STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OLVIN MEJIA PALACIOS,

Petitioner,

vs. Case No. 22-0614MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on April 26, 2022, by Zoom video conference before the undersigned, Robert L. Kilbride, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Marc Ginsberg, Esquire
Mandina & Ginsberg, LLP
Laurel Court, Suite 107
15500 New Barn Road
Miami Lakes, Florida 33014

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

STATEMENT OF THE ISSUE

The issue to be determined is whether the Agency for Health Care Administration's ("AHCA") Medicaid lien of $35,031.49 shall be paid in full from the $238,500.00 settlement recovery for Petitioner under section 409.910(11)(f), Florida Statutes; or if Petitioner proved by clear and

convincing evidence that a lesser amount is due to AHCA under section 409.910(17)(b).

PRELIMINARY STATEMENT

On February 24, 2022, Petitioner filed a "Petition Contesting Medicaid Reimbursement Amount Pursuant to Fla. Stat. 409.910(17)(b)" with DOAH. Petitioner later filed an Amended Petition on March 23, 2022.

The final hearing was scheduled for April 26, 2022. Prior to the final hearing, the parties filed a Joint Pre-hearing Stipulation ("JPHS"). The stipulated facts have been outlined herein together with any other material and relevant facts proven by clear and convincing evidence at the hearing.

At the final hearing, Petitioner presented two witnesses: Scott Feder, Esquire, and Marc Ginsberg, Esquire. Petitioner submitted into evidence 15 exhibits (labeled 1 through 15), which were accepted into evidence. AHCA did not call any witnesses and offered one exhibit (labeled A). However, AHCA explained that it was duplicative of Petitioner's Exhibit 9, and did not separately submit it.

At the conclusion of the hearing, Petitioner indicated through his counsel that he was not seeking any further reduction of his settlement amount for other attorney's fees he may have incurred.

Neither party ordered the trial transcript, and the undersigned relied on his recollection of the evidence and extensive notes taken during the hearing, as well as exhibits admitted into evidence.

All references to statutes, laws, or rules are to those in effect on the date that the act or omission occurred.

FINDINGS OF FACT

Based on the JPHS[1] and the evidence presented, the undersigned makes the following findings of relevant and material fact:

STIPULATED FACTS

1. On September 4, 2015, Petitioner, Olvin Mejia Palacios, suffered severe injuries when he fell over 20 feet from the roof of a building while performing roofing work. The unlicensed individual that hired Palacios as a day worker had no liability insurance, no workers' compensation insurance, and no ability to pay workers' compensation benefits. A licensed contractor, whose sole action in connection with this matter was to sign the permit application, did have liability insurance. Accordingly, that licensed contractor was sued. Discovery revealed that the licensed contractor received no financial renumeration for signing the permit application. Further, fall protection safety equipment was at the job, but Palacios declined to wear it, even though he acknowledged it was supposed to be worn. Fall protection equipment would have prevented his falling to the ground.

2. Palacios was taken to Memorial Regional Hospital where he was diagnosed with multiple fractures, a head fracture, collapsed lung, and other injuries.

3. Ultimately, Medicaid paid $35,031.49 for which it asserts a lien against Palacios's recovery.

4. In addition to the Medicaid lien for the hospital charges, Palacios also incurred an additional $9,653.00 that was not paid by Medicaid.

5. Petitioner has deposited the full lien amount in an interest-bearing trust account as required by the statute.

[1] Findings 1 through 5 are taken from the JPHS.

FACTS PRESENTED AT THE HEARING

Scott Feder, Esquire

6. Scott Feder is an attorney in Coral Gables, Florida. He has been an attorney since 1982, and has been board certified in civil trial law since 1992. He handled over 100 jury trials in Alabama, Texas, Georgia, and Florida on behalf of plaintiffs and defendants.

7. Feder explained the concept of considering liability issues in a personal injury case. For instance, the responsibility of the injured person for the incident is taken into account, as well as the responsibility of persons who are not named as parties to a lawsuit.

8. In a personal injury case, there are economic losses, including past earnings, loss of future earning opportunity, past medical expenses, and future medical expenses. There are also non-economic damages, such as pain and suffering, mental anguish, inconvenience, scarring, and loss of capacity for enjoyment of life for the past and future.

