. He did not describe in any detail what particular process or procedures are involved in the treatments, or how many such treatments would be necessary.

56. However, based on evidence credited by the undersigned, the following is a summary of future medical expenses, which Dr. Morariu believes will be necessary for Walden within a reasonable degree of medical certainty:

> 1. Physical Therapy - $4,500.00 per year.
>
> 2. Epidural Nerve Blocks - $1,000.00 for each of two (2) segments of the spine, each involving three (3) treatments - $6,000.00.
>
> 3. Ankle Surgery - $50,000.00.

[7] Dr. Morariu's extensive explanation is outlined in the hearing transcript, pages 71 through 90. His general overview of Walden's injuries and limitations is fully credited, and there seems to be no real dispute between the parties on this. In fact, Walden's injuries are outlined extensively by the parties in their Joint Pre-Hearing Stipulation.

> 4. Two lower back surgeries (cervical and lumbar areas) - $80,000.00.
>
> 5.Total estimate of future medicals from Dr. Morariu - **$140,500.00.**[8]

57. AHCA did not call any witnesses, present any experts regarding a different value of the damages or utilize its own witnesses to propose a different method to value the total damages suffered by Walden. Nor did ACHA independently provide any affirmative or contrary evidence regarding the amount in Walden's settlement "fairly attributable" to medical expenses.

58. Other than persuading the undersigned that Finizio's inclusion of $536,000.00 of future medicals in her valuation number was incorrect, AHCA did not persuasively contest Finizio's remaining valuation of Petitioner's total damages or the methodology used to calculate the allocation of past medical expenses in the settlement he reached. Nor did ACHA effectively assail Dr. Morariu's estimate of $140,500.00 for future medical expenses Walden would incur.

59. As a result, but for the $536,000.00 attributable to future medicals by Finizio, Petitioner's evidence regarding his projected total damages was essentially unrebutted and uncontradicted by ACHA.

60. To recap the evidence, Petitioner presented the unrebutted expert testimony of an experienced trial lawyer who provided an opinion as to the total value of Walden's personal injury claim. This evidence, with certain adjustments excluding her future medicals portion and inserting

[8] It was the Petitioner's burden to prove his challenge to ACHA's figures by clear and convincing evidence, as well as the future medicals he proposes to include in the total valuation of his case under the pro-rata methodology. Dr. Morariu's estimates for some of his future medicals lacked specificity, particularly with respect to *how many* physical therapy and epidurals sessions would be necessary. This was absent from the record. As a result, the undersigned is constrained to calculate using only one year of physical therapy and one year of epidurals. It would be speculation on the undersigned's part to award additional years, in the absence of clear and convincing evidence, to support a precise number of years.

Dr. Morariu's instead, provided an adequate basis to calculate what portion of Walden's undifferentiated settlement was "fairly allocable" to past medical expenses, utlizing the pro-rata methodology.

61. More specifically, in "doing the math" under the proportionality methodology--the $1,000,000.00 settlement represents a 32.28 percent recovery of all damages. ($1,000,000.00 is 32.28 percent of $3,097,594.53 – which excludes Finizio's $536,000.00 for future medicals, but includes Dr. Morariu's $140,500.00 instead.)

62. Applying the same percentage or ratio of 32.28 percent to the $596,173.98 in past medical expenses paid out by AHCA, the undersigned finds that $192,463.53 in the settlement agreement is the amount to be recovered by ACHA under the proportionality test as "fairly allocable" to past medical expenses.[9]

63. Petitioner conceded in the parties' Joint Pre-Hearing Stipulation, at the hearing, and in his proposed final order, that he only seeks a refund of the additional $187,293.38 he paid on August 23, 2021.

64. This stipulation by Petitioner results in ACHA retaining the $187,291.38 and is owed the additional sum of $5,172.15 under the proportionality test outlined below.[10]

65. Like other cases, pretrial stipulations are enforceable in Medicaid lien recovery cases. *Delgado v. Ag. for Health Care Admin.,* 237 So. 3d 432 (Fla. 1st DCA 2018), and cases cited therein. It would be error for the undersigned to overlook or reject the binding nature of the stipulation reached between the parties.

