STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GREGG J. MAIMONE,

Petitioner,

vs. Case No. 21-2957MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2021), before Administrative Law Judge ("ALJ") Cathy M. Sellers, on December 16, 2021, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Floyd B. Faglie, Esquire
Staunton & Faglie, PL
189 East Walnut Street
Monticello, Florida 32344

For Respondent: Alexander R. Boler, Esquire
2073 Summit Lake Drive, Suite 300
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STATEMENT OF THE ISSUE

The issue to be determined is the amount to be paid by Petitioner, Gregg J. Maimone, to Respondent, Agency for Health Care Administration, from the proceeds of a third party settlement, in satisfaction of Respondent's Medicaid lien, pursuant to section 409.910(17)(b), Florida Statutes (2021).

PRELIMINARY STATEMENT

On September 28, 2021, Petitioner filed his Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien ("Petition") with the Division of Administrative Hearings ("DOAH"). Initially, Humana, Inc. ("Humana"), was named as a Respondent; however, Petitioner subsequently settled his dispute with Humana, and filed a Motion to Dismiss Party. The motion was granted, Humana was dropped as a party to this proceeding, and the case style was amended accordingly.

The final hearing was held on December 17, 2021. Petitioner presented the testimony of two expert witnesses, Loren Gold and Karen Gievers. Petitioner's Exhibits 1 and 5 through 11 were admitted into evidence without objection, and Petitioner's Exhibits 2 through 4 were admitted over objection. Respondent did not present any witness testimony or tender any exhibits for admission into evidence.

The one-volume Transcript of the final hearing was filed at DOAH on January 18, 2022. The parties were given through January 28, 2022, to file their proposed final orders. Both parties timely filed their Proposed Final Orders, which have been given due consideration in preparing this Final Order.

FINDINGS OF FACT

The Parties

1. Petitioner, Gregg J. Maimone, is a person for whom Medicaid paid medical care expenses for injuries that he suffered in an accident.

2. Respondent, Agency for Health Care Administration, is the state agency that administers the Medicaid program in Florida. § 409.902, Fla. Stat.

Stipulated Facts

3. On April 28, 2017, Petitioner, a 58-year-old male, suffered severe injuries when his bicycle was struck by a car, and he was run over by oncoming traffic. He suffered a crushed pelvis, a fractured leg, lower back injury, and multiple lacerations. As a result of this accident, Petitioner is unable to walk without assistance and is permanently disabled.

4. Medicaid paid for Petitioner's medical care related to the injury. Through Respondent, Medicaid provided $121,948.84 in benefits for Petitioner's medical care. In addition, Humana, a Medicaid managed care organization, provided $23,583.58 in benefits. The sum of the benefits paid by Medicaid, through Respondent and Humana, totaled $145,532.42. This amount constitutes Petitioner's entire claim for past medical expenses.

5. Petitioner pursued a personal injury claim against the driver/operator of the vehicle ("Tortfeasor") to recover all of Petitioner's damages resulting from his injuries suffered in the accident.

6. The Tortfeasor had limited assets, and the amount of insurance policy limits totaled $300,000.

7. Petitioner settled his personal injury claim against the Tortfeasor for the unallocated amount of $300,000.

8. During the pendency of Petitioner's personal injury claim, Respondent was notified of the claim and asserted a Medicaid lien in the amount of $121,948.84 against Petitioner's cause of action and settlement of that action.

9. Respondent did not institute a civil action to enforce its rights under section 409.910, and it did not intervene or join in Petitioner's claim against the Tortfeasor.

10. By letter, Respondent was notified of Petitioner's settlement with the Tortfeasor.

11. Respondent has not filed a motion to set aside, void, or otherwise dispute Petitioner's settlement with the Tortfeasor.

12. The Medicaid program, through Respondent, paid $121,948.84 on behalf of Petitioner, all of which represents expenditures paid for Petitioner's past medical expenses.

13. Petitioner's taxable costs incurred in securing the settlement totaled $9,752.83.

14. If the formula in section 409.910(11)(f) is applied to Petitioner's $300,000 settlement, then $107,618.58 should be paid to Respondent to satisfy its Medicaid lien.

15. Petitioner deposited the amount due under application of the formula in section 409.910(11)(f)—i.e., $107,618.58—into an interest-bearing account for the benefit of Respondent, pending the outcome of an administrative determination of Respondent's rights regarding the Medicaid lien. Pursuant to section 409.910(17), such deposit constitutes "final agency action" under chapter 120.

