

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SARAH WOJTOWICZ, as parent and)
natural guardian of LEVI)
WOJTOWICZ, a minor,)
)
Petitioner,)
and)
)
JAMES M. WOJTOWICZ,)
)
Intervenor,)
)
vs.) CASE NO. 93-4268N
)
)
FLORIDA BIRTH-RELATED NEUROLOGICAL)
INJURY COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William J. Kendrick, held a formal hearing in the above-styled case on May 17, 1994, in Jacksonville, Florida.

APPEARANCES

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For Intervenor: James W. Wojtowicz, pro se
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For Respondent: W. Douglas Moody, Jr., Esquire
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STATEMENT OF THE ISSUES

At issue in this proceeding is the acceptance of the subject claim for compensation, and the resolution of a dispute between the parents of the infant as to what award, if any, they should receive pursuant to Section 766.31(1)(b), Florida Statutes.

PRELIMINARY STATEMENT

On August 2, 1993, Sarah Wojtowicz, as parent and natural guardian of Levi Wojtowicz, a minor, filed a claim with the Division of Administration Hearings (hereinafter referred to as "DOAH") for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (hereinafter referred to as the "Plan").

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (hereinafter referred to as "NICA") with a copy of the claim on August 4, 1993. NICA reviewed the claim, and on March 21, 1994, gave notice that it "agrees that Levi Wojtowicz suffered a birth-related neurological injury as defined in Section 766.302(2), Florida Statutes," and that it was "prepared to provide medical benefits as provided by Section 766.31(1)(a) and [was] willing to offer the full \$100,000.00 as provided in Section 766.31(1)(b)."

On April 15, 1994, DOAH issued a notice of hearing advising the parties that an evidentiary hearing would be held on May 17, 1994, as to whether "a lump sum benefit of \$100,000, as provided in Section 766.31(1)(b), Florida Statutes, should be awarded to the mother, Sarah Wojtowicz." The father, James M. Wojtowicz, who was divorced from Sarah Wojtowicz, was advised of the pendency of the hearing, and at hearing requested and was granted leave to intervene so that the respective interest of each parent to an award pursuant to Section 766.31(1)(b) could be resolved.

At hearing, the parties stipulated to a number of facts, which are addressed in the findings of fact which follow, Sarah Wojtowicz and James Wojtowicz were called as witnesses, and petitioner's exhibits 1 and 2 were received into evidence.

On June 22, 1994, a stipulation was filed whereby petitioner and NICA agreed that an attorney's fee of \$5,747.00 and costs of \$407.97 were duly incurred in connection with the filing of the claim on behalf of petitioner.

The transcript of the hearing was filed June 13, 1994, and the parties were accorded ten days from that date to file proposed findings of fact. As of the date of this final order no party has elected to file such proposals. 1/

FINDINGS OF FACT

The Claim for Compensation

1. Levi Wojtowicz (Levi) is the natural son of petitioner, Sarah Wojtowicz, and intervenor, James M. Wojtowicz. He was born a live infant on February 26, 1993, at Baptist Medical Center in Jacksonville, Florida, and his birth weight was in excess of 2500 grams.

2. The physician providing obstetrical services during the birth of Levi was John Bordelon, M.D., who was, at all times material hereto, a participating physician in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

3. Here the parties have stipulated, and based on such stipulation and the medical records of record it is found, that Levi suffered a "birth-related neurological injury" as defined by Section 766.302(2), Florida Statutes, in that he suffered an injury to the brain caused by oxygen deprivation in the course of

labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which rendered him permanently and substantially mentally and physically impaired.

4. As a consequence of the foregoing, NICA has agreed that the subject claim is compensable, and that it will pay all "actual expenses" previously incurred and to be incurred in the future, "reasonable expenses" incurred in connection with the filing of the claim on behalf of petitioner, which pursuant to agreement the parties have established to be a reasonable attorney's fee of \$5,747.00 and costs of \$407.97, and the payment of an award of \$100,000.00. Given the circumstances, the sole, remaining issue to be resolved is the appropriate apportionment of the award between the parents who, currently, are divorced.

