STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RANDALL MILLION AND EILEEN MILLION, on behalf of and as parents and natural guardians of SIMEON ELIJAH MILLION,	)	
Petitioners,	)	
vs.	)	Case No. 02-2702N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
NORTH BROWARD HOSPITAL DISTRICT, d/b/a BROWARD GENERAL MEDICAL CENTER; HARVEY C. ROTH, M.D.; MARK TOMBACK, M.D.; KAREN J. SACER, C.N.M.; and SUNLIFE OB/GYN SERVICES OF BROWARD COUNTY, P.A.,	)	
Intervenors.	)	

PARTIAL AWARD

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a hearing in the above-styled case on July 10, 2006, by video teleconference, with sites in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioners: Altom M. Maglio, Esquire
Maglio, Christopher & Toale Law Firm
2480 Fruitville Road, Suite 6
Sarasota, Florida 34237-6223

and

Henry T. Courtney, Esquire
Courtney Law Firm
The Merrick Plaza
2199 Ponce de Leon Boulevard, Suite 301
Coral Gables, Florida 33134

For Respondent: David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest Sixth Court
Plantation, Florida 33324

STATEMENT OF THE ISSUES

At issue is the amount of compensation to be awarded pursuant to Section 766.31(1), Florida Statutes, including the amount and manner of payment of an award to the parents, the amount owing for medical and other expenses previously incurred, and all other issues related to an award, including Petitioners' entitlement, if any, to "prejudgment interest." However, the amount owing for reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees, will (at the parties' request) be addressed, following a subsequent hearing.

PRELIMINARY STATEMENT

On January 27, 2004, an Order was entered in the above-styled case which resolved that the claim was compensable, and

that the hospital, but not the participating physicians, complied with the notice provisions of the Florida Birth-Related Neurological Injury Compensation Plan (Plan). Left to resolve was how much compensation was to be awarded pursuant to Section 766.31(1), Florida Statutes.

Following entry of the Order, an appeal was taken to the Fourth District Court of Appeal which, pertinent to this proceeding, reversed the finding that the participating physicians failed to comply with the notice provisions of the Plan. Sunlife OB/GYN Services of Broward County, P.A. v. Million, 907 So. 2d 624 (Fla. 4th DCA 2005).

Following the court's Opinion, and issuance of the Mandate, an Order was entered on August 17, 2005, which provided:

> ORDERED that the parties are accorded 30 days from the date of this order to resolve, subject to approval by the administrative law judge, the amount and manner of payment of an award to the parents or legal guardians, the reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees, and the amount owing for expenses previously incurred. If not resolved within such period, the parties shall so advise the administrative law judge, and a hearing will be scheduled to resolve such issues. Once resolved, a final award will be made consistent with Section 766.31, Florida Statutes.

Thereafter, although accorded a number of extensions of time within which to do so, the parties were unable to resolve all

issues related to an award. Consequently, a hearing was scheduled for July 10, 2006, to resolve such issues, with the exception of attorney's fees and costs.

At hearing, Petitioners called Eileen Million, as a witness, and Petitioners' Exhibit 1 (the deposition of Robert D. Halverson, M.D.), Exhibit 2 (the deposition of Mrs. Million), Exhibit 3 (a photograph of Simeon Million), and Exhibit 4 (a document titled Attendant Care of Petitioners Randall and Eileen Million),[1] were received into evidence. Respondent's Exhibit 1 (the deposition of Michael Duchowny, M.D.), and Exhibit 2 (the deposition of Aubrey Scott, Jr., M.D.), were received into evidence. No other witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed July 26, 2006, and the parties were accorded 10 days from that date to file proposed orders. The parties elected to file such proposals, as well as numerous memoranda related to the issues, and they have been duly-considered.

FINDINGS OF FACT

Background[2]

1. Simeon Elijah Million (Simeon), is the adoptive son of Randall and Eileen Million, and was born May 26, 1999, at Broward General Medical Center, Broward County, Florida.

2. At birth, Simeon suffered a "birth-related neurological injury," as that term as defined by Section 766.302(2), Florida Statutes, and by Order of January 27, 2004, it was resolved that the claim was compensable. Consequently, Petitioners are entitled to an award of benefits, as authorized by Section 766.31(1), Florida Statutes.

The claim for benefits

3. By Stipulation for Settlement of Certain Benefits, filed July 11, 2006, the parties resolved most issues related to an award, and that stipulation will be approved. Left to resolve at this time are Petitioners' entitlement to an award for residential or custodial care and, if so, the amount; Petitioners' entitlement to reimbursement for a Braun under-vehicle wheelchair lift; and Petitioners' entitlement to prejudgment interest and, if so, the amount. Left to resolve at a later date is an award for attorney's fees and other expenses (apart from those agreed-to in the parties' stipulation), incurred in pursuing the claim.

The Million family

4. Following discharge from Broward General Medical Center on July 19, 1999, Simeon joined Randall and Eileen Million, and their four children, Krysann, Kara, Randall, Jr., and Gabriella (aged approximately 10, 9, 5, and 3),[3] at their home in Naples, Florida. Krysann and Kara are special-needs children, who were

adopted by the Millions at early infancy, and Randall, Jr., and Gabriella are the Million's natural children, with no special needs. Of note Krysann was diagnosed with attention deficit hyperactivity disorder (ADHD) and Kara was diagnosed with an undisclosed emotional disorder. According to Mrs. Million, Kara has overcome her difficulty, although when this occurred is not of record. As for Krysann, her disorder persists and "it's a matter of her having learned to live with them and to adjust and to be as functional as she possibly can in the world." (Transcript (Tr.), page 11).