9. There is not necessarily any correlation between economic and non-economic damages.

10. Feder briefly described Palacios's injuries, including his severely injured wrist, neck fracture, shoulder dislocation, rib fractures, and leg fracture, where the femur connects with the knee. He underwent significant surgery to his wrist. He was hospitalized for 12 days and had follow-up care.

11. Palacios's past medical expenses were in excess of $45,000.00, consisting of what AHCA paid ($35,031.49), and approximately $10,000.00 in non-Medicaid medical bills.

12. Feder explained that Palacios would have future medical expenses. He estimated $3,000 per year for 40 years and approximated $75,000.00 to $85,000.00 as the present value of future medical expenses.

13. Feder next explained Palacios's lost earnings of $120,000.00 and loss of earning capacity, which he estimated at $400,00.00, with an approximate present value of $250,000.00.

14. While the lost earnings are known and based on the facts, the loss of future earning capacity is not. It is based on his opinion that Palacios could earn $150.00 per day.

15. Feder estimated that Palacios would have between $400,000.00 and $1,000,000.00 in non-economic damages including both past and future.

16. Feder provided an expert opinion on the total value of Petitioner's case. Based on his experience and review of the file and medical records, he testified that the total value of the case was from $1,000,000.00 to $1,500,000.00.

17. Based on the facts of the case, Feder testified that Palacios would have "no chance" of recovering the full amount of his damages at trial. He felt Petitioner would recover only 10 to 20 percent of his damages due to his own comparative fault during the incident.

18. Upon questioning by the undersigned for clarification on this point, Feder clarified that in his opinion, Palacios was 50 to 75 percent at fault for the workplace accident that resulted in his injuries.

Marc Ginsberg, Esquire

19. Marc Ginsberg is an attorney in Miami, Florida. He graduated from law school in 1981 and has been Florida Bar board certified in civil trial law since 1992.

20. He was the lead attorney for Palacios in his personal injury case. Ginsberg described the incident that led to Palacios' injuries.

21. Palacios was working on a flat, two-story roof applying tar to the roof surface. Palacios worked his way *backwards* while near the roof edge. He was pulling or dragging along a mop and a bucket of tar. When he reached the back edge of the roof walking or edging backwards, he tripped over the raised edge of the roof and fell 20 feet to the ground.

22. As a stipulated fact, during this roofing work, Palacios declined to wear an available safety harness. This harness would have prevented him from falling to the ground.

23. This description of the building configuration and accident site is supported by a photograph of the building. Pet. Ex. 1.

24. Ginsberg's description of Palacios' injuries was substantially in agreement with those described by Feder.

25. Ginsberg acknowledged that there were issues of contested liability, which would have limited Petitioner's recovery at trial. This, together with other factors and the lack of insurance coverage, led to a gross settlement in the amount of $238,500.00.

26. Much of the settlement was from the contractor who was insured and obtained the permit for the roofing work, but did not do any of the actual work. The subcontractor furnished copies of the permit and a certificate of insurance to the owner/tenant of the building, which protected them from liability. The subcontractor was uninsured, and no recovery was available from him. A nominal recovery was made from the owner/tenant of the building.

27. Ginsberg testified that Palacios should have known to use the fall safety equipment on this job, in part, because there was a previous job Palacios had worked where he refused to wear the available fall equipment. This resulted in either a shutting down of that job or other adverse consequences to him.

28. As a result of all these factors, Ginsberg could not foresee recovering more than 20 percent of Palacios's damages from the general contractor.

29. Regarding the total valuation of the case, based on his experience in personal injury cases and his extensive knowledge of Palacios's injuries and prognosis, Ginsberg opined that the total value of the personal injury case for Palacios ranged between $1,000,000.00 and $1,500,000.00.