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[9] As a point of law, the proportionality ratio or percentage is applied to the full amount ACHA spent, not the reduced amount under the section 409.910(11)(f) formula. *See generally Ag. For Health Care Admin. v. Rodriguez,* 294 So. 3d 441 (Fla. 1st DCA 2020), wherein the Court applied the proportionality ratio or percentage formula to the full lien amount claimed by ACHA, not the reduced amount under the section 409.910(11)(f) formula.

[10] The additional amount owed, $5,172.15, is: $192,463.53 (pro-rata amount owed to ACHA) minus $187,291.38 (already paid to ACHA on June 25, 2021). This results in ACHA being owed the additional sum of $5,172.15.

CONCLUSIONS OF LAW

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

67. DOAH has jurisdiction of this matter, pursuant to section 409.910(17)(b).

General Principles of Medicaid Lien Law

68. "Medicaid is a cooperative federal-state welfare program providing medical assistance to needy people." *Roberts v. Albertson's, Inc.*, 119 So. 3d 457, 458 (Fla. 4th DCA 2012). Although state participation in this federal program is voluntary, once a state elects to participate, it must comply with the federal Medicaid law. *Id.*

69. Federal law requires participating states to seek reimbursement for medical expenses incurred on behalf of Medicaid recipients who later recover from liable third parties.

70. Under the United States Supreme Court's reasoning in *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006), the federal Medicaid anti-lien provision at 42 U.S.C. § 1396p(a)(1) generally prohibits a Medicaid lien on any proceeds from a Medicaid recipient's tort settlement.

71. However, the provisions requiring states to seek reimbursement of their Medicaid expenditures also create an express exception to the anti-lien law, and authorize states to seek reimbursement from the medical expense portion of the recipient's tort recovery.

72. As previously noted, the Federal Medicaid Act limits a state's recovery to certain portions of the settlement funds received by the Medicaid recipient. In Florida, this has been recently interpreted by the Florida Supreme Court to be the amount in a personal injury settlement, which is fairly allocable to

past (not future) medical expenses. *Giraldo v. Ag. for Health Care Admin.*, 248 So. 3d 53, 56 (Fla. 2018).[11]

73. In this case, Walden settled his claim against a third party potentially liable to him for his injuries related to AHCA's Medicaid lien. Therefore, AHCA's lien may be enforced against his tort settlement.

74. The underlying question in this case is: How much is AHCA entitled to recover from Walden for the medical payments it provided to him?

Florida Law on Medicaid Lien Recovery

75. Section 409.910(11) establishes a formula to determine the amount AHCA may recover for medical assistance benefits paid from a judgment, award, or settlement from a third party. Section 409.910(11)(f) states, in pertinent part:

> 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

[11] Recently, in *Gallardo v. Dudek*, 963 F.3d 1167 (11th C.A. 2020), the Eleventh Circuit Court of Appeals determined that amounts in a settlement agreement fairly allocable to both past and future medical expenses are subject to the agency's lien. However, this is contrary to the Florida Supreme Court's holding in *Giraldo*. Generally, state courts are not required to follow the decisions of intermediate federal appellate courts on questions of federal law. "Although state courts are bound by the decisions of the United States Supreme Court construing federal law, *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 220–221, 51 S.Ct. 453, 75 L.Ed. 983 (1931), there is no similar obligation with respect to decisions of the lower federal courts." *Abela v. Gen. Motors Corp.*, 469 Mich. 603, 677, N.W. 2d 325, 327 (2004), *cert. denied*, 543 U.S. 870, 125 S.Ct. 98, 160 L.Ed.2d 117 (2004). Decisions of numerous state Supreme Courts have similarly held that state courts are under no obligation to follow the decisions of the lower federal courts. *See, e.g., Skelly Oil Co. v. Jackson*, 194 Okla. 183, 148, P.2d 182, 185 (1944) ("[D]ecisions of lower federal courts are persuasive and usually followed unless a conflict between the decisions of such courts makes it necessary to choose between one or more announced interpretations."). *Carnival Corp. v. Carlisle*, 953 So. 2d 461 (Fla. 2007). As a result, the undersigned has limited his inquiry to that portion of Walden's settlement allocable to *past* medical expenses.

