STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRIAN K. JOHNSTON,

Petitioner,

vs. Case No. 22-0211MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was held in this case in Tallahassee, Florida, on March 31, 2022, before Robert L. Kilbride, the designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

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
Tallahassee, Florida 32317

STATEMENT OF THE ISSUE

The amount of Petitioner's personal injury settlement payable to Respondent, Agency For Health Care Administration ("AHCA"), to satisfy AHCA's $118,062.09 Medicaid lien, under section 409.910(17)(b), Florida Statutes.

PRELIMINARY STATEMENT

On January 20, 2022, Petitioner filed a Petition with DOAH pursuant to section 409.910(17)(b). The matter was assigned to the undersigned to conduct a formal administrative hearing and enter a final order. The final hearing was scheduled for March 31, 2022.

Prior to the final hearing, the parties filed a Joint Prehearing Stipulation ("JPHS"), which included numerous stipulated and admitted issues of law and fact. Those stipulated issues of law and fact have been incorporated into this Final Order.

The March 31, 2022, final hearing proceeded as scheduled, with Petitioner calling two witnesses, Attorneys Frank DiGiacomo and Karen Gievers. Petitioner's Exhibits 1 through 7 were admitted into evidence. AHCA did not call any witnesses or submit any exhibits into evidence.

The one-volume transcript of the proceeding was filed with DOAH on April 21, 2022. After granting an extension of time, the parties filed their respective Proposed Final Orders on May 9, 2022. Both parties' Proposed Final Orders were reviewed and carefully considered in the preparation of this Final Order.

Unless otherwise noted, all references to section 409.910 or other laws refer to the version of the statute or laws in effect at the time of the action, omission, or occurrence.

FINDINGS OF FACT

Based on the stipulations of the parties, evidence presented at the hearing, and the record as a whole, the following Findings of Fact are made:

1. On April 12, 2015, Brian Johnston, who was then 39 years old, was assaulted by a patron at his wife's place of employment. In this assault, Johnston was doused with gasoline and set on fire resulting in catastrophic injuries. In this criminal assault, Johnston suffered burns to 33 percent of his body. These burns required extensive medical intervention, including multiple debridement, skin grafts, and plastic surgeries. Johnston has permanent scarring and will suffer the impact of his injuries for the remainder of his life. (JPHS pg. 8 ¶1)

2. Johnston's medical care related to the injury was paid by Medicaid. Medicaid through AHCA provided $118,062.09 in benefits. The $118,062.09 constituted Johnston's entire claim for past medical expenses. (JPHS pg. 8 ¶2)

3. Johnston and his wife pursued a personal injury action against the parties allegedly liable for Johnston's injuries ("Defendants") to recover all their damages. (JPHS pg. 8 ¶3)

4. The personal injury action was settled through a series of confidential settlements in a lump-sum unallocated amount. (JPHS pg. 8 ¶4)

5. As a condition of Johnston's eligibility for Medicaid, Johnston assigned to AHCA his right to recover from liable third-parties medical expenses paid by Medicaid. *See* 42 U.S.C. § 1396a(a)(25)(H) and § 409.910(6)(b), Fla. Stat.

6. During the pendency of Johnston's personal injury action, AHCA was notified of the action. (JPHS pg. 8 ¶5)

7. AHCA did not "institute, intervene in, or join in" the personal injury action to enforce its rights as provided in section 409.910(11), or participate in any aspect of Johnston's personal injury action against Defendants. (JPHS pg. 8 ¶6)

8. Instead, AHCA asserted a $118,062.09 Medicaid lien against Johnston's cause of action and settlement of that action. (JPHS pg. 8 ¶5; Ex. 4)

9. By letter, AHCA was notified of Johnston's settlement. (JPHS pg. 8 ¶7)

10. AHCA has not filed a motion to set-aside, void, or otherwise dispute Johnston's settlement. (JPHS pg. 9 ¶8)

11. The Medicaid program, through AHCA, spent $118,062.09 on behalf of Johnston, all of which represents expenditures paid for Johnston's past medical expenses. (JPHS pg. 9 ¶9)

12. Johnston's taxable costs incurred in securing the settlement totaled $8,706.75. (JPHS pg. 9 ¶10)

13. Application of the formula at section 409.910(11)(f) to Mr. Johnston's settlement required payment to AHCA of the full $118,062.09 Medicaid lien. (JPHS pg. 9 ¶11)

14. Petitioner deposited the Medicaid lien amount in an interest-bearing account for the benefit of AHCA pending an administrative determination of AHCA's rights, and this constituted "final agency action" for purposes of chapter 120, Florida Statutes, pursuant to section 409.910(17). (JPHS pg. 9 ¶12)

15. Petitioner and AHCA agree that Johnston is no longer a Medicaid recipient.

Testimony of Frank DiGiacomo, Esquire

16. Frank DiGiacomo has been a trial attorney for 24 years and practices with the Law Offices of Frank DiGiacomo in Stuart, Florida. DiGiacomo practices exclusively plaintiff's personal injury law with a focus on cases involving car accidents, slip-and-falls, and workers' compensation. DiGiacomo represents plaintiffs who have suffered catastrophic injuries.

