STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BURNICE BONNETT, A/K/A BERNICE BONNETT AS PLENARY GUARDIAN OF THE PROPERTY OF NIGEL CARTER. A/K/A NIGEL Q. CARTER, A/K/A NI'GEL QUANDARIUS TIJUAN CARTER,

Petitioner,

vs. Case No. 20-0110MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

On June 2, 2020, the parties to this matter filed a Joint Motion to Cancel Final Hearing, Admit Exhibits, and Set Schedule for Proposed Final Orders that, *inter alia,* requested that the instant matter be considered on a stipulation of facts, an agreed admission of exhibits, and the parties' proposed final orders. On June 3, 2020, Administrative Law Judge Robert J. Telfer III, of the Division of Administrative Hearings (Division), entered an Order Granting Joint Motion to Cancel Final Hearing, Admit Exhibits, and Set Schedule for Proposed Final Orders, which canceled the previously-scheduled final hearing in this matter and agreed to consider this matter based on joint stipulation, agreed exhibits, and the parties' proposed final orders.

APPEARANCES

For Petitioner: David H. Abney, II, Esquire, Qualified Representative
The Law Office of David H. Abney, II
622 Shelby Street
Frankfort, Kentucky 40601

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

STATEMENT OF THE ISSUE

The issue for the undersigned to determine is the amount payable to Respondent, Agency for Health Care Administration (AHCA), as reimbursement for medical expenses paid on behalf of Petitioner Nigel Carter (Mr. Carter), by and through Bernice Bonnett, plenary guardian of Mr. Carter (Petitioner), pursuant to section 409.910, Florida Statutes (2019), from settlement proceeds Mr. Carter received from third parties.

PRELIMINARY STATEMENT

On January 10, 2020, Petitioner filed a Petition to Determine Medicaid Lien. The Petition challenged AHCA's placement of a Medicaid lien in the amount of $240,587.85 on Mr. Carter's $1,900,000.00 settlement proceeds from third parties.

The undersigned set this matter for a final hearing, by video conference, on April 8, 2020. On March 16, 2020, Petitioner filed a Motion to Change Video Conference Location, and, in so doing, further requested a new hearing date due to the unavailability of the newly-requested video conference site on April 8, 2020. The undersigned granted Petitioner's motion on March 18, 2020, and reset the hearing, by video conference, for June 5, 2020.

On June 2, 2020, the parties filed a Joint Motion to Cancel Final Hearing, Admit Exhibits, and Set Schedule for Proposed Final Orders, which asked that the undersigned consider this matter based on the parties' Joint Stipulation, agreed exhibits, and proposed final orders, and further advised the undersigned that the parties waived their right to a final hearing. On June 3, 2020, the undersigned entered an Order Granting Motion to Cancel Final Hearing, Admit Exhibits, and Set Schedule for Proposed Final Orders, which cancelled the final hearing, and ordered that the undersigned shall consider this matter based on the joint stipulation, exhibits, and the parties' proposed final orders.

The parties filed their Joint Stipulation on June 2, 2020, and filed a Supplemental Joint Stipulation on June 26, 2020. The Joint Stipulation and Supplemental Joint Stipulation constitute "the final agreed-upon 'executive summary' as to what the impending trial is about and the specific issues that remain on the table." *Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc.*, 174 So. 3d 1037 (Fla. 4th DCA 2015). "Pretrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced." *Broche v. Cohn*, 987 So. 2d 124, 127 (Fla. 4th DCA 2008)(citations omitted). The Florida Supreme Court "has looked with favor upon stipulations designed to simplify, shorten, or settle litigation and save costs to parties. Such stipulations should be enforced if entered into with good faith and not obtained by fraud, misrepresentation, or mistake, and not against public policy." *Cunningham v. Standard Guar. Ins. Co.*, 630 So. 2d 179, 182 (Fla. 1994)(citations omitted). Stipulations "avoid needless presentation of evidence and thereby prevent expenditure of both private and public monies on court or agency proceedings that have been resolved by good-faith negotiations." *Doyle v. Dep't of Bus. Reg.*, 794 So. 2d 686, 693 (Fla. 1st DCA 2001).

Pursuant to the Order Granting Motion to Cancel Final Hearing, Admit Exhibits, and Set Schedule for Proposed Final Order, the undersigned has admitted Petitioner's Exhibits P1 and P2, and Respondent's Exhibit R1.

Both parties timely filed proposed final orders, which the undersigned has considered in the preparation of this Final Order.