30. Ginsberg broke down his total valuation as follows:

- $45,000.00 for past medical expenses
- $80,000.00 for future medical expenses
- $120,000.00 for past lost wages
- $250,000.00 for loss of earning capacity
- $300,000.00-400,000.00 for past non-economic damages
- $300,000.00-400,000.00 for future non-economic damages

31. Ginsberg stated that 23.85 percent of the settlement should be allocated to determine AHCA's lien. This is based on the $238,500.00 recovery divided by the $1,000,000.00 total value he placed on Palacios's claim. ($238,500.00 is 23.85 percent of $1,000,000.00).[2]

32. The burden was on Petitioner to present clear and convincing evidence to prove that the "proportionality test" he relied on to present his challenge to AHCA's lien under section 409.910(17)(b) was a reliable and competent method to establish what amount of his settlement was fairly allocable to past medical expenses.

33. Other than Petitioner's use of the proportionality methodology as a means to challenge AHCA's lien, there was no other persuasive evidence or arguments presented by him to prove that AHCA's lien should be reduced.

34. Conversely, however, no evidence was presented by AHCA to persuasively contradict or rebut the testimony of Petitioner's experts regarding their valuation of Petitioner's case at $1,000,000.00. Nor did AHCA convincingly assail their opinions regarding the total valuation of the case at $1,000,000.00.

35. Importantly, the facts established at the hearing describing the circumstances surrounding the accident and how it occurred and Petitioner's failure to use available fall safety equipment, as well as the evidence from Petitioner's expert regarding Petitioner's high degree of comparative

[2] This method of proof is generally referred to as the prorata or proportionality methodology.

negligence, support a finding by the undersigned that Petitioner was at least 80 percent at fault in this tragic workplace accident.

36. Comments and testimony by Petitioner's experts to questions posed by the undersigned also underscore and support that it is reasonable and fair to find that Petitioner was at least 80 percent at fault in the accident.

37. Consistent with the evidence and testimony of Petitioner's experts, and applying the proportionality method of proof advanced by Petitioner and accepted by the First District Court of Appeal in several recent cases, Petitioner's total recovery at trial would have been $200,000.00 ($1,000,000.00 anticipated trial verdict reduced by Petitioner's 80 percent comparative negligence, equaling a $200,000.00 recovery).

38. The proportionality methodology advanced by Petitioner as the proper means to determine AHCA's recovery, results in a finding that Petitioner, by settling for $238,500.00, recovered more than 100 percent of the true total value of his claim. Likewise, using the same methodology, AHCA is entitled to recover the same proportion, or 100 percent of its Medicaid lien.

CONCLUSIONS OF LAW

39. DOAH has jurisdiction of the parties and final order authority in this case pursuant to sections 120.57(1)(a) and 409.910(17)(b), Florida Statutes.

40. Petitioner is an individual who was the recipient of Medicaid funds to pay for medical expenses related to his care and treatment arising from personal injuries received in a serious workplace accident.

41. Petitioner and AHCA agreed that application of the formula at section 409.910(11)(f) to the $238,500.00 settlement requires payment to AHCA of the full $35,031.49 Medicaid lien. JPHS, p. 5.

42. The burden of proof for a Medicaid recipient to successfully contest the amount claimed by AHCA pursuant to the formula in section 409.910(11)(f) is clear and convincing evidence. § 409.910(17)(b), Fla. Stat.

43. DOAH has jurisdiction under section 409.910(17)(b) to determine the portion of a personal injury settlement which should be allocated as past medical expenses, including when the settlement is an unallocated lump sum settlement.

44. Respondent is the state agency responsible to administer Florida's Medicaid program. § 409.902, Fla. Stat.

OVERVIEW OF APPLICABLE FEDERAL AND STATE MEDICAID LAW

45. Medicaid is a cooperative federal-state welfare program providing medical assistance to people in need. *See generally Roberts v. Albertson's Inc.*, 119 So. 3d 457 (Fla. 4th DCA 2012).

46. To participate in the federal Medicaid program, the state agency is obligated to comply with federal Medicaid statutes and must seek reimbursement for what it has paid out for a recipient when the resources of a liable third party become available. *Id.*; § 409.910(4), Fla. Stat.

47. Under Florida law, the agency providing the Medicaid support is then subrogated to and assigned the recipient's rights of recovery from any liable third party. This results in a lien in favor of the agency for the full amount of medical assistance provided by Medicaid. § 409.910(6), Fla. Stat. The recipient may challenge the lien amount at an administrative hearing under the provisions of section 409.910(17)(b).