5. At some point during the first-half of the year 2000, the Millions relocated in Fountain, Florida, a small town in the Florida panhandle.[4] There, the Millions adopted two more children with special needs, Mariah and Jeremiah. Mariah joined the family at age two weeks, when Simeon was approximately one year old, and Jeremiah joined the family at age two weeks, when Simeon was approximately three years of age.[5] Of note, Mariah was born without an anal opening, and required surgical intervention. According to Mrs. Million, Mariah is now continent, and monitored only for diet and bowel movement. As for Jeremiah, he has spina bifida,[6] is paralyzed from the knees down, uses braces and a walker to ambulate, and had a ventriculoperitoneal shunt placed at about age two. Other

ongoing concerns include a need for bladder catheterization five times a day, and monitoring his bowel functions.

6. Following their move to Fountain, Mr. Million was employed as an examiner by the Florida Division of Motor Vehicles, but resigned in March 2005, and remains unemployed.[7] Mrs. Million is qualified by training and experience as a registered nurse (RN), licensed in Illinois, eligible for licensure by endorsement in Florida (as she was at one time in the mid-1980s), and admittedly qualified to address the special needs of her children. (See Respondent's proposed Final Order, Findings of Fact, paragraph 9). However, Mrs. Million has not been gainfully employed in her profession or otherwise since 1996, but cares for the family.[8]

The claim for residential or custodian care

7. Simeon, like all infants covered under the Plan, suffered a catastrophic injury at birth that resulted in permanent and substantial mental and physical impairment. In Simeon's case, he suffered profound hypoxic ischemic encephalopathy, with cerebral palsy (spastic quadriplegia and marked cognitive impairment), and cortical blindness. Simeon is wheelchair-bound (unable to ambulate), with fixed contractures at the elbow; no verbal communication skills; no bowel or bladder control; no evidence of mental development beyond the

early months of infancy;[9] and totally dependent on others for care.

8. Simeon has also displayed difficulty swallowing, reactive airway disease (asthma), allergies, eczema, and gastroesophael reflux. However, following hospitalization for ten days in February 2001, Simeon has been on medications that have controlled his asthma; and the placement of a G-tube in August 2003, resolved some issues with regard to his feeding, but episodes of reflux persisted. Then, ten months prior to hearing, Petitioners identified a food formula (Alpha ENF) that addressed Simeon's food allergies, and since then reflux has been a rare occurrence, the eczema has cleared up tremendously, wheezing is down tremendously, and his bowels are more regular. (Tr., pages 31, 32, 35, and 39). More recently, in June 2006, Simeon was hospitalized for two days, for orthopedic surgery (to return the hips to their socket), and is casted from the hips to the ankles, with two spreader bars to keep his legs in adduction.

9. In this case, the Millions are seeking an award for the residential or custodial care they provided from July 19, 1999, through June 30, 2006, excluding the period of Simeon's ten-day hospitalization in February 2001, and his two-day hospitalization in June 2006. (Petitioners' Exhibit 4). According to their proposed final order, Petitioners would also

exclude ten days for a hospital stay in 2003. (Petitioners' proposed Final Order, endnote 1).

10. To address the level and quantity of care provided Simeon, Petitioners offered the testimony of Mrs. Million, at hearing and by deposition. According to Mrs. Million, Simeon's daily routine begins at 8:00 a.m., when she wakes him, places him on the bed, and listens to his lungs, checks his ears, and takes his temperature. Between then and approximately 9:30 a.m., Mrs. Million spends 15 to 20 minutes stretching Simeon's upper and lower extremities; performs chest physical therapy (PT) and, if necessary, suctions his upper airway (which she does 3 or 4 times a day); spends another 5 minutes on stretching exercises; gives Simeon a bed bath; changes his diaper (as she does, as needed, during the day); applies his eczema medications; and then transfers him to his wheelchair and moves him into the kitchen. Medications are provided in the morning, as prescribed or as needed, as they are during the day.

11. In the kitchen, Simeon's teeth are brushed, continuous feeding by pump (through his G-tube) begins, and at 10:00 a.m., he is moved by wheelchair to the living room, and remains with the other children. There, according to Mrs. Million, the goal is to provide Simeon with four hours of ABR massage therapy, between 10:00 a.m. and 3:00 p.m., with a one-hour lunch break (from noon to 1:00 p.m.). Typically, ABR therapy is performed

by the other children for one hour each, although Mrs. Million may also participate. Notably, ABR therapy has not been prescribed or endorsed, as medically necessary or reasonably likely to be of benefit to Simeon, and is not an accepted program.

12. Simeon's morning feed is stopped at noon, Mrs. Million gives him some juice, provides chest PT and, if necessary, suctions his airways. During the afternoon session, Simeon's afternoon feed is started at 2:00 p.m., and discontinued at 4:30 p.m. In the interim, 3:00 p.m. to 4:00 p.m., is considered quiet time (in the living room), although Mrs. Million may assess Simeon, and at about 4:15 p.m., Simeon is moved to the kitchen where the family dines. Typically, Mrs. Million gives Simeon physical therapy (stretching exercises) similar to that given in the morning, two more times during the day or evening, and bathes Simeon twice weekly after dinner.

13. From 6:00 p.m. to 7:30 p.m., Simeon receives his evening feeding, and from 7:30 p.m. to 9:00 p.m., the family gathers for devotion time. Then the children retire to their rooms, and Simeon retires with his father to the parents' bedroom (where he sleeps in a hospital bed), although he may not go to sleep until 11:00 p.m. (when his father retires after watching television). Mrs. Million assesses Simeon at

11:00 p.m., at 12:30 a.m. (when she retires), briefly at 3:30 a.m., and again when she wakes him at 8:00 a.m.

