UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

October 24, 2024

CBCA 8005-FEMA

In the Matter of SOUTHWEST LOUISIANA HOSPITAL ASSOCIATION dba LAKE CHARLES MEMORIAL HOSPITAL

Wendy Huff Ellard and Yann Kaufman of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Jackson, MS, counsel for Applicant; and Chris Bomhoff, Disaster Policy Specialist, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Fort Lauderdale, FL, appearing for Applicant.

Lynne Browning, Assistant Deputy Director, and Daniel Crothers, Public Assistance Section Chief, Governor's Office of Homeland Security and Emergency Preparedness, Baton Rouge, LA, appearing for Grantee.

Ramoncito J. deBorja, Office of Chief Counsel, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC, counsel for Federal Emergency Management Agency.

Before the Arbitration Panel consisting of Board Judges **GOODMAN**, **KULLBERG**, and **CHADWICK**.

CHADWICK, Board Judge, writing for the panel.

Lake Charles Memorial Hospital (applicant) sought arbitration under 42 U.S.C. § 5189a(d) (2018) of a dispute with the Federal Emergency Management Agency (FEMA) regarding the amount of public assistance that was duplicated by an insurance recovery. The parties disagree as to how to apportion the insurance payment between losses that are eligible for public assistance and those that are not. Because FEMA followed its policy by apportioning the payment based on the insurance company's documentation of what was paid, applicant owes the amount of duplicated benefits that FEMA determined.

Background

Hurricane Laura damaged applicant's medical facility in August 2020. As of December 2023, FEMA had approved more than $30 million in public assistance for applicant, and applicant was seeking more than $60 million more. Applicant's Request for Arbitration at 11. This dispute concerns FEMA's reduction of applicant's eligibility for public assistance by $59 million, in a December 2023 first appeal decision, based on insurance proceeds applicant received in late 2020. Applicant's Exhibit 1.

By statute, "[a] person receiving Federal assistance for a major disaster or emergency shall be liable to the United States to the extent that such assistance duplicates benefits available to the person for the same purpose from another source." 42 U.S.C. § 5155(c); *e.g.*, *State of Hawaii v. Federal Emergency Management Agency*, 294 F.3d 1152, 1161 (9th Cir. 2002). FEMA's guidance on duplication of public assistance provides:

> FEMA cannot provide [assistance] that duplicates insurance proceeds . . . . If the Applicant receives insurance proceeds for ineligible losses (e.g., business interruption), FEMA calculates a relative apportionment of insurance proceeds to determine the insurance reduction based on:
>
> - The proceeds received per type of loss as specified by the insurance policy or settlement documentation;
> - Policy limits for categories of loss as specified in the insurance policy; or
> - The ratio of total eligible losses to total ineligible losses.

Public Assistance Program and Policy Guide (PAPPG) (June 2020) at 93–94 (paragraph break omitted). The PAPPG cites a June 2015 policy that uses substantially the same language on insurance apportionment. FEMA Recovery Policy (FP) 206-086-1, *Public Assistance Policy on Insurance* (June 2015).

Applicant had an insurance policy that covered losses that would be eligible for public assistance after a disaster as well as costs that are undisputedly ineligible for such assistance, such as business interruption costs. Applicant's Exhibit 6. Applicant submitted a claim under the policy for damage from the August 2020 hurricane. In October 2020, the insurance company issued a letter stating that coverage under the policy was limited to $75 million for a Named Storm (such as Laura), which amount the insurer would pay in full based on the documentation applicant had supplied. The letter stated:

Payment has been allocated as follows:

Building	$50,000,000
Contents	9,000,000
Time Element:	16,000,000

Applicant's Exhibit 7. "Time Element" refers to business interruption. *See* Applicant's Focused Request for Arbitration at 6; FEMA's Response at 13.

FEMA initially apportioned the insurance payment, at the Recovery Division level, based on an estimated ratio of applicant's eligible to ineligible losses. Applicant's Exhibit 2. In a first appeal in December 2023, however, FEMA found that "the settlement information provided by [the insurer] indicates the amount paid per type of loss and provides sufficient information for FEMA to reduce the eligible assistance by that amount," $59 million for the building and its contents. Applicant's Exhibit 1, First Appeal Analysis at 2. Applicant timely sought arbitration in February 2024. Applicant argues that the ratio-of-loss apportionment methodology (the third bullet-pointed methodology in the PAPPG) remains appropriate. Applicant presented evidence to support an allocation of the insurance proceeds on that basis, which, as we explain, we need not consider.