48. The Legislature outlined its lien recovery objectives and intent underlying the Florida Medicaid recovery statute.

> [I]t is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity. Medicaid is to be repaid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid.

§ 409.910(1), Fla. Stat.

49. The Florida Legislature also emphasized that:

> It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources.

Id.

50. Thus, it is clear from a reading of these provisions that the state's intent is to be repaid in full for medical payments it made for the benefit of the recipient, regardless of whether the recipient is made whole. The court in *Roberts* emphasized these provisions. *Roberts,* 119 So. 3d at 460.

51. Despite the lien recovery rights afforded to the state, there is a limitation affecting the Florida Medicaid recovery program under chapter 409. Specifically, the state's recovery program cannot run afoul of the "anti-lien" provisions of federal law.

52. To that point, the anti-lien provisions of the federal Medicaid Act "pre-empt a state's effort to take any portion of a Medicaid beneficiary's tort judgment or settlement not 'designated as payments for medical care.'" *Wos v. E.M.A.*, 568 U.S. 627, 630 (2013)(quoting *Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 284 (2006)). This sets "a ceiling on a State's potential share of a beneficiary's tort recovery[.]" *Id*. at 633.

53. Although the federal anti-lien provisions prohibit a state from recovering reimbursement by placing a lien on *any* of the recipient's property, 42 U.S.C. § 1396p(a)(1) (2012), a notable exception allows the state to obtain reimbursement from certain funds the recipient recovers from third parties legally liable to the recipient. *Ahlborn*, 547 U.S. at 268, 275.

54. So long as the Florida Medicaid recovery program outlined in chapter 409 complies with the federal anti-lien provision and the instructions in *Wos* and *Ahlborn*, it is enforceable and complies with federal law.[3]

[3] Section 409.910(17)(b), outlining how to challenge AHCA's lien, has been characterized as compliant with the federal anti-lien provisions outlined in *Wos*. *See generally Mobley v. State*, 181 So. 3d 1233, 1236 (Fla. 1st DCA 2015).

55. The statutory formula used by an agency to determine the Medicaid lien amount under certain circumstances is straightforward. Section 409.910(11)(f) provides:

> (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.

56. In compliance with the Supreme Court's comments in *Wos*, the statute currently affords an opportunity for Medicaid recipients to challenge the agency's lien.

57. A recipient may contest the Medicaid lien set by the agency at an evidentiary hearing as follows:

> 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.

§ 409.910(17)(b), Fla. Stat.

EVIDENTIARY STANDARD IN A HEARING UNDER SECTION 409.910(17)(b)

58. With respect to a key evidentiary issue in this case, the proper legal method to challenge the agency's Medicaid lien, numerous district court opinions and several very recent cases from the First District Court of Appeal have addressed the issue.

59. Until roughly 2019, the question regarding what type of evidentiary standard applied in cases challenging AHCA's Medicaid lien appeared unsettled. A variety of tests and methodologies were employed by the courts and administrative law judges, with mixed reviews by the district courts of appeal.

60. In 2019, the First District Court of Appeal issued a series of instructive Medicaid lien recovery opinions. Those cases are straightforward and provide new and useful guidance in Medicaid lien reimbursement cases under section 409.910.

61. More to the point, these recent cases settle, in large part, the evidentiary question by acknowledging the propriety of utilizing the proportionality methodology or prorata test advanced by Petitioner.[4]

62. Specifically, the First District Court of Appeal has determined that in the absence of evidence to contradict or rebut expert testimony using the proportionality or prorata methodology, it is an abuse of discretion for an ALJ to reject this methodology. *See generally Eady v. Ag. for Health Care*

[4] This method typically involves the use of experts at a DOAH hearing to establish the projected total value of Petitioner's case, had it gone to trial. The settlement amount Petitioner recovered is compared against the experts' total value to ascertain the percentage of recovery. The percentage recovered is then multiplied against the agency's lien amount. Under this test, the lower resulting figure is then the amount the agency may recover from Petitioner to satisfy its Medicaid lien.