14. While Mrs. Million described a typical day for Simeon, care issue have varied over time, as discussed supra. Moreover, Simeon is, and has been, somnolent (drowsy or sleepy), but arousable, and may sleep for portions, if not all of the day, and require little direct attention.[10]

15. Apart from Mrs. Million's testimony regarding the level and quantity of care she and other members of the family have provided, the parties offered the testimony of three physicians, all of whom were of the opinion that Simeon required some level of residential or custodial care. Offered on behalf of Petitioners was the testimony of Robert Halverson, M.D., a physician board-certified in physical medicine and rehabilitation, and offered on behalf of Respondent was the testimony of Michael Duchowny, M.D., a physician board-certified in pediatrics, neurology with special competence in child neurology, and clinical neurophysiology, and Aubrey Scott, Jr., M.D., a physician board-certified in pediatrics and Simeon's treating pediatrician. (Petitioners' Exhibit 1, and Respondent's Exhibits 1 and 2).

16. Dr. Halverson reviewed the medical records, interviewed Mrs. Million, examined Simeon (on June 15, 2006), and considered the guidelines for treatment and care for

children and adolescents with cerebral palsy, to derive the type and intensity of care Simeon required. Based on that analysis, Dr. Halverson concluded that because of the severity of Simeon's cognitive impairment, paralysis, and spasticity, Simeon required 24-hour care. Dr. Halverson's analysis and conclusions were stated, as follows:

> Q . . . [I]n your evaluation of this matter, did you arrive at any conclusions in regard to Simeon's need for attendant care?
>
> A Yes. I looked at how much attendant care he's going to need versus the kinds of interventions and medications he needs throughout the day. Right now his mother is providing all of his care 24 hours a day. That includes monitoring and treating his respiratory condition, providing him with chest percussion and suctioning; treating him with his aerosol nebulizers and his Albuterol, administering his medications; taking care of his feeding tube site, dressing changes, and dealing with infections there; administering his tube feedings and checking for any residuals that might be occurring with the tube feedings. She's providing his daily skin care. She's providing his bowel program which includes inserting a suppository. She provides him frequent range of motion and stressing -- stretching to try to reduce contractures.
>
> Approximately one week ago he also had surgery to both of his hips, and currently, he's in a cast, so she's providing his wound care for that and monitoring for any complications to that. In addition to those kinds of nursing care that she's providing, she's also providing all of his routine self care like changing his diaper and cleaning him up after he defecates. She and other family members perform transfers. She

dresses and bathes Simeon. She provides him with all his transportation in a van. And she also frequently repositions him to keep his skin intact and also to keep him from vomiting from his tube feedings.

Q Are all the different types of care that you just described, in your opinion to a reasonable degree of medical certainty, medically necessary?

A Yes. And they're also consistent with the guidelines of treatment of individuals with this condition.

Q In your role of evaluating the cost of medical care and the types of medical care to be required by a patient, have you ever had occasion to determine whether a patient requires different levels of nursing care?

A Yes.

Q And could you explain briefly the different levels of nursing care that are required by different patients?

A Well, you -- the level of care is based on the intensity of services or the types of services for the complexity of medical services that an individual would need. So, basically, you look at their underlying condition, what skill level is required to treat that condition, and the best situation to provide it.

Q What skill level of nursing care does Simeon require?

A Simeon requires a fairly high level of nursing care for many of the tasks that he requires each day. A nurse is necessary to administer medications, to perform the wound care, perform the tube feedings[,] to perform the respiratory therapy treatments, to monitor for complications, to perform the respiratory chest percussion and the

suctioning that's necessary and to treat any other -- or spot any other complications that might be occurring.[11]

* * *

Q Now, Dr. Halverson, have you made any effort to determine the monetary costs of the care that has been provided to Simeon from his adoption by the Millions to present?

A Yes.

Q And could you give us a brief overview of what you've done?

A I reviewed his medical records and looked at the kind of care he needed each year of his life up to this point, and then assessed the kind of care or the intensity of care that he needed based on his medical problems, and then attached a monetary figure to that.

Q Okay. And is that the typical approach that you would take in determining the cost of medical services that could be required by a patient?

A Yes.

Q Starting with the year 1999, could you walk us through more specifically the methodology that you used and the numbers that you did arrive at?

A Well, in 1999 and shortly after Simeon was born that year, he was fairly sick, but manageable. He was in the neonatal intensive care unit for a period of time and preceded his initial treatment with stabilizing him neurologically and medically. After that, he was discharged to receive his ongoing care and at that time he was not requiring a tube feeding. He was taking formulas, but he did require some

medications. So, based on my assessment, I felt that he needed about two hours of nursing care per day and the rest of the care was what we'd call aide or attendant care which is less skilled.

Q Okay. And was that consistent during the year 2000?

A During the year 2000 to 2001, he began to develop more respiratory problems. In fact, if I recall correctly, he had several hospitalizations -- short hospitalizations for respiratory problems, so the level of care he needed that next year was a little higher. After that, he needed more close respiratory monitoring and more medications, so it appeared he needed about four hours of nursing care per day and about 20 hours of attendant care per day.

Q Okay. And could you walk us through your evaluation of the year 2001?

A Year 2001 to 2002 and 2002 to 2003, he remained fairly stable, about that same level; requiring about four hours of nursing care per day and 20 hours of aide or attendant care per day.

Q Okay. And what year does that bring us up to?

A Year 2003 and 2004 he began to develop more severe spasticity and also having a lot of trouble with feeding. They diagnosed dysphasia and had to put in a feeding tube so his nursing requirements increased. For that year he required about eight hours of nursing care and 16 hours of attendant care per day.

Q Okay. And in 2004?