All references are to the 2019 codification of the Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

1. AHCA is the state agency charged with administering the Florida Medicaid program, pursuant to chapter 409, Florida Statutes.

2. On November 24, 2016, Mr. Carter, age 20, visited friends at the Hilltop Village Apartments, 1646 West 45th Street, Jacksonville, Duval County, Florida. During this visit, an unknown assailant shot Mr. Carter. Mr. Carter sustained gunshot wounds to his head and ankle.

3. As a result of the November 24, 2016, incident, Mr. Carter suffered a traumatic brain injury. Mr. Carter does not have the full use of the left side of his body, cannot walk or ambulate independently, and requires 24-hour assistance. Mr. Carter can speak, but has occasional emotional outbursts. Mr. Carter's life expectancy is significantly reduced.

4. Mr. Carter made a claim for personal injury damages against Southport Financial Services, Inc., d/b/a Hilltop Village Apartments, and SP Hilltop Village, LP (Hilltop Village Apartments).

5. Petitioner entered into a settlement agreement with Hilltop Village Apartments for $1,900,000. Petitioner contends that Mr. Carter's injuries were millions of dollars in excess of the settlement.

6. Mr. Carter has not received any other recovery for the injuries suffered as a result of the shooting on November 24, 2016, and Petitioner does not expect to make any other recovery on behalf of Mr. Carter.

7. The value of Mr. Carter's personal injury claim that arose from the November 24, 2016, incident at the Hilltop Village Apartments is $21,966,575.18. This amount consists of the following sum of Mr. Carter's damages:

a. Past medical costs: $1,023,371.05;

b. Future medical costs: $9,959,916.54; and

c. Past and future pain and suffering, mental anguish, and loss of enjoyment of life: $10,983,287.59.[1]

8. Gerri Pennachio has the expertise to create Mr. Carter's life plan, and did so based upon facts not disputed by the parties. Ms. Pennachio's life plan for Mr. Carter confirms the valuation of Mr. Carter's future life care needs at $9,959,916.54, which is consistent with the parties' stipulated value of Mr. Carter's future medical costs.

9. AHCA, through its Florida Medicaid program, provided $240,587.85 in medical assistance payments for the benefit of Mr. Carter, and has asserted a statutory lien in this amount against Petitioner's recovery from the third parties.

10. Molina Healthcare of Florida paid $27,179.81 for medical expenses associated with Mr. Carter's gunshot wounds and has also imposed a lien seeking a recovery for that entire amount.

11. Petitioner has deposited the full Medicaid lien amount in an interest-bearing account pending a determination of AHCA's rights, which, under

[1] The parties note that this amount was determined based upon the practice of multiplying the economic damages to determine the non-economic damages. Here, a multiplier of 1 was used for the non-economic damages. Thus, this amount is the sum of the past and future medical costs.

chapter 120, Florida Statutes, constitutes "final agency action" pursuant to section 409.910(17).

12. The parties stipulated that the value of Mr. Carter's personal injury claim is $21,966,575.18. The parties have also stipulated that Mr. Carter's settlement ($1,900,000.00) represents 10 percent of the true value of his personal injury claim.[2] However, the undersigned finds that Mr. Carter's settlement actually represents 8.6 percent of the stipulated value of his personal injury claim. Strangely, AHCA states, in its proposed final order, that it "accepts the stipulated 10% figure as the recovery rate, despite the seeming incongruity."

13. Accordingly, the undersigned finds that the preponderance of the evidence establishes that the total value of Petitioner's personal injury claim is $21,966,575.18, and that the $1,900,000.00 settlement resulted in Petitioner recovering 8.6 percent of Mr. Carter's past medical expenses. In addition, the preponderance of the evidence establishes that Mr. Carter's *total* past medical expenses (*i.e.*, the amounts provided by Medicaid and Molina Healthcare) are $267,767.66. The 8.6 percent of $267,767.66 is $23,028.02. Thus, the undersigned further finds that the preponderance of the evidence establishes that $23,028.02 amounts to a fair and reasonable determination of the past medical expenses actually recovered by Petitioner and payable to AHCA.

CONCLUSIONS OF LAW

14. The Division has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.57(1) and 409.910(17). *Giraldo v. Ag. for Health Care Admin.*, 248 So. 3d 53 (Fla. 2018).

[2] In their Joint Stipulation, the parties stipulated that the "pro rata share based on these numbers is 9%." Then, in a Supplemental Joint Stipulation, the parties stipulated that Mr. Carter's "settlement represents 10% of the true value of his case."