Facts Found Pursuant to the Evidence Adduced at Final Hearing

16. Loren Gold testified as an expert witness for Petitioner regarding the value of Petitioner's case.

17. Gold has been a trial attorney since 1989 and exclusively practices personal injury law on behalf of plaintiffs, with a focus on cases involving car accidents. Gold is experienced at reviewing medical records and accident reports, and he stays abreast of jury verdicts by reviewing jury verdict reports and discussing cases with other attorneys.

18. As a routine part of his practice, Gold assesses the value of damages suffered by injured clients. He is familiar with, and routinely participates in, the allocation of settlements in the context of health insurance liens, workers' compensation liens, Medicare set-asides, and allocations of post-verdict judgments.

19. Gold represented Petitioner in relation to his personal injury claim from the accident that gave rise to this proceeding. He reviewed Petitioner's

extensive medical records and the accident report, and met with Petitioner numerous times.

20. Petitioner worked at the same liquor store for 20 years. He would ride the bus and then ride his bike the remaining distance to work. On April 28, 2017, while riding his bike home from work, Petitioner ran into an SUV and fell into oncoming traffic. A car ran over Petitioner, resulting in severe injuries. Petitioner suffered multiple fractures to his vertebrae, a crushed pelvis, and a broken leg. He had a massive wound to his back side and leg, which caused him to nearly bleed to death. He was taken to the hospital, where he had multiple blood transfusions and surgeries.

21. Petitioner's injuries have had a significant negative impact on him. Petitioner is only able to stand for short periods of time and only able to walk short distances, both of which require the use of a walker. He suffers from bowel and bladder incontinence, resulting in the need to wear diapers.

22. Petitioner enjoyed his work and was well-liked by customers at the store where he worked. Post-accident, he is not able to work, depriving him of that social outlet. Additionally, he lives with his 91-year-old father, and is unable to provide assistance to him, as he previously was able to do. Petitioner is depressed, and worries about his future.

23. Based on his professional training and experience, Gold conservatively valued Petitioner's damages at $3,000,000, but opined that they could be as much as $5,000,000, with the majority of his damages attributable to his claim for past and future pain and suffering.

24. The life-altering impact of the accident and the seriousness of the physical injury that Petitioner suffered are demonstrable. Gold testified, credibly, that he would expect a significant award in non-economic damages from a Broward County jury. To this point, jury verdicts in cases involving injuries comparable to those suffered by Petitioner averaged approximately $4.7 million in damages for pain and suffering, and he expects that a jury would award Petitioner damages for pain and suffering in a similar amount.

25. In valuing Petitioner's claims, Gold consulted with other personal injury attorneys who concurred that the value of Petitioner's damages for pain and suffering would exceed $3 million.

26. Petitioner pursued a personal injury claim against the driver and owner of the vehicle that pulled out in front of him, and also filed a claim against Petitioner's uninsured motorist insurance carrier. While the damages Petitioner suffered had a very high value, the limits in available insurance restricted Petitioner's recovery for those damages to a total settlement amount of $300,000.

27. Gold testified, persuasively, that the $300,000 settlement amount did not fully compensate Petitioner for the entire value of his damages. Based on the conservative valuation of $3,000,000 for all of Petitioner's damages, Petitioner recovered only ten percent of the value of his damages. Because Petitioner recovered only ten percent of his damages in the settlement, he proportionately recovered only ten percent of his $145,532.42 claim for past medical expenses, which is $14,553.

28. Gold opined that the allocation of $14,553.24 of the settlement to past medical expenses was fair and reasonable, and, in fact, is conservative because it is based on the valuation of $3,000,000 for Petitioner's damages, which could fairly be valued at much higher than that amount.

29. Karen Gievers also testified on Petitioner's behalf. Gievers, who is Board Certified in Civil Trial Practice by the Florida Bar, has extensive experience handling personal injury cases.

30. During Gievers's civil trial practice, she has handled numerous jury trials and represented plaintiffs with catastrophic injuries. She also stays abreast of jury verdicts by reviewing jury verdict reports and discussing cases with other attorneys.

31. As a routine part of her practice, Gievers assesses the value of damages suffered by injured parties. She is familiar with, and has participated in, settlement allocations in the context of health insurance

liens, Medicare set-asides, and workers' compensation liens. Additionally, she has experience in the process of allocating settlements of Medicaid liens, both as an attorney and as a former circuit court judge.

32. Gievers was familiar with the nature and extent of Petitioner's injuries. She concurred with Gold that the injuries Petitioner suffered were catastrophic and life-changing. She noted that the photographs of Petitioner's physical injuries were extremely graphic and disturbing, and definitely would demonstrate, to a jury, the extreme nature of the injuries he suffered.

33. Based on her professional training and experience, Gievers believes that Petitioner's damages had a value of $6 to $10 million.