A From 2004 to present his nursing and attendant care needs have been about the

> same: Eight hours of nursing and 16 hours of attendant care per day.
>
> Q Did you make any efforts to put a monetary figure on the cost of the care during those years?
>
> A Yes. In calculating the costs for the nursing care and the attendant care for each one of those years, in year one which would be 1999 to 2000, the total cost was $419,750 . . .; for year two, which was 2000 to 2001, the total cost was $496,400; for year three, which is 2001 to 2002, the total cost was $547,500; for year four, which was 2002 to 2003, the total cost was $605,900; for year five which is 2003 to 2004, the total cost was $773,946; for year six, which was 2004 to 2005, the cost was $840,960; and for year seven, 2005 to 2006, the cost was $919,800.
>
> Q And could you explain how you arrived at those figures?
>
> A I actually called home health agencies up in the Fountain, Florida area to see what they were charging currently for home health care for pediatric patients in that area. At the current values they're presently charging $135 per hour for an RN and $90 per hour for an aide or an attendant. When I was doing my calculations, I reduced the costs by 15 percent per year for medical inflation going backwards.
>
> Q And could you explain why you did that?
>
> A Because that's the medical inflation rate, average medical inflation rate for medical services.

Dr. Halverson's calculation totals $4,604,256 for years 1999 through 2005. However, he offered no calculation for the period of January 1, 2006, through June 30, 2006.[12]

17. Notably, on cross-examination Dr. Halverson acknowledged that, except for changing out the G-tube on a monthly basis and administering injections (such as Simeon's Lupron Depot, every 28 days), the services of a licensed practical nurse (LPN) would be adequate to address Simeon's needs. Dr. Halverson further acknowledged that the rates he quoted for an RN and an aide were agency rates (which include agency overhead and profit), not the wage an RN or aide could expect in that community, and the agency rate was hourly, representing a casual employment, as opposed to a weekly or monthly rate, which would be less.[13] Finally, Dr. Halverson acknowledged that his calculations did not exclude any days Simeon was hospitalized, and that those days should be excluded from any award.

18. Dr. Scott, like Dr. Halverson, was of the opinion that, because of his severe cerebral palsy, Simeon required attendant care 24 hours a day, and had required such care since he first saw Simeon in May 2000. As for the level of care, Dr. Scott opined that Simeon required "a responsible person who could meet his care and needs present at all times." (Respondent's Exhibit 2, page 12). As for periods of sleep, it was Dr. Scott's opinion that Simeon likewise required a responsible person present, but it was not necessary that Simeon be watched. That attendance was necessary to address

respiratory difficulties (i.e., caused by vomiting or aspiration), and the need (because of his severe cerebral palsy) for someone to help clear his airway. As for the level of care, Dr. Scott noted:

> A. To care for him, they would -- it would be a person that would have to be able to handle any airway problems; would have to be a person who was trained in his feedings. It would have to be a person trained in even moving him; range of motion exercises; medication administration. Those would be the basics that would be entailed.
>
> Q. Would it require somebody with training in nursing, or would an aide be sufficient?
>
> A. An aide could do it if they were skilled enough. I don't think all aides could. There are some who could. We would have to be selective.

(Respondent's Exhibit 2, pages 13 and 14).

19. Dr. Duchowny, like Doctors Halverson and Scott, was also of the view that Simeon required attendant care, and that "Simeon's family would benefit from having . . . care assistance available to supplement in the care rendered to Simeon." (Petitioners' Exhibit 1, page 8). As for the time period when care assistance would be helpful, Dr. Duchowny was of the opinion that such assistance would be appropriate during Simeon's waking hours (which he understood to be from 8:00 a.m. to 8:00 p.m.), and that Simeon did not require an attendant while sleeping. Dr. Duchowny was also of the opinion that

attendance at an outside program for handicapped children for part of the day, Monday through Friday, would be appropriate. Consequently, he recommended assistance with home care from 3:00 p.m. to 8:00 p.m., Monday through Friday, and from 8:00 a.m. to 8:00 p.m., Saturday and Sunday.

20. As for the level of care, Dr. Duchowny was of the opinion that Simeon did not require the services of a nurse (RN or LPN), and that a nurses' aide would suffice. As for the nature of the aide's services, Dr. Duchowny described the aide's primary role as "feeding him, changing him, [and] moving him about." (Petitioners' Exhibit 1, page 9). Dr. Duchowny was also of the opinion that physical therapy, by a licensed therapist, was appropriate 2 to 4 times a week (at 45 minutes a session), and that Mrs. Million could supplement that therapy.

21. In sum, Dr. Duchowny's testimony supports the need for an aide (to assist the Millions) seven days a week, at least 12 hours a day (absent participation in an outside program). It further supports the need for ongoing physical therapy.

22. Giving due regard to Simeon's profound mental and motor impairment, Simeon requires, and has required since birth, 24-hour attendant care. Such attendance is required to maintain his airway (with periodic chest PT and suctioning, if necessary); attend to gastrostomy tube feedings or other nutritional needs; to respond to reflux or vomiting, and the

threat of aspiration; and to otherwise respond to his physical, therapeutic and hygienic care.

23. As for the quantity and level of care required, I accept Dr. Halverson's opinion that from birth to the end of calendar year 1999, Simeon required 2 hours of LPN care and 22 hours of nurse's aide care per day, and from January 1, 2000, through December 31, 2003, Simeon required 4 hours of LPN care and 20 hours of aide care per day.[14] For subsequent years, Dr. Halverson's opinion that, starting January 1, 2003, and each year thereafter, Simeon required 8 hours of LPN care and 16 hours of aide care per day is rejected, as the record fails to disclose any dramatic change in Simeon's condition that would support a need for such intensive care. Rather, the record reveals his needs have remained fairly consistent, and perhaps improved somewhat within the last 10 months, and that from January 1, 2003, through June 30, 2006, Simeon required no more than 4 hours of LPN care and 20 hours of aide care.