Apportionment of the Award to the Parents

5. Sarah Wojtowicz (Sarah) and James Wojtowicz (James) were married July 11, 1987, in Edmore, Michigan. One child, Levi, the injured infant in the instant case, was born of that marriage.

6. In January 1993, approximately six to eight weeks before Levi's birth, Sarah and James separated, and James removed himself from the marital home. Notwithstanding, James was present when Levi was delivered by emergency cesarean section, and for the ensuing nine days. Thereafter, of the two months Levi was in the hospital James saw Levi "in the off hours [from the Navy] when he could get in there to see him."

7. Between Levi's discharge from the hospital to the care of Sarah, and September 22, 1993, James visited with Levi on 7 occasions. Two of those times were for 45 minutes, one for 10 minutes, and four were for an entire day. Otherwise, the care of Levi was left to Sarah.

8. On September 15, 1993, a final judgment of dissolution of marriage of James and Sarah Wojtowicz was rendered by the Circuit Court, Duval County, Florida, and the primary residence and custody of Levi was awarded to Sarah. Parental responsibility was, however, shared between them with regard to Levi. As to visitation, the final judgment provided:

The Husband shall have reasonable and liberal visitation privileges with the minor child of the parties upon furnishing the Wife two (2) weeks notice of his intention to exercise said visitation. Said visitation shall include, but is not limited to, the following:

- (a) Minimum two (2) weeks per year when the Husband is on leave;
- (b) The Husband shall have visitation with the minor child of the parties on alternating Christmas days beginning in the calendar year 1994.
- (c) The parties shall agree on a visitation schedule during the summer months closer to the time that the minor child is of school age. Said visitation, however, is contingent upon the fact that the minor child will remain within a 150 mile radius of the minor child's doctor due to his serious medical condition.

Finally, the final judgment approved the parties' agreement that Sarah be allowed to leave the jurisdiction of the court and return to the State of Michigan with Levi.

9. Consistent with the terms of the final judgment, Sarah returned to Michigan on September 22, 1993, and has continued to reside there with her parents, who assist her with the care of Levi. James remarried on December 5, 1993, and continues to reside in Jacksonville, Florida, with his new wife and an infant son born of that union.

10. Since September 22, 1993, James has exercised his rights of visitation on only one occasion and that occurred for a six day period in October 1993 when he, as well as his parents, cared for Levi at his parents' home in Michigan. As to future visitation, James expressed a desire at hearing to again visit with Levi in December 1994; however, it is apparent that the demands of his new family and naval career, as well as the great distance that divides them, may affect that decision and severely limit any visitation James may choose to exercise. Under such circumstances, Sarah is the primary caretaker for Levi, with all its attendant responsibilities and sacrifices.

11. As the primary caretaker for Levi, who is substantially mentally and physically impaired, the demands placed on Sarah are onerous. A typical day with Levi was described by her as follows:

On a typical day that he gets say therapy at home one of the therapists comes in which is twice a week, three times every other week, Levi will wake up anywhere between 7 and 9 depending on what kind of a night he's had. Just recently he started having really bad nights again and we have to wake him up at 9. He gets fed at 9, 11, 1, 3, 5, 7, and 9 by bolus feeding. These feedings take about an hour a piece. It takes about 20 to 30 minutes to run in the milk, the formula, then you have to hold him upright for 20 to 30 minutes longer in order for his reflex not to lose all of the milk. So we have about an hour to an hour and 20 minutes in between feeds to give him everything else he needs.

We can give him -- whenever we play with him, it's structured therapy, and I'm saying we because when I'm on the phone doing paperwork my mom is with him. She's my babysitter without pay. So we spend whatever time is in between there doing structured play with him either with his gross motor skills or fine motor skills.

We also have to position Levi. He doesn't have any independent muscle control to sit. He cannot shift weight independently to relieve pressure. Fortunately, we haven't had any pressure source (sic) yet.

So then when a therapist comes, she will work with Levi and I will stay in the room while she is working with him because she shows me what to do for the rest of the week or weeks depending on how Levi responds to things.