15. AHCA is the agency authorized to administer Florida's Medicaid program. § 409.902, Fla. Stat.

16. The parties have stipulated that the Petitioner's burden of proof to challenge the statutory lien is the preponderance of the evidence standard under section 120.57(1)(j).[3]

17. A preponderance of the evidence is defined as "the greater weight of the evidence," or evidence that "more likely than not tends to prove a certain proposition." *S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC*, 139 So. 3d 869, 872 (Fla. 2014).

18. Medicaid is a cooperative federal-state medical assistance program. *See* 42 U.S.C. § 1396, *et seq.* Florida has elected to participate in the program, and thus must comply with federal Medicaid statutes and regulations. *See Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498 (1990); *Public Health Trust of Dade Co. v. Dade Co. Sch. Bd.*, 693 So. 2d 562, 564 (Fla. 3d DCA 1997).

19. The federal Medicaid program requires every participating state to implement a third-party liability provision that authorizes a state to seek

[3] The undersigned notes that the parties presumably arrived at this stipulation according to *Gallardo v. Dudek*, 263 F. Supp. 3d 1247 (N.D. Fla. 2017). The district court held that the provisions of section 409.910 that placed a clear and convincing burden of proof on the Medicaid recipient was preempted by federal Medicaid law's anti-lien and anti-recovery provisions, and enjoined AHCA from applying the clear and convincing standard. *See id.* at 1259-60. However, the United States Court of Appeals for the Eleventh Circuit recently reversed the *Gallardo* decision, and, *inter alia*, held that the application of the "clear and convincing evidence" burden of proof, as enunciated in section 409.910(17)(b), is applicable. *Gallardo v. Dudek*, Case No. 17-13693, 2020 WL 3478027 (11th Cir. June 26, 2020). Petitioner makes no mention of the Eleventh Circuit's opinion in its proposed final order. AHCA, in its proposed final order, states that the Eleventh Circuit's opinion "is not yet final and the injunction has not been lifted. Further, AHCA admit[s] … that it is still bound by its stipulations." The undersigned accepts the parties' stipulation as to the burden of proof in this proceeding. In further support of the application of this burden of proof, the undersigned also relies on *Carnival Corp. v. Carlisle*, 953 So. 2d 461, 465 (Fla. 2007), in which the Florida Supreme Court held that "[g]enerally, state courts are not required to follow the decisions of intermediate federal appellate courts on questions of federal law." As Florida state appellate courts have applied the preponderance of the evidence standard in similar proceedings (albeit, without the benefit of the Eleventh Circuit's recent opinion in *Gallardo*), the undersigned will continue to do the same in this one. Nonetheless, in the event it is later determined that the clear and convincing evidence should apply, since the evidentiary record was entirely stipulated, and not subject to any dispute, any facts found herein were established by clear and convincing evidence.

reimbursement for Medicaid expenditures from third parties when those resources become available. *See* 42 U.S.C. § 1396a(a)(25); § 409.910(4), Fla. Stat.; *Giraldo,* 248 So. 3d at 55. To accomplish this, section 409.910(6) establishes that AHCA is automatically assigned any rights a Medicaid recipient has to third-party benefits. Section 409.910(1) states, in part:

> It is the intent of the Legislature that Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid. If benefits of a liable third party are discovered or become available after medical assistance has been provided by Medicaid, it 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 paid in full from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid.

20. In addition, section 409.910(7) authorizes AHCA to recover payments paid from any third party, the recipient, the provider of the recipient's medical services, or any person who received the third-party benefits.

21. Section 409.910(11)(f) provides a formula to establish the amount AHCA may recover from a settlement, as follows:

> (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.

22. In the instant matter, applying the formula set forth in section 409.910(11)(f), to the $1,900,000.00 settlement, results in AHCA being owed $240,587.85 --100 percent of its payments-- to satisfy the Medicaid lien. Petitioner, however, asserts that a lesser amount is owed.

23. Section 409.910(17)(b) provides an administrative procedure for determining whether a lesser portion of the total recovery should be allocated as reimbursement for past medical expenses, instead of the amount calculated pursuant to section 409.910(11)(f). Section 409.910(17)(b) provides, in pertinent part:

> 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…. 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 expense 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.

The undersigned reiterates, as concluded in paragraph 15 above, that the preponderance of the evidence standard, rather than the clear and convincing evidence standard provided in this statutory subsection, applies in this proceeding. However, the practical effect of the undisputed stipulated record means that all findings of fact are supported by clear and convincing evidence.