24. As for the provision of such services, the proof demonstrates that Mrs. Million provided the required nursing and aide services, as well as "on call" services, from July 19, 1999, through June 30, 2006, with the exception of a ten-day hospitalization in February 2001, a ten-day hospitalization in 2003, and a two-day hospitalization in June 2006. Consequently, excluding the periods of hospitalization, the proof demonstrates

that Mrs. Million provided nursing and aide services from July 19, 1999, through December 31, 1999, totaling 3,960 hours, and from January 1, 2000, to June 30, 2006, totaling 56,424 hours, or a total of 60,384 hours.[15]

25. Since care by someone with a medical background and training was medically necessary, at least in part; since Simeon required 24-hour attendant care; and since Mrs. Million was qualified by training and experience to render professional services, she is entitled, for reasons appearing more fully in the Conclusions of Law, to an award for residential or custodial care. However, the more difficult question is whether she should be compensated for all her hours even though during some of the time she was actively doing ordinary household chores, caring for other children, or providing other services normally and gratuitously provided by family members.

26. Faced with a similar issue under the Workers' Compensation Law, Chapter 440, Florida Statutes, the court in Standard Blasting & Coating v. Hayman, 476 So. 2d 1385 (Fla. 1st DCA 1985), resolved that it was proper to award attendant care for the hours when a spouse was required to be on call and available to attend the claimant's needs even if the spouse was engaged in otherwise non-compensable activities at the home. In so concluding, the court relied on two cases from other jurisdictions that had addressed the issue, as follows:

The first [case] is *Brown v. Eller Outdoor Advertising Co. 111 Mich. App. 538, 314 N.W.2d 685 (1981)*. Claimant was a quadriplegic who required frequent assistance and someone always on "stand-by." The issue on appeal was whether Mrs. Brown should be compensated for all of her time and the court answered the question affirmatively:

> Thus, the fact that a spouse is able to perform household tasks during those times when not actually in attendance with the patient is irrelevant under the circumstances of this case. If the services were provided by someone other than plaintiff's wife, that person would, we assume, pursue his or her own interests within the limits of the job. Such person might read, knit, watch television, or nap during those times in which he or she is simply "on call." The fact that Mrs. Brown might use her "on call" time to perform household tasks does not alter the "nature of the service provided" or the "need" for the service.

Id. at 543, 314 N.W.2d at 688. A similar result was reached in *Texas Employers Insurance Association v. Choate, 644 S.W. 2d 112 (Tex. Ct. App. 1982)*. Mr. Choate lost the use of both arms in an industrial accident and Mrs. Choate was awarded compensation for the time (approximately five hours a day) that she spent in the household assisting her husband. The insurer presented evidence that the actual time spent performing the tasks was approximately 40 minutes per day and argued on appeal that recovery should be limited to a corresponding amount. Its argument was rejected:

> The . . . practical problem with the argument is that it ignores the realities of the situation. Mrs. Choate cannot set aside 40 minutes a day, take care of Choate and then go on to other things. She must be available to meet his needs during the entire time he is at home and awake. As the company's own witness admitted, a third person hired to do what Mrs. Choate does could not be hired or compensated on the 40 minutes per day basis now advanced by the company; instead such a person would be hired by the day or week and paid for the time during which he or she is available, not just the time spent actually helping Choate.

Accord Builders' Square v. Drake, 557 So. 2d 115 (Fla. 1st DCA 1990); Williams v. Amax Chemical Corporation, 543 So. 2d 277 (Fla. 1st DCA 1989); Amador v. Parts Depot, Inc., 508 So. 2d 1320 (Fla. 1st DCA 1987). "Because NICA has long been compared to the workers' compensation system, cases construing the workers' compensation statutes provide us with guidance." Romine v. Florida Birth-Related Neurological Injury Compensation Association, 842 So. 2d 148, 154 (Fla. 5th DCA 2003). Accordingly, an award for 24-hour care is appropriate. What remains to resolve is the market rate for the care provided.

27. In this case, the only evidence concerning the market rate for professional nursing and aide care was Dr. Halverson's testimony that he was told during telephone calls to home health

agencies in the Fountain, Florida, area that, "for pediatric patients in that area," they were currently "charging $135 per hour for an RN and $90 per hour for an aide or attendant." (Petitioners' Exhibit 1, page 15). Such testimony is hearsay, and cannot support a finding of fact. § 120.57(1)(c), Fla. Stat. Moreover, the agency rate is not the rate paid to the worker, which would presumably reflect the market rate. See Williams v. Amax Chemical Corporation, 543 So. 2d 277 (Fla. 1st DCA 1989). Finally, I reject Petitioners' suggestion that the administrative law judge should rely on the hourly rates put forth by Dr. Halverson because NICA offered no contrary proof. See Commercial Carrier Corp. v. Beck, 580 So. 2d 334, 335 (Fla. 1st DCA 1991)("It is the claimant's burden to prove by competent substantial evidence the quantity, quality and duration of the claimed care . . . . This burden includes establishing the market rate for care.").

28. Market rate, as that term is used in the Plan, is "limited to reasonable charges prevailing in the same community for similar treatment of injured persons when such treatment is paid for by the injured person."[16] Here, the market rate was not established. Therefore, it would be appropriate (as opposed to awarding no compensation for attendant care) to accept the minimum wage rate for purposes of awarding compensation since, it cannot be subject to serious dispute, the minimum wage rate

does not exceed the market rate for professional nursing and aide services.

