

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MARIA FERGUSON AND GARRY )  
FERGUSON, ON BEHALF OF AND AS )  
PARENTS AND NATURAL GUARDIANS )  
OF CASEY FERGUSON, A MINOR, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 01-1195N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

AMENDED FINAL ORDER FOLLOWING REMAND,  
APPROVAL OF PARTIES' STIPULATION, AND AWARD

On December 18, 2001, a Final Order was rendered in the above-styled case which resolved that the subject claim qualified for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan), and that the participating physician, but not the hospital, complied with the notice provisions of the Plan. Left to resolve was how much compensation, if any, should be awarded pursuant to Section 766.31, Florida Statutes.

That Final Order was duly appealed to the District Court of Appeal, Second District, State of Florida, which, by Opinion filed April 2, 2004, resolved that:

. . . [w]e determine that the ALJ not only exceeded his jurisdiction in reaching the legal conclusions regarding immunity, but also exceeded his jurisdiction in addressing the factual issues of notice. We therefore reverse the ALJ's order as to the notice issues. In so doing, we certify conflict with the Fifth District's opinion in *O'Leary*, 757 So. 2d 624, the Third District's opinion in *University of Miami v. M.A.*, 793 So. 2d 999 (Fla. 3d DCA 2001), and the Fourth District's opinions in *Gugelmin v. Division of Administrative Hearings*, 815 So. 2d 764 (Fla. 4th DCA 2002), and *Behan v. Florida Birth-Related Neurological Injury Compensation Ass'n*, 664 So. 2d 1173 (Fla. 4th DCA 1995), to the extent that these opinions hold that the ALJ has the authority to determine issues related to notice in NICA proceedings.

\* \* \*

Additionally, we affirm the ALJ's order as to the finding of compensability of the injury, and we remand for the entry of an amended final order consistent with this opinion.

On January 11, 2007, the Supreme Court of Florida rendered its opinion in the consolidated case, Florida Birth-Related Neurological Injury Compensation Association v. Division of Administrative Hearings (All Children's Hospital) and Florida Birth-Related Neurological Injury Compensation Association v. Ferguson, 948 So. 2d 705 (Fla. 2007). As for the Ferguson case, the Court found the issue raised to be moot, and dismissed the petition for review. However, with regard to the All Children's

Hospital case the Court resolved the conflict question, as follows:

In conclusion, when the issue of whether notice was adequately provided pursuant to *section 766.316* is raised in a NICA claim, we conclude that the ALJ has jurisdiction to determine whether the health care provider complied with the requirements of *section 766.316*. Therefore, we quash the Second District's decision in *All Children's Hospital*, and remand for further findings consistent with this opinion. We dismiss the petition to review *Ferguson* as moot.

On receipt of the Supreme Court's Mandate in Ferguson, the District Court of Appeal returned the record to the Division of Administrative Hearings (DOAH), and closed its file. Left pending before DOAH, was the obligation to conform the ALJ's Final Order to the opinions of the District Court of Appeal and the Supreme Court, and to resolve how much compensation, if any, should be awarded pursuant to Section 766.31, Florida Statutes. The issue of compensation was addressed by the parties' Stipulation as to the Amount of the NICA Award, filed September 28, 2007.

Giving due consideration to the Opinion of the District Court of Appeal, the Supreme Court's Opinion, and the parties' Stipulation, it is

ORDERED that:

1. A new sentence is added at the end of paragraph 31 of the Final Order to read, as follows: "Here, the participating

physician complied with the notice provisions of the Plan, but the hospital did not."

2. Paragraphs 32 through 38 and Endnote 9 of the Final Order are vacated.

3. Paragraph 39 of the Final Order is renumbered paragraph 32, and amended to read, as follows:

32. Where, as here, the administrative law judge determines that "the infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth," he is required to make a determination as to "how much compensation, if any, is to be awarded pursuant to s. 766.31." Section 766.309(1)(c), Florida Statutes. In this case, the issues of compensability and the amount of compensation to be awarded were bifurcated. Accordingly, absent agreement by the parties, a further hearing will be necessary to resolve any existing disputes regarding "actual expenses," the amount and manner of payment of "an award to the parents or natural guardians," and the "reasonable expenses incurred in connection with the filing of the claim." Section 766.31(1), Florida Statutes.

4. The "Conclusion" of the Final Order is amended to read, as follows:

#### CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the claim for compensation filed by Maria Ferguson and Garry Ferguson, as parents and natural guardians of Casey Ferguson, a minor, and NICA's proposal

to accept the claim for compensation be and the same are hereby approved.

It is further ORDERED that the participating physician complied with the notice provisions of the Plan, but the hospital did not.

It is further ORDERED that absent agreement, and subject to the approval of the administrative law judge, a hearing will be scheduled to determine "how much compensation, if any, is to be awarded pursuant to s. 766.31." § 766.309(1)(c), Fla. Stat. Once resolved, an award will be made consistent with Section 766.31, Florida Statutes.

It is further ORDERED that 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.

5. The Stipulation as to the Amount of the NICA Award, filed September 28, 2007, is hereby approved, and the parties are directed to comply with the provisions thereof.

6. Petitioners, Maria Ferguson and Garry Ferguson, as the parents of Casey Ferguson, a deceased minor, are awarded One hundred thousand dollars (\$100,000.00), pursuant to Section 766.31(1)(b), Florida Statutes, to be paid in lump sum, together with past expenses in the sum of Two thousand five hundred four dollars and fifty cents (\$2,504.50), pursuant to Section 766.31(1)(a), Florida Statutes. Petitioners are also awarded attorney's fees, including costs, in the sum of Thirty thousand

dollars (\$30,000.00), pursuant to Section 766.31(1)(c), Florida Statutes, which shall be payable to Goldfarb, & Gold, P.A., Trust Account.

7. Upon payment of the award of One hundred thousand dollars (\$100,000.00), attorney's fees and other expenses of Thirty thousand dollars (\$30,000.00), and past expenses of Two thousand five hundred four dollars and fifty cents (\$2,504.50), the claims of Petitioners (Claimants) shall be deemed fully satisfied and extinguished.

8. The Division of Administrative Hearings retains jurisdiction over this matter to resolve any disputes, should they arise, regarding the parties' compliance with the terms of this Amended Final Order and Award.

DONE AND ORDERED this 4th day of October, 2007, in Tallahassee, Leon County, Florida.



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WILLIAM J. KENDRICK  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 4th day of October, 2007.

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 the original of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 766.311, 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.