24. The formula set forth in section 409.910(11)(f) provides an initial determination of AHCA's recovery for past medical expenses paid on a Medicaid recipient's behalf, and section 409.910(17)(b) sets forth an administrative procedure for an adversarial challenge to that recovery. "[W]hen AHCA has not participated in or approved a settlement, the administrative procedure created by section 409.910(17)(b), serves as a means for determining whether a lesser portion of the total recovery should be allocated as reimbursement for medical expenses in lieu of the amount calculated by application of the formula in section 409.910(11)(f)." *Eady v. Ag. for Health Care Admin.*, 279 So. 3d 1249, 1255 (Fla. 1st DCA 2019) (quoting *Delgado v. Ag. for Health Care Admin.*, 237 So. 2d 432, 435 (Fla. 1st DCA 2018)). To successfully challenge the amount payable to AHCA, the Medicaid

recipient must prove, by a preponderance of the evidence, that a lesser portion of the total recovered should be allocated as reimbursement for past medical expenses than the amount AHCA has calculated pursuant to section 409.910(11)(f).

25. In this matter, the parties have stipulated that the value of Mr. Carter's personal injury claim is $21,966,575.18, which the undersigned accepts. *See, e.g., Arrington v. State,* 233 So. 2d 634, 636 (Fla. 1970) ("A stipulation is a voluntary agreement between opposing counsel concerning the disposition of some relevant point so as to obviate the need for proof or to narrow the range of litigable issues. The beneficial aspects of stipulations in terms of conserving time, money and effort are universally recognized.").

26. The undersigned concludes that Petitioner proved, by a preponderance of the evidence, that the $1,900,000.00 settlement represents 8.6 percent of the value of Petitioner's claim. The undersigned recognizes that the parties stipulated to a 10 percent allocation, but the undersigned rejects this stipulation as an incorrect mathematical calculation that is not supported by the preponderance of the evidence.

27. As explained in *Smith v. Agency for Health Care Administration*, 24 So. 3d 590 (Fla. 5th DCA 2009), evidence of all medical expenses must be presented, as AHCA may recover from the entirety of the medical expense portion—not just the portion that represents its lien. Further, section 409.910(17)(b) grants the undersigned the power to find "the portion of the total recovery which should be allocated as past … medical expenses," and to limit AHCA to that amount. The statute does not authorize a reduction of the Medicaid lien to the Medicaid-only portion of a recipient's recovery. *See also Garcia v. Ag. for Health Care Admin.*, Case No. 19-2013MTR, at 31 (Fla. DOAH Aug 27, 2019) (considering the full amount of all medical expenses in making a determination on past medical expenses). Accordingly, the undersigned concludes that Mr. Carter's past medical expenses, which have been established by a preponderance of the evidence, consist of the amounts

provided by Medicaid ($240,587.85) and Molina Healthcare ($27,179.81), and total $267,767.66.

28. When applying the percentage allocation of 8.6 percent to the past medical expenses of $267,767.66, the result is $23,028.02, which constitutes the share of the settlement proceeds fairly and proportionally attributable to Petitioner's recovery of past medical expenses. In addition, the preponderance of the evidence establishes that $23,028.02 amounts to a fair and reasonable determination of the past medical expenses actually recovered by Petitioner and payable to AHCA.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Agency for Health Care Administration is entitled to $23,028.02 as satisfaction of its Medicaid lien.

DONE AND ORDERED this 22nd day of July, 2020, in Tallahassee, Leon County, Florida.

ROBERT J. TELFER III
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of July, 2020.

COPIES FURNISHED:

Alexander R. Boler, Esquire
Suite 300
2073 Summit Lake Drive
Tallahassee, Florida 32317
(eServed)

Shena Grantham, Esquire
Agency for Health Care Administration
Building 3, Room 3407B
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

David H. Abney, II, Esquire
The Law Office of David H. Abney, II
622 Shelby Street
Frankfort, Kentucky 40601
(eServed)

Mary C.Mayhew, Secretary
Agency for Health Care Administration
Mail Stop 1
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

Stefan Grow, General Counsel
Agency for Health Care Administration
Mail Stop 3
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

Richard J. Shoop, Agency Clerk
Agency for Health Care Administration
Mail Stop 3
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

Thomas M. Hoeler, Esquire
Agency for Health Care Administration
Mail Stop 3
2727 Mahan Drive
Tallahassee, Florida 32308
(eServed)

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.