Admin., 279 So. 3d 1249 (Fla. 1st DCA 2019); *Larrigui-Negron v. Ag. for Health Care Admin.*, 280 So. 3d 550 (Fla. 1st DCA 2019); *Mojica v. State Ag. for Health Care Admin.*, 285 So. 3d 393 (Fla. 1st DCA 2019); *Bryan v. State Ag. for Health Care Admin.,* 291 So. 3d 1033 (Fla. 1st DCA 2020); and *Ag. for Health Care Admin. v. Rodriguez,* 294 So. 3d 441 (Fla. 1st DCA 2020).

63. It is unmistakable that *Eady, Larrigui-Negron, Mojica*, *Bryan*, and *Rodriguez* chart a clear and distinct course providing much needed clarity to the courts, ALJs, and practitioners.

64. This is particularly helpful because the proportionality test or methodology had previously been characterized by one court as "problematic" and of uncertain evidentiary use. *Smith v. Ag. for Health Care Admin.,* 24 So. 3d 590, 591 (Fla. 5th DCA 2009). Even the *Eady* court recognized that the proportionality test had "been met with decidedly mixed reviews." *Eady,* 279 So. 3d at 1256.

65. To be clear, this Final Order will utilize and apply the proportionality methodology advanced by Petitioner, and adopted in *Eady*. However, adjustments are made to the "total value" based on the uncontradicted finding, supported by Petitioner's experts, that there was a very high degree of comparative negligence, by Petitioner, which contributed to causing this workplace accident and his injuries.

THE FLORIDA SUPREME COURT'S OPINION IN GIRALDO

66. A proper decision in this case must also take into account the Florida Supreme Court's opinion in *Giraldo v. Agency for Health Care Administration*, 248 So. 3d 53 (Fla. 2018).

67. In *Giraldo*, the Florida Supreme Court was asked to resolve a conflict between the First and Second District Courts of Appeal regarding whether AHCA could recover its lien and payments from the *future* medical expenses portion of a Florida Medicaid recipient's tort recovery.

68. The court examined the plain language of the federal Medicaid Act and held that federal law limited Florida's Medicaid assignment of rights

(and lien) to reach settlement funds fairly allocable to *past* medical expenses, but not to *future* medical expenses.[5]

69. In *Eady*, the First District characterized the Supreme Court's holding in *Giraldo* as decisive. *Eady* also noted that the Supreme Court emphasized in *Giraldo* that the Medicaid recipient, utilizing a prorata allocation, had presented uncontested testimony establishing the propriety of the prorata method of proof. *Eady,* 279 So. 3d at 1259.

70. Based on these comments, the appellate panel in *Eady* determined that *Giraldo* supported the view that the proportionality methodology was an acceptable approach when challenging a Medicaid lien submitted by AHCA.

71. The Supreme Court in *Giraldo* remanded the case with instructions to reduce the lien amount awarded to $13,881.79, since this amount was established by the uncontradicted evidence, and there was no reasonable basis in the record to reject using that amount.

CONSIDERATION OF PETITIONER'S COMPARATIVE NEGLIGENCE

72. Every Medicaid lien recovery case at DOAH presents a different and unique set of facts. Since it is clear from *Eady* that the proportionality method may be used as one method to challenge AHCA's lien, it is important to determine what factors and circumstances should be considered when applying that method of proof.

73. As previously noted, the testimony and facts from Petitioner's experts, as well as other evidence at the hearing established, without any question,

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[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. This determination was recently upheld by the U.S. Supreme Court in *Gallardo v. Marstiller, Secretary of the Florida Agency for Health Care Administration*, 596 U.S. _____ (2022), slip opinion in Case No. 20-1263 issued June 6, 2022. As a result, Florida courts are bound by this new decision since the Supreme Court's decision construes federal law. *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 220-221 (1931).

Nonetheless, the updated *Gallardo* principle does not change the outcome of this case. This is due primarily to the fact that the use of the default formula by AHCA under section 409.910(11)(f) would not permit it to be awarded any more than the $35,031.49 awarded herein, regardless of the amount of Palacios's past and future medical expenses. In short, AHCA has been awarded the full amount it claimed.