17. DiGiacomo testified that he is familiar with working personal injury cases up to trial by reviewing medical records, reviewing accident reports, and meeting with clients. DiGiacomo testified that he stays abreast of jury verdicts by reviewing jury verdict reports and discussing cases with other attorneys.

18. DiGiacomo is a member of a number of trial attorney associations including the Florida Justice Association, Treasure Coast Justice Association, Martin County Bar Association, and the St. Lucie County Bar Association.

19. As a routine part of his practice, DiGiacomo makes assessments concerning the value of damages suffered by injured clients and he explained his process for making these determinations. He is familiar with, and routinely participates in, allocation of settlements in the context of health insurance liens, worker compensation liens, and Medicare set-asides, as well as allocations of judgements made by trial judges' post-verdict.

20. DiGiacomo represented Johnston in his personal injury claim. DiGiacomo reviewed Johnston's extensive medical records, reviewed the police reports, reviewed the surveillance videos, and interviewed witnesses. Additionally, he explained that he knew Johnston personally even before he became an attorney 24 years ago, and after the incident he met with Johnston and his wife numerous times.

21. Johnston's wife worked at a local bar that did not have security, so she asked Johnston to be present at the bar while she worked. On the evening of the incident, Johnston asked a patron to leave because he was intoxicated and bragging that he had slipped a pill into someone's drink.

22. This individual left the bar, but returned 20 minutes later with a cup of gasoline. He confronted Johnston and then threw the gasoline on Johnston and lit him on fire. Johnston suffered catastrophic burns on his face, chest, and both arms.

23. Johnston was in a medically induced coma for 21 days while he underwent numerous skin grafts and debridement. There was a period of time where medical staff did not think he would survive, but fortunately, he eventually recovered and was able to be released from the hospital.

24. The assailant, who threw the gasoline on Johnston and lit him on fire, fled the scene. Law enforcement was unable to locate him for over a year.

25. Eventually the FBI arrested the assailant in Puerto Rico. The assailant was criminally prosecuted and Johnston and his wife testified at the criminal trial. The assailant was convicted and sentenced to life in prison.

26. The criminal incident and the burn injuries have had a profound impact on Johnston and his wife. The burns left deep scarring over Johnston's face, neck, arms, and upper body. These scars are light and heat sensitive, and Johnston is unable to spend time in the sun.

27. Johnston had been employed in a home remodeling business. He was not able to return to his business for approximately a year after the incident. Now he can only take jobs that involve inside work.

28. Further, Johnston has had issues of fear, anxiety, and depression associated with both the trauma and the process of the criminal prosecution subsequent to the arrest of the assailant. Additionally, Johnston's wife's life has likewise been negatively impacted from having her husband injured and she suffered extensively seeing her husband on fire and dealing with his subsequent care.

29. DiGiacomo testified that based on his professional training and experience, Johnston and his wife's damages have a total value in excess of $4,400,000.00, stating:

> [M]y opinion based on, again, my 25, 24 years of experience handling significant catastrophic cases… My opinion of anywhere between 4.5 to 5.5 [Million] was what I thought the full value of the claim was going to be.

30. DiGiacomo explained that there is no future medical care expected so there was no claim for future medical expenses. However, DiGiacomo testified, the vast majority of the claim for damages was for the past and future pain and suffering of Johnston and his wife.

31. DiGiacomo offered that juries understand burn injuries and assign a high value to the pain and suffering associated with a burn injury. Unlike soft tissue injuries that may not be easily apparent, jurors more readily

relate to how a severe burn hurts and understand the horrific nature of catastrophic burns.

32. DiGiacomo indicated that by showing the jury the pictures of the injury and the video of the incident, he was confident that the jury would award a significantly high award for the pain and suffering of Johnston and his wife (who witnessed the event and the aftermath of the extensive medical care).