> 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.

76. In essence, section 409.910(11)(f) provides that the agency's recovery for a Medicaid lien is the *lesser of*: (1) its full lien; or (2) one-half of the total award, after deducting attorney's fees of 25% of the recovery and taxable costs, not to exceed the total amount actually paid by Medicaid on the recipient's behalf. *See Ag. for Health Care Admin. v. Riley*, 119 So. 3d 514 (Fla. 2d DCA 2013).[12]

77. Nonetheless, another corresponding section, section 409.910(17)(b), provides a method by which a Medicaid recipient may challenge the amount AHCA seeks under the default formula found at section 409.910(11)(f).

[12] Here, the parties agreed in the Joint Pre-hearing Stipulation that application of the section 409.910(11)(f) formula to Petitioner's settlement would require payment to AHCA of $374,584.76.

78. More specifically, 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, thus, what portion of a petitioner's settlement may be recovered to reimburse the Medicaid lien held by AHCA.

Section 409.910(17)(b) states:

> A recipient 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 payable to the agency, the recipient must prove, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f) or that Medicaid provided a lesser amount of medical assistance than that asserted by the agency.[13]

[13] In this case, the parties agreed that the standard of proof for the Petitioner is clear and convincing evidence.

79. In simple terms, if Petitioner can demonstrate that the portion of his 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 should be reduced.

80. The difficult question of how this is demonstrated had been the subject of considerable debate in Florida, and around the country. Unfortunately, this fundamental question has not been directly decided by the United States Supreme Court, as it acknowledged in *Wos v. E.M.A.,* 568 U.S. 627 (2013):

> A question the Court had no occasion to resolve in *Ahlborn* is how to determine what portion of a settlement represents payment for medical care. The parties in that case stipulated that about 6 percent of respondent Ahlborn's tort recovery (approximately $35,600 of a $550,000 settlement) represented compensation for medical care. *Id.,* at 274, 126 S. Ct. 1752. The Court nonetheless anticipated the concern that some settlements would not include an itemized allocation. It also recognized the possibility that Medicaid beneficiaries and tortfeasors might collaborate to allocate an artificially low portion of a settlement to medical expenses.

Wos, 568 U.S. at 634.

81. In an effort to arrive at the proper answer to this "allocation question" in Florida, several Florida District Courts of Appeal opinions have relied on the following statement by the Florida Supreme Court, and have utilized it, in part, to identify one correct methodology to establish AHCA's lien. In *Giraldo,* the Florida Supreme Court stated:

> Because we hold that the federal Medicaid Act prohibits AHCA from placing a lien on the future medical expenses portion of a Medicaid recipient's tort recovery, we remand with instructions that the First District direct the ALJ to reduce AHCA's lien amount to $13,881.79. *Although a factfinder may*

> *reject "uncontradicted testimony," there must be a "reasonable basis in the evidence" for the rejection. Wald v. Grainger,* 64 So. 3d 1201, 1205-06 (Fla. 2011). *Here, Villa presented uncontradicted evidence establishing $13,881.79 as the settlement portion properly allocated to his past medical expenses, and there is no reasonable basis in this record to reject Villa's evidence. For this reason, no further fact finding is required.* (Emphasis added).

Giraldo, 248 So. 3d at 56.

The Proportionality Methodology in Florida

82. The question that had existed in Florida regarding the appropriate methodology to determine a fair allocation of past medical expenses in an undifferentiated settlement agreement was resolved by the First District Court of Appeal in a series of related opinions in 2019. While the Florida Supreme Court has not issued a definitive opinion expressly or specifically addressing this matter, the prevailing law in the First District Court of Appeal appears to be settled when certain evidentiary circumstances exist.[14]

83. Beginning with *Eady v. Agency for Health Care Administration*, 279 So. 3d 1249 (Fla. 1st DCA 2019), and followed by *Larrigui-Negron v. Agency for Health Care Administration*, 280 So. 3d 550 (Fla. 1st DCA 2019), and *Mojica v. Agency for Health Care Administration*, 285 So. 3d 393 (Fla. 1st