34. She noted that Broward County juries typically award larger verdicts than juries in north Florida, and that the $3,000,000 valuation of Petitioner's damages was very conservative. She testified that the largest component of Petitioner's damages would be non-economic, due to the nature of his injury and his relatively long life expectancy. Additionally, Petitioner's injuries are demonstrable and juries would readily comprehend the impact that his injuries had on his daily life. Based on these considerations, Gievers opined that the $3,000,000 valuation of Petitioner's case is a conservative, low-end valuation of his injuries.

35. Gievers testified that the $300,000 settlement amount did not fully compensate Petitioner for the damages he had suffered. She opined that, using the conservative valuation of $3,000,000 for all of Petitioner's damages, the $300,000 settlement amount represents a recovery of ten percent of the full value of Petitioner's damages.

36. Gievers further opined that because Petitioner recovered ten percent of the full value of all of the damages he suffered, he proportionately recovered ten percent of the $145,532.42 claim for past medical expenses—i.e., $14,553.24. She noted that allocating $14,553.24 of the settlement for past medical expenses was reasonable and fair under the circumstances.

37. Gievers explained that the methodology for calculating the $14,553.24 allocation to past medical expenses was the formula typically used to determine the allocation to past medical expenses. This method of allocation, which applies the same ratio that the settlement amount bears to the total value of the damages claim, to determine past medical expenses, is the method she previously applied, as a circuit judge, to determine the amount to be paid in satisfaction of Medicaid liens, and is consistently applied in Medicaid third-party reimbursement cases before DOAH.

38. Respondent did not call any witnesses or present any evidence as to the value of the damages. Nor did it propose a different valuation of the damages or contest the methodology used to calculate the $14,553.24 allocation to past medical expenses. Thus, Petitioner's testimony and other evidence presented was unrebutted.

CONCLUSIONS OF LAW

39. 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).

40. Petitioner bears the burden of proof, by clear and convincing evidence, to show that the amount to be paid to Respondent in satisfaction of its Medicaid lien is less than the $107,618.58 that would be due if the formula in section 409.910(11)(f) were applied in this proceeding.

41. Medicaid is a joint federal-state cooperative program that helps participating states provide medical services to residents who cannot afford treatment. *Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 275 (2006). 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.* at 275. 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.

42. 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).

43. 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 Medicaid recipients' 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).

44. 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").*

45. 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.

46. Section 409.910(6)(c) creates an automatic lien, on behalf of Respondent, 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 Respondent may be obligated to provide medical assistance under the Medicaid program.

47. Section 409.910(11)(f) establishes a formula for determining the amount owed Respondent 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.

48. This formula creates a presumptive "default allocation" of third party proceeds subject to a Medicaid lien when the Agency for Health Care Administration does not participate in the settlement. *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).

49. 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 Respondent 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. Ag. for Health Care Admin.,* 181 So. 3d 1233, 1235 (Fla. 1st DCA 2015). 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.

50. In compliance with section 409.910(17)(b), Medicaid recipients who assert that the amount paid to satisfy Respondent's Medicaid lien is less than that calculated by application of the section 409.910(11)(f) formula are entitled to present evidence in an administrative forum showing 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 Respondent's lien should be reduced. *See Harrell v. Ag. for Health Care Admin.*, 143 So. 3d 478, 480 (Fla. 1st DCA 2014).

51. The First District Court of Appeal, in *Eady v. Agency for Health Care Administration*, 279 So. 3d 1249 (Fla. 1st DCA 2019), determined, under circumstances similar 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 any 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 uncontradicted testimony where there is no reasonable basis in the evidence for doing so. *Id.*

52. Since *Eady*, Florida courts consistently have held that where a Medicaid recipient presents unrebutted competent substantial evidence to show that the pro rata allocation methodology 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. Ag. for Health Care Admin.*, 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); *Larrigui-Negron v. Ag. for Health Care Admin.*, 280 So. 3d 550 (Fla. 1st DCA 2019).

53. Here, clear and convincing evidence establishes that the pro rata allocation methodology is a fair and reasonable method for allocating Petitioner's third-party settlement proceeds in this case.

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

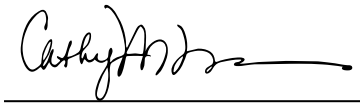
55. Under *Eady* and the other case law cited herein, it would be reversible error for the undersigned to reject application of the pro rata allocation methodology to Petitioner's third-party settlement recovery in determining the amount of his past medical expenses for purposes of satisfaction of Respondent's Medicaid Lien.

56. Based on the foregoing, it is concluded that Respondent is entitled to a payment of $14,553.24 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 $14,553.24 from Petitioner's third-party settlement proceeds in satisfaction of its Medicaid lien.

DONE AND ORDERED this 17th day of February, 2022, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.