33. He noted that during the litigation of the case, there was a mediation with a mediator with extensive trial experience. This mediator was asked to give his valuation of the damages and he valued the damages for Johnston at $4 to $5 million and $400,000 to $500,000 for his wife. DiGiacomo testified that this valuation "was something that I relied upon as another tool in assessing what I already thought – basically, that was my range to begin with on the full value of the claim."[1]

34. DiGiacomo testified that valuing Johnston and his wife's damages at $4,400,000.00 is conservative and on the very low-end of his valuation of the full value of the damages.[2]

35. DiGiacomo detailed that the personal injury claim was pursued against the bar where the incident occurred and the shopping center with the theory of negligent security and nuisance. Later the action was amended to include a dram shop count against the liquor license with the theory that the assailant was a known drunk/trouble maker. Ultimately, the bar owner had limited funds, the shopping center had limited liability, and the dram shop

[1] While the mediator's comments were hearsay, they supplemented or explained DiGiacomo's testimony and can be relied upon by an expert.

[2] AHCA did not advance the argument that the wife's claim should be excluded from the total value of the case for purposes of applying the pro-rata methodology. Needless to say, AHCA did not offer any evidence to that effect. Regardless, in this case, there was no direct or express evidence presented to determine exactly how much of the total value of the case should be attributable to the wife's claim or how that would affect the total value analysis or the proportionality methodology under the prevailing case law.

case was difficult to prove. As a result, the case was settled with all parties for $1,350,000.00.

36. DiGiacomo felt that the $1,350,000.00 settlement did not fully compensate Johnston and his wife for the full value of their damages. He testified that, based on a conservative value of all damages at $4,400,000.00, Johnston recovered only 30.7 percent of the total value of the damages. Consequently, since Johnston recovered only 30.7 percent of his total damages, he only recovered 30.7 percent of his past medical expenses in his settlement, or $36,245.06.

37. DiGiacomo opined that it was reasonable to conclude that $36,245.06 of the settlement was fairly allocable to past medical expenses.

38. DiGiacomo felt that, because there was no expectation that Johnston will need future care related to the incident, there was no claim for future medical expenses at the time of settlement. Accordingly, he testified that no portion of the settlement represented compensation for future medical expenses.

Testimony of Karen Gievers, Esquire

39. Gievers has been a member of the Florida Bar since 1978 and Board Certified in Civil Trial Law by the Florida Bar since 1985. Gievers began her legal career in Miami, Florida, where she was a civil trial attorney handling cases involving personal injury. Over the years, her practice evolved into a civil litigation practice representing injured children statewide.

40. In 1999, Gievers moved her law office to Tallahassee, Florida, where she continued her trial practice until she was elected as a Second Circuit Court Judge in 2010. As a Circuit Court Judge, Gievers handled civil litigation cases, as well as other civil matters. In April 2019, Gievers retired from the bench and reopened her Tallahassee law office.

41. Gievers is a member of numerous trial attorney organizations, including the Florida Justice Association, Capital City Justice Association, American Board of Trial Advocates, and the Trial Lawyer Section of the

Florida Bar. She is a past president of the Academy of Florida Trial Lawyers, the Dade County Bar Association, the Dade County Trial Lawyers Association, and the Tallahassee Chapter of the American Board of Trial Advocates. She co-founded, and served on the Board of Directors, of both Florida's Children First and Children's Advocacy Foundation.

42. During her practice, Gievers handled jury trials and represented plaintiffs with catastrophic injuries. She also testified that she stays abreast of jury verdicts by reviewing jury verdict reports and discussing personal injury cases with other attorneys.

43. Gievers testified that as a routine part of her practice she makes assessments concerning the value of damages suffered by injured parties. She explained her process for making these assessments. Gievers testified that she is familiar with, and has participated in, settlement allocations in the context of health insurance liens, Medicare set-asides, and workers' compensation liens, and she has worked through the process of allocation of settlements in the context of Medicaid liens both as an attorney and as a judge.

44. Gievers was familiar with Johnston's injuries and, in addition to listening to DiGiacomo's testimony, she had reviewed the exhibits filed in this proceeding and reviewed the JPHS. Gievers testified regarding the nature and extent of Johnston's injuries.

45. Gievers went on to explain that burn injuries are injuries that juries understand well because they know the pain suffered with a minor burn, and they can deduce the extent of pain based on the extent of the injury suffered. Gievers additionally noted that Johnston's wife suffered a grievous injury in that she had to watch her husband burn and then watch her husband go through the extensive medical interventions to save his life.