Palacios' very high degree of comparative negligence and fault in the accident.

74. In considering the applicability of *Eady* and similar Medicaid lien recovery cases issued by the First District Court of Appeal, it is important to note that comparative negligence was *not* discussed or examined under the facts of those cases. *Eady* (car rollover to avoid hitting an animal); *Mojica* (brain damage during a routine tonsillectomy); *Larrigui-Negron* (facts not described in the opinion); *Bryan* (head trauma resulting in brain damage); *Rodriguez* (partial paralysis from a motor vehicle crash–details not provided).

75. An updated research survey reveals that courts have *not* yet had an occasion to address or provide guidance in any meaningful way as to how, when, and under what circumstances the petitioner's own comparative negligence would affect the "total value" of the case, when the proportionality method is used to challenge AHCA's lien.

76. Notable as well, *Eady* did not discuss or analyze what specific factors should be used by the experts or courts to estimate the total value of a personal injury case when using the proportionality methodology. This case squarely presents the need to do so.

77. Moreover, comments by the U.S. Supreme Court in *Wos* are instructive on the open question of the effect of comparative negligence. For example, while acknowledging the difficulty courts have in determining the "fair allocation" question, the Court noted:

> Where no such judgment or stipulation exists, a fair allocation of such a settlement may be difficult to determine. Trial judges and trial lawyers, however, can find objective benchmarks to make projections of the damages the plaintiff likely could have proved had the case gone to trial.
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> * * *
>
> What portion of this lump-sum settlement constitutes "fair and just compensation" for each

> individual claim will depend both on how likely E. M. A. and her parents would have been to prevail on the claims at trial and ***how much they reasonably could have expected to receive*** on each claim if successful, in view of damages awarded in comparable tort cases. (emphasis added).

Wos, 568 U.S. at 641 (2013).

78. These comments by the Court suggest that the "objective benchmarks" mentioned and used by judges applying the proportionality method, should include any reasonable and relevant factors affecting how much a plaintiff could expect to receive at trial.

79. This, in turn, compels the conclusion that pertinent factors that affect how much a Florida plaintiff could expect to receive at trial should be considered as a part of the objective analysis required by *Wos*.

80. Considering comparative negligence or other facts, when the proportionality method is used, is also reinforced by comments from other state courts. In a case cited by *Eady*, *State of Colorado Department of Health Care Policy & Financing v. S.P.*, 356 P.3d 1033 (Colorado Court of Appeals, Division Seven 2015), the court stated:

> The *Wos* Court certainly recognized that, absent stipulation, a fair settlement allocation "may be difficult to determine." 568 U.S. at [sic], 133 S. Ct. at 1400. Furthermore, *Wo*s acknowledged that ***fact-specific considerations might be relevant to judicial determinations in particular cases***. *See id.* (noting that apportioning settlement funds will depend upon both how likely a plaintiff is to prevail on his or her claims at trial and how much he or she "reasonably could have expected to receive on each claim if successful, in view of damages awarded in comparable tort cases"); *see also Price v. Wolford*, 608 F.3d 698, 707-08 (10th Cir. 2010) (discussing considerations that might justify reduced Medicaid repayment amounts). Nevertheless, the Court expressed confidence that judges and lawyers would be able to "find objective

> benchmarks to make projections of the damages the plaintiff likely could have proved had the case gone to trial." *Wos*, 568 U.S. at [sic], 133 S. Ct. at 1400.

(emphasis added).

81. In Florida, an objective and reliable analysis and opinion by an expert concerning the total value of a personal injury claim must account for the fact that any recovery for a personal injury claim is materially affected by the plaintiff's own degree of fault in the accident. The concept of comparative fault by an injured party has been has been imbedded in and part of the decisional and statutory law in Florida for many decades. § 768.81, Fla. Stat.

82. In this case, an important goal of the hearing was to arrive at a fair allocation of the past medical component of Petitioner's undifferentiated settlement agreement. Since the proportionality method chosen and advanced by Petitioner is premised on a comparison of the settlement amount to the total value of a case, it is entirely reasonable and rational to consider all factors affecting the total value Palacios might have been awarded.