[14] A recent district court opinion observed that the Florida Supreme Court has "accepted the use of the pro-rata method to reduce the Medicaid lien when the Medicaid recipient has presented competent, substantial, and uncontradicted evidence to support the position that only a portion of the settlement should be allocated for past medical expenses." *See Soto v. Ag. for Health Care Admin.,* 313 So. 3d 143 (Fla. 1st DCA 2020)

DCA 2019), these appellate panels adopted the proportionality test or pro-rata method advanced by Petitioner as one acceptable method of proof.[15]

84. Under the proportionality test, a petitioner may carry his burden of proof, and the tribunal may reduce AHCA's lien, by the same ratio or percentage that petitioner's personal injury settlement bears to the total projected value of his claim. (e.g., Petitioner's total settlement amount divided by the total case value equals a percentage or proportion. That percentage is multiplied by ACHA's lien to arrive at the reduced amount owed to ACHA). The total value may be established through the testimony of expert witnesses called by Petitioner, typically experienced personal injury attorneys.

85. Notably, if the Petitioner's expert testimony concerning the total case value and resulting proportionality ratio is not adequately contradicted or rebutted by Respondent, then those values stand as the means to calculate the proper and fair allocation in the settlement agreement for past medicals, ultimately setting the amount AHCA may recover. *Eady*, 279 So.3d at 1258.

86. In this case, other than demonstrating that Finizio's inclusion of her future medicals in her valuation of the case was flawed and unsupportable, there was no evidence presented by AHCA to contest or contradict a finding that the amount of $192,463.53 would be the fair allocation of past medical expenses in Petitioners' settlement.

87. Counsel for AHCA cross-examined Petitioner's witnesses, but elicited no compelling information or persuasive evidence to assail their opinions. As

[15] These cases do not exclude the possibility that the agency may present evidence to refute or contradict the expert testimony offered. Likewise, every case is different. Neither *Eady, Larrigui-Negron*, or *Mojica* define the exact parameters of the pro-rata formula. Nor do they exclude the possibility that there may be other acceptable or competing methods of proof to use at the hearing. Likewise, there may be facts elicited from the experts on direct or cross examination or other evidence presented, which may warrant an adjustment to the proportionality test or the total damages projected by the experts. As an example, the undersigned has previously found that a petitioner's high degree of comparative negligence in an accident should be considered insofar as it affects the total damages recoverable by the petitioner at trial. *Hosek ex rel. Hosek v. Ag. For Health Care Admin.*, Case No. 18-6720MTR (Fla. DOAH July 3, 2019)(Revised Final Order Apr. 27, 2020).

a result, a fair allocation of past medical expenses recovered in the Petitioner's undifferentiated settlement would result in ACHA being owed the reduced amount of $192,463.53.

88. 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.

89. In *Eady* and related cases, the First District Court of Appeal has cautioned that it would be an error to reject the expert testimony, unless there is a basis in the record to do so. With the limited exception of discounting the total value by $536,000.00, and using instead Dr. Morariu's testimony establishing $140,500.00 in future medicals, there was no basis in this record to reject her total and resulting valuation of $2,957,094.53.

90. As such, and based on this record, the undersigned is obliged to follow *Eady*, *Larrigui-Negron*, and *Mojica,* and concludes that $192,463.53 is the reduced amount due to AHCA.

ORDER

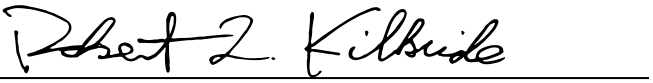
Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED AND ADJUDGED as follows:

1. AHCA may retain the sum of $187,291.38 received from Petitioner on June 25, 2021, and recover the additional amount of $5,172.15, which will fully satisfy its Medicaid lien. This totals $192,463.53.

2. Likewise, the adjusted and net amount of $182,121.23 shall be recovered and refunded to Petitioner from the funds on deposit.

DONE AND ORDERED this 21st day of January, 2022, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of January, 2022.

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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.