46. Gievers testified that both Mr. and Mrs. Johnston's lives had been negatively impacted due to the catastrophic injuries suffered and this impact will last the remainder of their lives.[3]

47. Gievers testified that based on her professional training and experience, she placed the low-end value of the Johnstons' total damages at $5,000,000.00, and stated:

> I did determine that a – in my view, the lowest end of the full value for this case would be in the 5 million range. Seeing that the case was in the Port St. Lucie area, that's not quite as high-end verdict as any Broward County and West Palm Beach County to the immediate south of that part of our state. And for that reason, since I was also made aware that plaintiff's counsel had assessed the damages and in the 4.5 to 5.5 million range. I don't dispute that, but my personal assessment would have been in the higher-a little higher range as likely whole value.

48. Her valuation of the total damages did not include future medical expenses because there was no expectation that Johnston would need future medical care. Instead, her valuation of the total damages included the $118,062.09 claim for past medical expenses, Johnston's claim for past and future non-economic damages, and Mrs. Johnston's claim for both loss of consortium and mental pain and suffering.

49. After she reviewed the case and developed her valuation of the damages, Gievers located an article on a burn victim case where the Florida Supreme Court had affirmed a $5.2 million verdict (just a few days prior to the Final Hearing in this matter). Gievers testified that while she had already developed her opinion concerning the value of Mr. and Mrs. Johnston's damages, the Florida Supreme Court's affirmance of a $5.2

[3] As previously alluded to, the extent of the wife's injuries may largely be irrelevant to the fair allocation analysis herein.

million jury verdict in a similar burn victim case supported her valuation of the damages.[4]

50. Gievers explained that she was aware that the case settled for $1,350,000.00. She opined that the settlement did not fully compensate Mr. and Mrs. Johnston for all the damages they had suffered.

51. Using a conservative value of total damages of $4,400,000.00, the $1,350,000.00 settlement represents a recovery of 30.7 percent of the value of the total damages. Gievers testified that because the settlement represented only 30.7 percent of the total damages, 30.7 percent of the $118,062.09 lien amount was a fair allocation for past medical expenses recovered in the settlement.

52. As a result, Gievers testified that it would be reasonable to allocate $36,245.06 of the settlement to past medical expenses.

Other Evidence

53. AHCA did not call any witnesses or present any persuasive evidence as to a different total value of the damages. Nor did AHCA propose a different valuation of the damages or persuasively challenge the pro-rata methodology used to calculate the $36,245.06 allocation to past medical expenses. As a result, Petitioner's testimony and evidence presented was essentially unrebutted and uncontradicted.

54. Based on the methodology of applying the same ratio the settlement bears to the total value of all damages, $36,245.06 of the settlement fairly represents past medical expenses. Stated another way, the $1,350,000.00 settlement represents 30.7 percent of $4,400,000.00. Applying 30.7 percent to the $118,062.09 lien amount results in a finding that $36,245.06 of the settlement is fairly allocable to past medical expenses.

55. As a result, Petitioner has proven that $36,245.06 of the settlement is fairly allocable to past medical expenses.

[4] While the article she relied on is arguably hearsay, it explained or supplemented her testimony, and was also information that can be relied upon by an expert.

CONCLUSIONS OF LAW

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

57. DOAH has jurisdiction of this matter pursuant to section 409.910(17)(b) and the standard of proof in this proceeding is clear and convincing evidence by Petitioner that he is entitled to a reduction of the lien claimed by AHCA.

58. "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.*

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

60. 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) prohibits a Medicaid lien on any proceeds from a Medicaid recipient's tort settlement.

61. However, the provisions requiring states to seek reimbursement of their Medicaid expenditures from liable third parties 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.

62. As 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).[5]

63. In this case, Johnston settled his personal injury claim against third parties liable to him for injuries related to AHCA's Medicaid lien. Therefore, AHCA's lien may be enforced against his tort settlement.

64. The underlying question in this case, however, is how much is AHCA entitled to recover from Petitioner for the medical payments it provided for him?

65. 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 the remaining recovery shall be paid to the agency

[5] 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, 465 (Fla. 2007). As a result, the undersigned has limited his inquiry to that portion of Johnston's settlement allocable to *past* medical expenses.

> 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.

66. In essence, section 409.910(11)(f) provides that the agency may recovery the *lesser of*: (1) its full lien; or (2) one-half of the total award, after deducting attorney's fees of 25 percent 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. 2nd DCA 2013).