29. Here, official recognition was taken of the following facts:

> 1. The Fair Labor Standards Act (FLSA) established a federal minimum wage of not less than $5.15 per hour effective September 1, 1997, and that minimum wage has not been changed as of this date.
>
> 2. Florida's minimum wage was consistent with the federal minimum wage ($5.15 per hour), until May 2, 2005, when it was increased to $6.15 per hour. Effective January 1, 2006, Florida's minimum wage was $6.40 per hour.
>
> 3. State laws also apply to employment subject to the FLSA.
>
> 4. When both the FLSA and a state law apply, the law setting the higher standard must be observed.

30. From July 19, 1999 through December 31, 2004, Mrs. Million provided 47,568 hours of residential or custodial care (attendant care), and from January 1, 2005 through May 1, 2005, 2,904 hours of attendant care. That totals 50,472 hours, which multiplied by $5.15 yields a sum of $259,930.80. From May 2, 2005 through December 31, 2005, Mrs. Million provided 5,856 hours of attendant care, which multiplied by $6.15 yields a sum of $36,014.40. From January 1, 2006 through June 30, 2006, Mrs. Million provided 4,296 hours of attendant care, which multiplied by $6.40 yields a sum of $27,494.40. Adding those

sums yields a value for the attendant care provided of $323,439.60.

The claim for reimbursement for a Braun under-vehicle wheelchair lift

31. It is undisputed that Simeon requires a wheelchair lift, and NICA has agreed to reimburse Petitioners the sum of $5,895.00 for the installation of a Braun Vangator single arm wheelchair lift (standard lift) for their vehicle (a 15-passenger 2005 GMC Savannah). However, Petitioners have requested reimbursement for a Braun under-vehicle wheelchair lift (under-vehicle lift) instead.[17]

32. At hearing, and in her deposition, Mrs. Million offered a number of reasons to support Petitioners' request for the under-vehicle lift, in lieu of a standard lift, all supported by her experience with a similar standard lift in their previous 15-passenger van.

33. The primary issue was one of safety. The standard lift is installed behind the front passenger seat, and inside the passenger compartment. So installed, its weight (about 360 pounds) is on one side of the vehicle, as well as the upper level of the vehicle, and would, given the high center of gravity of 15-passenger vans, contribute to a rollover risk. Moreover, the loading door, located behind the passenger seat and by way of which the passenger compartment is entered, could

not be used in case of emergency until the lift could be lowered. Indeed, the door can never be used to enter or exit the passenger compartment until the lift is lowered. Mrs. Million further noted that installation of the standard lift behind the passenger seat (from floor to ceiling) blocks the driver's view out the side of the van; the hydraulics for the lift (also in the passenger compartment) block the walkway to the back of the vehicle; and the addition of the lift in their previous van adversely affected its handling, by making it more difficult to steer. Finally, with the standard lift installed behind the passenger seat, the passenger seat could not be moved backward or reclined. Although partly a matter of comfort or convenience, the impaired movement makes it difficult for Mrs. Million (from the front passenger seat) to attend Simeon, who is seated (in his wheelchair) behind the driver.

34. In contrast to the standard lift, the under-vehicle lift (also about 360 pounds) is mounted under the frame of the vehicle, and its weight distributed evenly, from side to side. Moreover, since the lift is installed under the vehicle, the passenger compartment can be entered or exited without first lowering the lift; the driver's view out the passenger compartment door is not blocked; and the passenger seat is not impeded. Finally with the under-vehicle lift, the hydraulics

can be placed in the back of the van, and not block the walkway to the back of the vehicle.

35. Here, Mrs. Million has articulated logical reasons to support installation of an under-vehicle lift, as opposed to a standard lift. In contrast, NICA offered no proof on the subject. Consequently, it is resolved that Petitioners established their entitlement to reimbursement for installation of a Braun under-vehicle lift.

Petitioners' claim for prejudgment interest

36. For reasons appearing in the Conclusions of Law, Petitioners claim for prejudgment interest is denied.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 766.301, et seq., Fla. Stat.

38. Pertinent to this case, Section 766.31(1), Florida Statutes, provides that when, as here, a claim for compensation has been approved, the claimants are entitled to an award of specified benefits.

39. In this case, apart from those claims addressed in the parties' Stipulation for Settlement of Certain Benefits, Petitioners contend they are entitled to reimbursement for residential or custodial care from July 19, 1999 through June 30, 2006, less periods of hospitalization; reimbursement

for a Braun under-vehicle wheelchair lift; and an award of prejudgment interest. As the claimants, Petitioners bear the burden to demonstrate their entitlement to these benefits. Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal."). Conversely, NICA bears the burden to demonstrate that the requested benefits are available through a collateral source and, pursuant to Section 766.31(1)(a)1-4, Florida Statutes, excluded from coverage. State Comprehensive Health Association v. Carmichael, 706 So. 2d 319, 320 (Fla. 4th DCA 1977)("Once . . . [the insured] established that the medical expenses qualified for coverage under the policy, the burden shifted to . . . [the insurer] to prove that the expenses were not covered by virtue of a policy exclusion."). Here, NICA made no such contention.

The claim for residential or custodial care

40. Pertinent to this case, Section 766.31(1), Florida Statutes, provided, from the date of Simeon's birth until June 7, 2002, as follows:

> (1) Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation

for the following items relative to such injury:

(a) Actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, residential, and custodial care and service, for medically necessary drugs, special equipment, and facilities, and for related travel.

* * *

Expenses included under this paragraph shall be limited to reasonable charges prevailing in the same community for similar treatment of injured persons when such treatment is paid for by the injured person. (emphasis added.)

41. Effective June 7, 2002, Section 766.31(1), Florida Statutes, was amended to read, as follows:

(1) Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for the following items relative to such injury:

(a) Actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, family residential or custodial care, professional residential, and custodial care and service, for medically necessary drugs, special equipment, and facilities, and for related travel.

* * *

Expenses included under this paragraph shall be limited to reasonable charges prevailing in the same community for similar treatment of injured persons when such treatment is

> paid for by the injured person. (emphasis added.)