83. A trustworthy case value analysis by an expert must include any factor a Florida jury would be instructed by the court to consider in its deliberations—for instance, the plaintiff's comparative negligence or fault. § 768.81, Fla. Stat.

84. It is clear in Florida that at a personal injury trial, the jury is instructed to consider the percentage or degree of the plaintiff's own comparative negligence. What could rationally or logically explain why Palacios's experts would exclude or overlook his very high degree of comparative negligence when setting a valuation had the case gone to trial?

85. This concern by the undersigned is particularly true since the concept and application of comparative negligence is so deeply rooted in Florida statutory law and jurisprudence. *See generally Hoffman v. Jones,* 280 So. 2d 431 (Fla. 1973); and *Y.H. Invs. Inc. v. Godales*, 690 So. 2d 1273 (Fla. 1997).

86. Said differently, the total value of Palacios's claim relied upon by the experts would be an erroneous figure, lacking the required objectivity, if not properly adjusted, as a jury would be instructed to do to account for Petitioner's comparative negligence.

87. The undisputed and unfortunate circumstances surrounding Petitioner's fall from the roof of the building and the experts' uncontradicted acknowledgement of Palacios's own high degree of comparative negligence, support a finding that his comparative fault was at least 80 percent.

88. Yet, in rendering their professional opinions regarding the total valuation of the case, Petitioner's experts inexplicably ignored this important factor. They failed to explain why Petitioner's comparative negligence should not affect their opinions regarding the total value of the case. This omission from their analysis in no way constitutes proper consideration of the "objective benchmarks" required by *Wos*.

89. The undersigned concludes that the impact of Palacios's comparative negligence on the total value of his claim is highly relevant and cannot be disregarded when using and applying the proportionality methodology.[6]

90. Moreover, a plaintiff's degree of comparative negligence contributing to an auto accident is not just an "external" factor influencing their desire to settle the case.[7]

91. Rather, in Florida, the plaintiff's degree of comparative negligence is an "internal" factor, deeply woven into and inseparable from the fabric of the case. It cannot be ignored when objectively benchmarking or evaluating the total value of the case.

92. Lastly, to abide by the instructions in *Wos*, Palacios's comparative negligence should be taken into account since it is necessary to determine

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[6] It is worth noting that if the challenge to a Medicaid lien had been analyzed under the long-standing principle of equitable distribution or apportionment, it could not be seriously disputed that Petitioner's comparative negligence would be considered by the judge.

[7] Other external factors affecting the case may include the level of insurance coverage available, statute of limitations issues, or statutory caps on damages.

how much he could reasonably have expected to receive on his claim, had the case gone to trial. *Wos*, 568 U.S. at 641.

93. It is reasonable to conclude that the total value of the case under the proportionality test must take into account *all* components of a personal injury claim—those that add to the value, as well as those factors that may reduce the proposed total value—such as comparative negligence. There is no other reasonable way to arrive at the true total value and respect the Supreme Court's mandate in *Wo*s to use objective benchmarks when making the allocation determination.

ORDER

WHEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, it is hereby DETERMINED and ORDERED as follows:

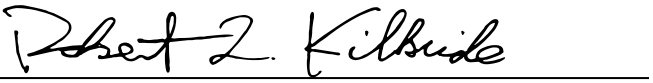
1. Based on the evidence presented in this case, and as directed by the court in *Eady*, the proportionality methodology is used to determine if AHCA's lien should be reduced.

2. Reducing the total value of Palacios's claim to reflect his 80 percent comparative negligence, results in a total value of his claim of $200,000.00 ($1,000,000.00 reduced by Petitioner's 80 percent comparative negligence).

3. Applying the total value of his claim of $200,000.00 to his settlement amount of $234,500.00 results in a finding that Palacios recovered over 100 percent of the total value of his claim.

4. Therefore, under the proportionality methodology advanced by Petitioner, AHCA is entitled to recover 100 percent of its lien, and is hereby awarded the full amount of $35,031.49 from Petitioner.

DONE AND ORDERED this 7th day of June, 2022, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
Administrative Law Judge
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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.