67. Here, the parties agreed that application of the section 409.910(11)(f) formula to Petitioners' settlement would require payment to AHCA of $118,062.09.

68. Notably, however, another corresponding section, outlined below, provides a means by which a Medicaid recipient may challenge the amount AHCA seeks under the default formula mentioned above.

69. 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. That section, 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.

70. 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.

71. Notably, the question of how to fairly allocate the past medical expense portion of an undifferentiated settlement agreement has been the subject of considerable and ongoing debate. Unfortunately, this has not yet been squarely decided by the United States Supreme Court, as it acknowledged:

> 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 627, 634.

72. To ascertain the answer to the "fair allocation" question, several Florida District Court of Appeal opinions have relied on the following statement by the Florida Supreme Court as settling the question. The Florida Supreme Court noted:

> 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.

73. Fortunately, the question that had existed in the law regarding the proper methodology to use has been resolved by the First District Court of Appeal in a series of related opinions. While the Florida Supreme Court has not issued a definitive or express opinion on the matter, the prevailing law in the First District Court of Appeal appears to be settled when certain evidentiary circumstances exist.

74. More particularly, in *Eady v. Agency for Health Care Administration*, 279 So. 3d 1249 (Fla. 1st DCA 2019); *Larrigui-Negron v. Agency for Health Care Administration*, 280 So. 3d 550 (Fla. 1st DCA 2019); *Mojica v. Agency for Health Care Administration*, 285 So. 3d 393 (Fla. 1st DCA 2019); and *Soto v. Agency for Health Care Administration*, 313 So. 3d 143 (Fla. 1st DCA 2020), the appellate panels accepted the proportionality test or pro-rata method advanced by Petitioner as one acceptable method of proof.[6]

75. As a result, a petitioner may carry their burden of proof, and the tribunal may reduce AHCA's lien, by the same ratio that a petitioner's settlement bears to their total damage claim. This may be accomplished through the testimony of expert witnesses.

76. Notably, under *Eady* and subsequent cases, if the petitioner's expert testimony and evidence is not adequately contradicted or rebutted, it stands

[6] 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 or other evidence presented, which warrant an adjustment to the proportionality methodology or to 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) (Rev. Apr. 27, 2020).

as the proper allocation in the settlement agreement and sets the amount from which AHCA may recover.

77. In this case, there was no persuasive evidence presented by AHCA to contest or contradict that $36,246.06 was a fair allocation of past medical expenses in Petitioner's settlement, as presented by his experts.

78. Counsel for AHCA cross-examined Petitioner's experts, but elicited no compelling information or persuasive evidence to assail their opinions that a fair allocation of past medical expenses recovered in the Petitioners' undifferentiated settlement was $36,246.06.

79. In short, Petitioner's expert testimony concerning a fair allocation of the settlement agreement was unchallenged by AHCA, without any contrary facts or evidence in the record.

80. In the aforementioned cases, the First District Court of Appeal has determined that it would be an error to reject this expert testimony, unless there is a basis in the record to do so. There was no basis in this record to do so.

81. As such, and based on this record, the undersigned is obliged to follow *Eady*, *Larrigui-Negron*, *Mojica,* and *Soto*, and concludes that $36,246.06 is the amount due to AHCA.

82. The evidence and testimony presented established that the allocation of Petitioner's past medical expenses in the amount of $36,245.06 constitutes a fair amount to allocate as his past medical expenses recovered in the settlement.

83. This is calculated under the pro-rata or proportionality methodology as follows: Using the total value of all the damages at $4,400,000.00, the settlement of $1,350,000.00 is a recovery of 30.7 percent of the total value of the damages. Applying this same 30.7 percent ratio to AHCA's claim of $118,062.09, results in a fair determination that $36,245.06 of the settlement is for past medical expenses. ($36,245.06 is 30.7 percent of $118,062.09).

84. AHCA did not present any persuasive evidence disputing that Petitioner's total damages had a conservative value of $4,400,000.00. Nor did AHCA propose a different valuation of Petitioner's damages, or persuasively contest the proportionality methodology approved by the First District Court of Appeals.

85. For the foregoing reasons, Petitioner has proven that $36,245.06 is the portion of Petitioner's settlement which should be allocated as past medical expenses, and recoverable by AHCA.

ORDER

Upon consideration of the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED that:

The amount of Petitioner's settlement payable to the Agency for Health Care Administration in full satisfaction of its Medicaid lien is $36,245.06.

DONE AND ORDERED this 20th day of May, 2022, in Tallahassee, Leon County, Florida.

ROBERT L. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of May, 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.