I have bought a big ball for him that he gets facial therapy on. He's got a feeder chair that we can try to work with him on. He doesn't sit well so we work with that.

At each feed he also gets exercise with his mouth and a brushing program that takes probably five minutes and I do that usually while I'm decompressing him while I'm feeding him, so it's all part of the process included in that hour. Also if we have to go to a doctor, we have to -- I try to schedule it so that we can leave in the hour after he's fed that we've got. We can drive down there and then we can feed him there, go to the appointment, feed him again, and then drive home. It usually involves either feeding him in the waiting room or in a restaurant.

Q How about the evenings?

A He gets a bath between his 9 and 11 o'clock feed and in between there there's also care for his stoma. It doesn't take a long time, but it's kind of routine and repetitive.

In the evenings -- he doesn't sleep well at all. He has a sleeping pill right now that's also a seizure depressant so it acts as a sleeping pill too. The night before I came down here he was up for two and a half hours screaming excessively and nothing would calm him, that was worse than it had been just recently, but until he was about maybe a year old or a little later he would do that almost every night.

Clearly, the demands placed on Sarah in the care for Levi leave her little time for other activities, and greatly exceed the demands assumed by the parent of an infant not so impaired as Levi.

12. Under the circumstances, it is apparent that, as between them, the loss suffered by Sarah as a consequence of Levi's injury is grossly disproportionate to that suffered by James, and that such disparity warrants a similar distinction, as between them, in the apportionment of any award. Accordingly, based on such disparity and the legal principles discussed *infra*, it is found that of an award of \$100,000, Sarah Wojtowicz is eligible to receive \$95,000 and James Wojtowicz is eligible to receive \$5,000.

CONCLUSIONS OF LAW

13. The Division of Administration Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Section 766.301, et seq., Florida Statutes, (1993).

14. The Florida Birth-Related Neurological Injury Compensation Plan (the "Plan") was established by the Legislature "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" relating to births occurring on or after January 1, 1989. Section 766.303(1), Florida Statutes.

15. The injured "infant, his personal representative, parents, dependents, and next of kin," may seek compensation under the Plan by filing a claim for compensation with the Division of Administrative Hearings within five years of the infant's birth. Sections 766.302(3), 766.303(2), 766.305(1), and 766.313, Florida Statutes. The Florida Birth-Related Neurological Injury Compensation Association (NICA), which administers the Plan, has "45 days from the date of service of a complete claim . . . in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." Section 766.305(3), Florida Statutes.

16. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, as it has in this case, it may award compensation to the claimant, provided that the award is approved by the Hearing Officer to whom the claim has been assigned. Section 766.305(6), Florida Statutes. Here, the parties have stipulated that the attending physician who provided obstetric services during the birth of Levi was a "participating physician" as that term is defined by Section 766.302(7), Florida Statutes, and as that term is used in Section 766.301 through 766.316, Florida Statutes, and that Levi suffered a "birth-related neurological injury," within the meaning of Section 766.302(2), Florida Statutes. Such stipulation is consistent with the medical records filed in support of the claim for compensation and officially recognized. Under these circumstances, NICA's determination that the claim is compensable and should be accepted for compensation is approved. Section 766.305(6), Florida Statutes.

17. Where, as here it has been found that "the infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth," the Hearing Officer is required to make a determination as to "how much compensation, if any, is awardable pursuant to s. 766.31." Section 766.309(1)(c), Florida Statutes. Included among the "items relative to such injury" for which the Hearing Officer "shall make an award providing compensation," are:

Periodic payments of an award to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury, which award shall not exceed \$100,000. However, at the discretion of the hearing officer, such award may be made in lump sum.

Section 766.31(1)(b), Florida Statutes.

18. The foregoing provision offers no guidance as to the basis upon which an "award" to the parents is to be premised. Accordingly, it is presumed that the Legislature intended that such award be based on the same factors that support an award at common law. *Vanner v. Goldshein*, 216 So.2d 759, 760 (Fla. 2d DCA 1968), ("The general rule is that statutes are to be construed with reference to appropriate principles of the common law, and when possible they should be so construed as to make them harmonize with existing law and not conflict with long settled principles."), and *Carlile v. Game and Fresh Water Fish Commission*, 354 So.2d 362 (Fla. 1977), (A statute designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law was intended unless the statute is explicit in this regard.).

19. Pertinent to this case, the parents of a child who has suffered a significant injury resulting in the child's permanent total disability had, at common law, a right to recover indirect economic losses such as income lost by the parent in caring for the child and for the permanent loss of filial consortium suffered as a result of the injury. *United States of America v. Dempsey*, 19 F.L.W. S198 (Fla. 1994), and *Wilkie v. Roberts*, 91 Fla. 1064, 109 So. 225 (1926). In this context, "consortium" has been defined "to include the loss of companionship, society, love, affection, and solace of the injured child, as well as ordinary day-to-day services that the child would have rendered." *United States of America v. Dempsey*, supra, at S200.

20. Given that the foregoing factors are the premise upon which the award of \$100,000 must rest, so must those factors be balanced, relative to the impact the child's injury has had on the respective interests of the parents, in apportioning the award between the parents. So considered, a significant difference is apparent between the loss suffered by Sarah and James as a consequence of Levi's injury, including: Sarah's lost opportunity in caring for Levi, as compared to James' continued Naval career; and, Sarah's daily loss of Levi's companionship, society, love, affection and solace, as well as ordinary day-to-day services Levi would have rendered had his maturation been age appropriate, as compared to James' periodic loss of consortium. Under such circumstances, the proof demonstrates that of an award of \$100,000, Sarah Wojtowicz is eligible for \$95,000, and James Wojtowicz is eligible for \$5,000; however, no decision is reached as to whether such sums should be paid in periodic payments, lump sum, or through some other means. Rather, the parties are accorded thirty (30) days from the date of this final order to resolve the method of payment, subject to the approval of the Hearing Officer, failing which a hearing will be held to address that issue.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

ORDERED that:

1. The claim for compensation filed by Sarah Wojtowicz, as parent and natural guardian of Levi Wojtowicz, a minor, and NICA's acceptance of that claim for compensation be and the same is hereby approved.

2. NICA shall make immediate payment of all actual expenses, as defined by Section 766.31(1)(a), Florida Statutes, previously incurred and shall make payment for future expenses as incurred.

3. Petitioner shall recover from NICA, as reasonable expenses incurred in connection with the filing of the claim for compensation, a reasonable attorney's fee of \$5,747.00 and costs of \$407.97.

4. Sarah Wojtowicz and James Wojtowicz, as the parents of Levi, are entitled to an award of \$100,000, of which Sarah Wojtowicz is entitled to \$95,000, and James Wojtowicz is entitled to \$5,000.

5. The parties are accorded thirty (30) days from the date of this order to resolve, subject to approval by the Hearing Officer, the manner in which the award to James and Sarah Wojtowicz should be paid. If not resolved within such period, the parties will so advise the Hearing Officer, and a hearing will be scheduled to resolve such issue.

6. Pursuant to Section 766.312, Florida Statutes, jurisdiction is reserved to resolve any disputes should they arise, regarding the parties compliance with the terms of this final order.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 22nd day of July, 1994.

WILLIAM J. KENDRICK
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of July 1994.

ENDNOTE

1/ By letter dated June 22, 1994, filed June 27, 1994, petitioner's counsel advised the Hearing Officer "we were not aware that the transcript was sent to you on June 9, 1994, [and therefore] we did not submit a proposed order to you within the required time period. Now that we have become aware of what has transpired, we will prepare a proposed order and forward it to you for your review within the near future." To date, no such proposal has been forthcoming.

COPIES FURNISHED:
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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 Sections 120.68 and 766.311, Florida Statutes. Review~proceedings are governed by the Florida Rules Of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Agency Clerk Of The Division Of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the appropriate District Court Of Appeal. See, Section 120.68(2), Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992). The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.