Ch. 2002-401, §6, Laws of Fla. Contemporaneously, Section 766.302, Florida Statutes, was amended to include the following definitions:

> (9) "Family member" means a father, mother, or legal guardian.
>
> (10) "Family residential or custodial care" means care normally rendered by trained professional attendants which is beyond the scope of child care duties, but which is provided by family members. Family members who provide nonprofessional residential or custodial care may not be compensated under this act for care that falls within the scope of child care duties and other services normally and gratuitously provided by family members. Family residential or custodial care shall be performed only at the direction and control of a physician when such care is medically necessary. Reasonable charges for expenses for family residential or custodial care provided by a family member shall be determined as follows:
>
> (a) If the family member is not employed, the per-hour value equals the federal minimum hourly wage.
>
> (b) If the family member is employed and elects to leave that employment to provide such care, the per-hour value of that care shall equal the rates established by Medicare for private duty services provided by a home health aide. A family member or a combination of family members providing care in accordance with this definition may not be compensated for more than a total of 10 hours per day. Family care is in lieu of professional residential or custodial care, and no professional residential or custodial

> care may be awarded the period of time during the day that family care is being provided.

Ch. 2002-401, §5, Laws of Fla.

42. In this case, Petitioners are seeking an award for residential or custodial care they provided, 24 hours a day, from July 19, 1999 through June 30, 2006, excluding periods of hospitalization. Regarding that claim, NICA was of the view that Section 766.31(1)(a), Florida Statutes, as it existed before the June 7, 2002, amendments, only authorized an award for professional residential or custodial care, not family (nonprofessional) residential or custodial care, and that any award for such care rendered on or after June 7, 2002, was limited to that prescribed by Section 766.302(9) and (10), Florida Statutes.[18] In contrast, Petitioners were of the view that the provisions of Section 766.31(1)(a) in effect at Simeon's birth supported an award for family residential or custodial care, and the amendments cannot be applied to limit their claim for benefits on and after June 7, 2002.

43. Here, it is unnecessary to address the parties respective interpretations of Section 766.31(1)(a), pre or post-amendment since Mrs. Million is a professional, clearly qualified to provide professional services, and who rendered professional attendant care. Under such circumstances, Petitioners are entitled to compensation for her services under

the statute as it existed before June 7, 2002, and the limitations imposed by Section 766.302(10), Florida Statutes, after the amendment, are not applicable to the professional care provided by Mrs. Million. See Kraft Dairy Group v. Cohen, 645 So. 2d 1072 (Fla. 1st DCA 1994)(Resolving that claimant's spouse (a Certified Nursing Assistant) was a professional, and not subject to the value and time limitations imposed by the Workers' Compensation Law, Section 440.13(2)(h), Florida Statutes (1993).) Compare Standard Blasting & Coating v. Hayman, 597 So. 2d 392 (Fla. 1st DCA 1992). Notably, the amendments to the Plan, effective June 7, 2002, were clearly modeled after the Workers' Compensation Law, Sections 440.13(1)(b) and (2)(b), Florida Statutes (2002). Consequently, Petitioners are entitled to an award of $323,439.60 for residential or custodial care provided Simeon from July 19, 1999 through June 30, 2006.

The claim for reimbursement for the cost and installation of a Braun under-vehicle wheelchair lift

44. Here, there is no dispute that Simeon is wheelchair bound, in need of a wheelchair lift for the family van, and entitled to such special equipment under Section 766.31(1)(a), Florida Statutes. Indeed, NICA has offered to pay for the purchase and installation of a standard lift, but Petitioners

have, based on concerns hereto addressed, requested a Braun under-vehicle wheelchair lift instead.

45. As heretofore noted, Petitioners' concerns with the standard lift were rationally based, and NICA offered no proof to dispel those concerns. Consequently, Petitioners have demonstrated their entitlement to reimbursement for the purchase and installation of a Braun under-vehicle wheelchair lift.

The claim for prejudgment interest

46. With regard to an award, the responsibilities and authority of the administrative law judge are succinctly set forth in Section 766.31, Florida Statutes, and include an award for past medical expenses, a parental award, and an award for attorney's fees and costs. There is nothing in the plain language of Section 766.31, Florida Statutes, that can be read as granting the administrative law judge authority to award interest.

47. Where the plain and ordinary meaning of statutory language is unambiguous, an administrative tribunal cannot construe a statute in a way that would extend, modify, or limit its express terms or its reasonable and obvious implications. Crutcher v. School Board of Broward County, 834 So. 2d 228, 232 (Fla. 1st DCA 2002); American Bankers Life Assurance Company of Florida v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968). "[I]t is a basic principle of statutory construction that courts

'are not at liberty to add words to statutes that were not placed there by the Legislature.'" Seagrave v. State, 802 So. 2d 281, 287 (Fla. 2001)(quoting Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999). "Administrative construction of a statute, the legislative history of its enactment and other extraneous matters are properly considered only in the construction of a statute of doubtful meaning." Donato v. American Telephone and Telegraph, Co., 767 So. 2d 1146, 1153 (Fla. 2000). If the legislature intended to confer jurisdiction to award interest, it could have done so. Under the plain meaning of the statute as written, an administrative law judge has no authority to award interest. See also Williams v. Amax Chemical Corporation, 543 So. 2d 277 (Fla. 1st DCA 1989).

CONCLUSION

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

ORDERED that:

1. The parties' Stipulation for Settlement of Certain Benefits, filed July 11, 2006, is approved, and the parties are directed to comply with the provisions thereof.

2. Petitioners' request for past expenses associated with residential or custodial care is approved, and for such care, Petitioners are awarded $323,439.60.