Discussion

This dispute hinges on the meaning of the term "settlement documentation" in the PAPPG. FEMA could use the first of the three apportionment methodologies listed in the PAPPG if the amounts applicant received from its insurer for eligible versus ineligible costs can be determined either from applicant's insurance policy or from "settlement documentation." PAPPG at 94. No one argues that the policy alone (before the claims adjustment process) required the insurer to apportion the payments exactly as it did. Applicant argues that its insurer's October 2020 letter is not "settlement documentation" for use under the first PAPPG apportionment methodology because the letter "is not the product of any negotiation or other process that could [have] been construed as a settlement." Applicant's Reply at 3. Therefore, applicant argues that we must use the ratio-of-loss methodology instead. *See id*. at 4 ("[T]he only applicable methodology . . . is Methodology 3 because . . . the . . . Letter does not constitute a settlement document."). FEMA maintains that the insurer's letter is the best evidence of what was paid and that FEMA policy on duplication of benefits contains "no requirement" of any affirmative "negotiation or settlement" of an insurance claim. FEMA Surreply at 4.

Neither party cites an independent definition of the modifier "settlement" in the term "settlement documentation" or of the verb "to settle." Applicant insists that the insurer's letter is not documentation of a settlement, while FEMA insists that it is.

Ordinary usage supports FEMA's position. To "settle" means to make a final determination or payment of money owed. *See Settle*, Black's Law Dictionary (12th ed. 2024) (definitions 9, 10). Insurance claims may be deemed "settled" when paid. *See State v. Hahn*, 9 N.W.3d 253, 255–56 (S.D. 2024) (referring to an insurer's payment on a property damage claim as an "insurance settlement"); Conn. Gen. Stat. § 38a-816(6) (2022) (prohibiting "Unfair claim settlement practices" by insurers); *cf.* 31 U.S.C. § 3702(a) (assigning authority to "settle" claims for federal employees' pay, allowances, and other entitlements among the Secretary of Defense, the Director of the Office of Personnel Management, the Administrator of General Services, and the Director of the Office of Management and Budget); *Janice F. Stuart*, GSBCA 16596-RELO, 05-2 BCA ¶ 33,024, at 163,668 ("[U]nder statute and regulation, once the Board has settled a [relocation allowance] claim, the agency must follow the Board's decision."). An insurer can settle (pay) a claim without negotiations or adversarial proceedings.

Accordingly, the insurer's October 2020 letter constitutes "settlement documentation" from which FEMA may determine the duplication of public assistance, absent some good reason not to rely on the letter. We see no such disqualifying problem. As FEMA notes, because the insurer agreed to pay the policy limit of $75 million, it had no apparent incentive (and applicant suggests none) to manipulate the categories of loss to applicant's detriment here. FEMA Surreply at 4. Applicant argues that it lacked the luxury of time to negotiate with the insurer about allocating the payout (which applicant says should have included more ineligible business interruption damages) and that we should not "punish" applicant for opting to obtain the money promptly rather than extending the claim process. Applicant's Reply at 3–4. Although applicant presumably had to make tradeoffs in order to obtain relief, FEMA's policy of relying on the final statement of the third-party insurer itemizing the amounts it paid is neither punitive nor irrational.

Applicant further argues that we should use an apportionment methodology more favorable to it because FEMA has not applied its apportionment policy consistently over time. Applicant goes so far as to accuse FEMA of being "opportunistic" in calculating the duplicated benefits here. Applicant's Surreply at 2–3, 7–8. We reject applicant's accusation. None of the earlier matters that applicant cites as evidence of FEMA's supposed inconsistency involved an allocated insurance payment. *See Columbus Regional Hospital v. Federal Emergency Management Agency*, 708 F.3d 893, 899 (7th Cir. 2013) ("The Hospital's insurer paid out the policy limit of $25 million without allocating between property loss and business-interruption loss."); *Orleans Parish School Board & Louisiana Recovery School District*, CBCA 5457-FEMA, 18-1 BCA ¶ 36,929, at 179,921(2017) ("The settlement agreement did not identify the type of loss or damage for which the applicants were receiving compensation under the terms of the settlement."); Appeal Analysis for Christus Health, FEMA-1791-DR (undated). Even if any of the other matters had involved FEMA's current (June 2020) guidance on duplication of benefits—which they did not—they

would not be examples of circumstances similar to those here, where the insurer expressly apportioned the payment among types of loss.

We see no grounds to disagree with FEMA's selection of the first apportionment methodology listed in the PAPPG to determine the duplication of benefits by attributing the insurance payment to the types of loss that applicant's insurer specified in the document memorializing the settlement of the claim.

Decision

The amount of duplicated benefits under 42 U.S.C. § 5155(c) for the insurance payment at issue is $59 million, as determined by FEMA.

Kyle Chadwick
KYLE CHADWICK
Board Judge

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge