STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SANDRA NAP BRITT AND FRANK BRITT, as parents and natural guardians of DAVID BRITT, a minor,

Petitioners,

vs. Case No. 00-3823N

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Respondent,

and

FLORIDA BOARD OF REGENTS and TAMPA GENERAL HOSPITAL,

Intervenors.

FINAL ORDER DENYING PETITIONERS' MOTION TO AMEND FINAL ORDER AND/OR FOR REHEARING

On July 22, 2002, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a hearing in the above-styled case to address Petitioners' Motion to Amend Final Order and/or for Rehearing.

APPEARANCES

For Petitioners: Roland J. Lamb, Esquire
Hahn, Morgan & Lamb
2701 North Rocky Point Drive, Suite 410
Tampa, Florida 33601

For Respondent: Kenneth J. Plante, Esquire
Brewton, Plante & Plante, P.A.
225 South Adams Street, Suite 250
Tallahassee, Florida 32301

For Intervenor Florida Board of Regents:

Michael N. Brown, Esquire
Allen Dell, P.A.
101 East Kennedy Boulevard, Suite 1240
Post Office Box 2111
Tampa, Florida 33602

For Intervenor Tampa General Hospital:

David S. Nelson, Esquire
Smith & Fuller, P.A.
Post Office Box 3288
Tampa, Florida 33601

STATEMENT OF THE CASE

1. On August 14, 2001, a Final Order was entered in the above-styled case which resolved that David Britt, a minor, had suffered a "birth-related neurological injury," as defined by the Florida Birth-Related Neurological Injury Compensation Plan (Plan). Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, to mean:

> . . . injury to the brain . . . of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation . . . occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired . . . . (Emphasis added)

2. The Final Order was appealed by the Florida Birth-Related Neurological Injury Compensation Association (NICA), to the District Court of Appeal, Second District, State of Florida.

3. During the pendency of the appeal, Petitioners/Appellees filed what they termed a Notice of Request for Alternative Relief. That notice read, as follows:

> Appellees, SANDRA NAP BRITT and FRANK BRITT, as parents and natural guardians of DAVID BRITT, a minor, by and through their undersigned attorneys, hereby notice this Court of their Request for Alternative Relief and, as grounds therefor, state as follows:
>
> 1. On September 1, 1999, Appellees, SANDRA NAP BRITT and FRANK BRITT, filed a Complaint against Tampa General Hospital and The Florida Board of Regents, alleging medical negligence during and surrounding the birth of their son, David Britt, which negligence resulted in permanent and serious injuries to David Britt.
>
> 2. The Defendants affirmatively defended against Plaintiffs' Complaint by alleging NICA exclusivity and immunity. As a result of Defendants' affirmative defense, the Britt's civil action was abated pending a determination by the Administrative Law Judge in the Division of Administrative Hearings as to the applicability of NICA to the claim.
>
> 3. Pursuant to the Court's Order of Abatement, the Britts filed a Petition with the Division of Administrative Hearings on September 14, 2000, requesting a determination on the issue of NICA applicability. In particular, the Appellees challenged the Defendants' affirmative defense in the civil action by contending that appropriate notice under Section

766.316, Florida Statutes, had not been provided to the Appellees.

4. On November 8, 2000, The Florida Board of Regents and Tampa General Hospital were accorded leave to intervene in the Administrative proceeding.

5. On June 23, 2001 [sic],[1] an evidentiary hearing was held to resolve whether the health care providers complied with the notice provisions of the Plan. Both The Florida Board of Regents and Tampa General Hospital were represented by counsel at the hearing and participated in the hearing in order to present their position that they had complied with the notice provisions of the Plan.

6. At the hearing, based upon the totality of the information provided to the Appellees through June 25, 2001, the Appellees stipulated that David suffered "a birth-related neurological injury" as defined by the Plan. . . . To so stipulate, the injuries suffered by David Britt must have been "injury to the brain or spinal cord . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired." Section 766.302(2), Florida Statutes.

7. On August 14, 2001, Administrative Law Judge William J. Kendrick entered a Final Order finding that proper notice had not been given to the Britts and, therefore, the Britts could elect to pursue their civil action or accept NICA benefits. The Britts elected to continue with the pursuit of their civil action.

8. As a result of the Administrative Law Judge's Final Order and the Britts' election,

the Circuit Court lifted the abatement of the civil action, and discovery was permitted to proceed.

9. On October 31, 2001, Plaintiffs served Interrogatories upon the Defendants in the civil action. One of the interrogatories requested the Defendants to: "Describe in detail how the incident described in the complaint happened, including all actions taken by you to prevent the incident". Defendant, Florida Health Sciences, Inc., d/b/a Tampa General Hospital's answer to interrogatory #3 stated that:

. . . a decision was made by the physicians employed by co-defendant University of South Florida to expedite delivery via cesarean section. The minor child, David Britt, was delivered via C-section. The initial Apgar scores were low but the baby did show signs of improvement while still in the operating room. The baby was intubated and transported to recovery. During the transcript [sic - transport], the minor child's endotracheal tube became dislodged. Following this dislodgement the baby decompensated and it was later discovered that the child had suffered an anoxic insult to his brain.

. . . The Florida Board of Regents answered Plaintiff's interrogatory #3 by stating:

During the labor period, the fetus developed fetal distress. Measures were taken to correct the signs of the fetal distress [sic - and] a decision was made to expedite delivery with a cesarian section. That was accomplished and while one of the initial Apgar scores were low, the baby did improve while in the operating room. He was intubated and was being transported to recovery. Sometime during the transport, David's endotracheal tube became dislodged. At this time, we are not aware of how the tube became dislodged. The baby decompensated following this dislodgement.

It was later discovered that the child had suffered an anoxic insult to his brain.

* * *

10. The medical records of Sandra Nap Britt and David Britt are void of any reference to the endotracheal tube becoming dislodged during the transport. Any and all information pertaining to David Britt's endotracheal tube becoming dislodged during the transport, and the connection between such dislodgement and the possible injuries suffered by David Britt, were not provided to the Appellees or made available to the Appellees until after the administrative hearing held before the Administrative Law Judge.

11. If, as the Defendants, The Florida Board of Regents and Tampa General Hospital, assert, David's endotracheal tube became dislodged, and such dislodgment caused decompensation and resulted or contributed to David's anoxic insult to his brain, then David's injury would not qualify for NICA compensation because such an injury would not have occurred, in whole or in part, during the labor, delivery, or resuscitation in the immediate post-delivery period, as is required under the Plan. See Sections 766.302(2), 766.303(2), 766.308(1) and 766.309(1)(a), Florida Statutes.

12. This newly discovered evidence pertaining to the dislodgement of David Britt's endotracheal tube could provide an independent basis for excluding David Britt's injury from NICA coverage. Due to the concealment of this fact in the medical records (said concealment occurring through the absence of any reference to this incident), Appellees were not aware of these facts at the time of the initial administrative hearing in this matter.

> 13. Accordingly, although Appellees believed the Administrative Law Judge's Order should be affirmed, for all the reasons set forth by Appellees in this appeal, should this Court determine that the Administrative Law Judge's Final Order should be reversed, Appellees respectfully request this Court to remand this matter back to the Division of Administrative Hearings for further determinations by the Administrative Law Judge, in light of newly discovered evidence which could have a significant impact upon the applicability and compensability of this claim under the Plan.
>
> WHEREFORE, Appellees respectfully request this Court to affirm the Final Order of the Administrative Law Judge, or, in the alternative, if reversal is warranted, Appellees respectfully request this Court to remand this case for further proceedings in order to allow Plaintiffs to present the newly discovered evidence to the Administrative Law Judge and to NICA for their determination.

4. In response to Petitioners'/Appellees' notice, the court, by Order of April 25, 2002, resolved that:

> Appellees' notice of request for alternative relief is treated as a motion to relinquish jurisdiction and is granted for 60 days in order for appellees to file a motion pursuant to Fla.R.Civ.P. 1.540.

5. On June 3, 2002, Petitioners filed the pending Motion to Amend Final Order and/or for Rehearing with the Division of Administrative Hearings (DOAH). That motion, which read substantially the same as the notice filed with the court, concluded that:

11. If, as the Intervenors, The Florida Board of Regents and Tampa General Hospital, assert, David Britt's endotracheal tube became dislodged, and such dislodgment caused decompensation and resulted in or contributed to David Britt's anoxic insult to his brain, and additional sequelae and events in the NICU nursery, then David Britt's injury would not qualify for NICA compensation because such an injury would not have occurred, in whole or in part, during the labor, delivery, or resuscitation in the immediate post-delivery period, as is required under the Plan. See Sections 766.302(2), 766.303(2), 766.308(1) and 766.309(1)(a), Florida Statutes.

12. This newly discovered evidence pertaining to the dislodgement of David Britt's endotracheal tube, which is fraudulently absent from the medical records, would provide a basis for excluding David Britt's injury from NICA coverage, in whole or in part. Due to the concealment of this fact in the medical records (said concealment occurring through the absence of any reference to this incident), Petitioners were not aware of these facts at the time of the initial administrative hearing in this matter.

13. After learning of this newly discovered evidence, the Petitioners (acting as Appellees before the Second District Court of Appeal) filed their Notice of Request for Alternative Relief with the District Court of Appeal . . .

14. In response to the Notice of Request for Alternative Relief, the District Court of Appeal issued its Order stating that the Notice would be treated as a motion to relinquish jurisdiction and such motion was granted for a period of 60 days in order for the Petitioners (Appellees) to file a motion pursuant to Florida Rule of Civil Procedure 1.540 . . . .

> 15. Petitioners request this Court to amend the Final Order concerning the issue of whether David Britt suffered a birth-related neurological injury within the meaning of Chapter 766, Florida Statutes, given the newly discovered and fraudulently concealed factual circumstances now sworn to in answers to interrogatories by both Intervenors, Tampa General Hospital and The Florida Board of Regents.
>
> 16. It is Petitioners' contention that the initial conclusion of Administrative Law Judge William Kendrick that David Britt suffered a "birth related neurological injury" was entirely correct. Unfortunately, it appears that counsel for both Intervenors were aware that after the initial resuscitation within the delivery room a subsequent event occurred involving the dislodgment of the endotracheal tube which they apparently believed led to an arrest and code in the neonatal intensive care unit. Under the circumstances of such conduct and given the sworn evidence concerning the event of subsequent dislodgment of the endotracheal tube, Petitioners request the Administrative Law Judge to find that the subsequent events after the initial successful resuscitation, and during transport, do not constitute a compensable claim since brain injuries related to this event would not have occurred during the labor, delivery or resuscitation in the immediate post-delivery period as is required by the plan.
>
> WHEREFORE, Petitioners respectfully request that an Amended Order be entered adding a provision finding that the newly discovered incident and its sequelae does not constitute a compensable claim.

6. In reading the Notice of Request for Alternative Relief filed with the court, as well as the Motion to Amend Final Order

and/or for Rehearing filed with DOAH, one would reasonably conclude that Petitioners are of the view that, if considered, the "newly discovered evidence" would likely alter the conclusion that David suffered a "birth-related neurological injury," because his brain injury may be attributable to events (the dislodgement of his endotracheal tube) that occurred after "labor, delivery, or resuscitation in the immediate post-delivery period." Section 766.302(2), Florida Statutes. See also Nagy v. Florida Birth-Related Neurological Injury Compensation Association, 813 So. 2d 155 (Fla. 4th DCA 2002). So read, Petitioners' motion is founded on a logical premise. However, such is neither Petitioners' contention nor the rationale for the pending motion.

7. Succinctly stated, Petitioners do not contend that any injury that may have resulted from the dislodgement of David's endotracheal tube affects the conclusion reached that he suffered a "birth-related neurological injury," defined as an "injury to the brain . . . caused by oxygen deprivation . . . occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired." Section 766.302(2), Florida Statutes. Rather, Petitioners, by their motion, merely "request that an Amended Order be entered adding a provision finding that the newly discovered incident and

its sequelae does not constitute a compensable claim." Stated otherwise, as Petitioners' counsel acknowledged at hearing, they agree the Final Order correctly resolved that David suffered a "birth-related neurological injury," but request that the administrative law judge find that any dislodgement of his endotracheal tube occurred after "the immediate post-delivery period" and, consequently, the Plan does not preclude them from pursuing a civil action with regard to that incident.

8. Given that Petitioners neither seek relief from the Final Order nor contend that the "newly discovered" evidence would likely change the result if rehearing were granted, no useful purpose would be served by conducting an evidentiary hearing to resolve whether good cause exists under Fla.R.Civ.P. 1.540, to relieve Petitioners from the terms of the Final Order.

CONCLUSIONS OF LAW

9. Pursuant to an order of the District Court of Appeal, Second District, State of Florida, discussed supra, jurisdiction has been relinquished to the Division of Administrative Hearings to consider a motion, pursuant to Fla.R.Civ.P. 1.540, for relief from the Final Order entered August 14, 2001.

10. Pertinent to this case, Fla.R.Civ.P. 1.540(b), provides as follows:

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the

> court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party . . . .

11. Notably, as heretofore discussed, Petitioners do not seek relief from the Final Order. Moreover, they do not contend the "newly discovered" evidence would likely change the result if rehearing were granted. Consequently, there is no basis for relief under Fla.R.Civ.P. 1.540(b), and no need to conduct an evidentiary hearing on Petitioners' motion. Dade National Bank of Miami v. Kay, 131 So. 2d 24, 26 (Fla. 3d DCA 1961)(The "requirements for granting a new trial on the ground of newly discovered evidence are [, inter alia,] . . . that it must appear that the evidence is such as will probably change the result if a new trial is granted; . . . [and] that it is material to the issue."). See also Schlapper v. Maurer, 687 So. 2d 982 (Fla. 5th DCA 1997)(Materiality is one of four elements required before a court should grant relief from fraudulent misrepresentation).

12. As for Petitioners' request that the administrative law judge conduct an evidentiary hearing and enter an amended final order finding that any dislodgement of David's endotracheal tube occurred after "the immediate post-delivery period" and,

consequently, the Plan does not preclude them from pursuing a civil action with regard to that incident, I decline to accord such relief for two reasons. First, jurisdiction was relinquished to the Division of Administrative Hearings for the limited purpose of considering a motion filed pursuant to Fla.R.Civ.P. 1.540. Petitioners' request exceeds the bounds of the court's delegation. Secondly, given Petitioners' acknowledgement that the claim is compensable, the subsequent dislodgement of David's endotracheal tube is not material to the issue of whether he suffered a "birth-related neurological injury." Consequently, whether the dislodgement occurred during "the immediate post-delivery period" or thereafter is not a matter the administrative law judge need address. See Section 766.309, Florida Statutes, and Gugelmin v. Division of Administrative Hearings, 27 Fla.L.Weekly D1101a (Fla. 4th DCA May 8, 2002).

CONCLUSION

Based on the foregoing, it is

ORDERED that Petitioners' Motion to Amend Final Order and/or for Rehearing is denied.

DONE AND ORDERED this 31st day of July, 2002, in Tallahassee, Leon County, Florida.

____

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of July, 2002.

ENDNOTE

1/ The hearing was held on June 25, 2001.

COPIES FURNISHED:

Kenneth J. Plante, Esquire
Wilbur E. Brewton, Esquire
Brewton, Plante & Plante, P.A.
225 South Adams Street
Suite 250
Tallahassee, Florida 32301

Michael N. Brown, Esquire
Allen Dell, P.A.
Post Office Box 2111
Tampa, Florida 33601

Roland J. Lamb, Esquire
Hahn, Morgan & Lamb
2701 North Rocky Point Drive
Suite 410
Tampa, Florida 33601

Lynn Larson, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
1435 Piedmont Drive, East, Suite 101
Tallahassee, Florida 32312

David S. Nelson, Esquire
Smith & Fuller, P.A.
Post Office Box 3288
Tampa, Florida 33601

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.