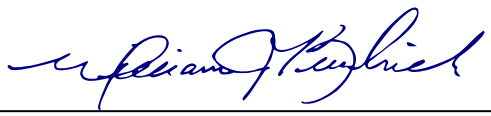
3. Petitioners' request for reimbursement for the purchase and installation of a Braun under-vehicle wheelchair lift is approved, and Respondent shall reimburse Petitioners for such expenses.

4. Petitioners' request for prejudgment interest is denied.

5. Respondent shall pay all future expenses as incurred.

6. By separate order or notice, a hearing will be scheduled to resolve the amount owing for reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees. Once resolved, an award will be made and a final order issued.

DONE AND ORDERED this 29th day of August, 2006, 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 29th day of August, 2006.

ENDNOTES

1/ Petitioners' Exhibit 4 is a demonstrative exhibit prepared by Mrs. Million that lists the months and years for which attendant care is claimed, with the total number of hours claimed each month (by multiplying the number of days claimed by 24), and a gross total for the period of July 19, 1999 through June 30, 2006. The document is accurate as to the number of days in each calendar month, and is generally an accurate arithmetic calculation by month and year. However, the document does contain several errors, discussed infra, but when corrected it is helpful in deriving an award.

2/ See Order on Compensability and Notice, dated January 27, 2004.

3/ The ages of Krysann, Kara, Randall, Jr., and Gabriella, were given at hearing as 17, 16, 12, and 10, respectively. However, their dates of birth were not provided. Consequently, their ages at the time Simeon joined the family are noted as approximate.

4/ According to the "Florida Official Transportation Map," Fountain is located south of Interstate 10, on State Road 231, approximately midway between Marianna and Panama City, Florida.

5/ At hearing, Mariah's age was given as six, with no date of birth. Jeremiah's age was given as four, with that birthday having occurred between June 27, 2006, and the day of hearing (July 10, 2006).

6/ "Spina bifida" is "a developmental anomaly characterized by defective closure of the bony encasement of the spinal cord, through which the cord and meninges may . . . or may not . . . protrude." Dorland's Illustrated Medical Dictionary, Twenty-Eighth Edition, 1994.

7/ Mr. Million resigned and the family moved to Texas to assess whether Simeon's eczema and allergies were related to his environment. There, testing in March 2005 revealed Simeon's difficulties were likely related to severe food allergies, and the family returned to Fountain in March 2006.

8/ According to Mrs. Million, the family supports itself with their savings and a monthly income of approximately $3,600 (monies paid by the states where they adopted their special

needs children, to provide for their needs) because their home is unencumbered and they have a frugal lifestyle.

9/ Mrs. Million described Simeon's level of maturity as consistent with that of a two-to-three month old infant. (Tr., page 20).

10/ As to whether Simeon napped during the day, Mrs. Million responded:

> It's very inconsistent. His wake and sleep cycles, he could be sleeping while they are doing ABR, or he could be, you know, usually when I'm stretching him he's awake, you know, but he can fall right back to sleep. It's, he doesn't have set wake and sleep patterns, and there's some days he can sleep the whole day. It seems like every four to five days he sleeps pretty much the whole day. He will arouse, but he will go back to sleep.

(Petitioners' Exhibit 2, page 25).

11/ At page 26 of his deposition (Petitioners' Exhibit 1), Dr. Halverson restated the skilled services Mrs. Million provides, as follows:

> Administering medications, managing the gastrotube, changing the tube, preparing the tube feedings, doing wound care, doing the respiratory therapy treatments and the suctioning, treating him with the aerosol nebulizer, and Albuterol, applying any kind of skin care that he might need to any kind of rashes or open wounds or decubiti that develops, performing the bowel program.

Contrasted with unskilled care "such as the dressing, the bathing, the repositioning, the transfer, the transportation." (Petitioners' Exhibit 1, page 26).

12/ In Petitioners' proposed final order, Petitioners request an award of $3,738,936.96 for attendant care provided to Simeon from July 19, 1999 through to June 30, 2006. (Petitioners' proposed final order, page 21). Presumably, Petitioners' request is premised on Petitioners' Exhibit 4, reduced by 240

hours for a ten-day hospitalization in 2003, or 60,402 hours. (Petitioners' proposed Final Order, page 7). However, Petitioners offered no explanation as to how they derived their request for $3,738,936.96.

13/ The home health agency fee for RNs and aides on which Dr. Halverson based his calculations was hearsay and not competent proof to support a finding of fact. § 120.57(1)(c), Fla. Stat. ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.") Here, such proof did not supplement any competent evidence and it was not admissible over objection in a civil action.

14/ In so concluding, I am not unmindful that the services of an RN might be required for injections and to change Simeon's G-tube. However, the only injection Simeon apparently receives is Lupron Depot, once every 28 days, for precocious puberty, and his G-tube is changed once a month. Consequently, attendance by an RN on a daily basis is unnecessary. Moreover, the cost of RN time is deemed de minimus or now shown, since the giving of an injection is generally not time consuming and the time required to change the G-tube is not of record.

15/ For a breakdown of these hours, one may refer to Petitioners' Exhibit 4, which lists the days claimed (by month and year), multiplied by 24 hours, to derive a monthly total. The exhibit is accurate for its purposes, with the following exceptions: (1) the entry of July 19-July 31, 1999, reflects 288 hours but obviously and correctly excludes one day (presumed to be July 19, 1999, the day the Million's received custody of Simeon at some unknown time); (2) the entry for February 2001, correctly omits a ten-day hospital stay, but the total number of hours for the month are miscalculated as 430, and should read 432; (3) the total number of hours for March 2004 is miscalculated as 740, and should read 744; (4) as noted in Petitioners proposed final order, a ten-day (240 hour) hospitalization must be deducted in the year 2003; and (5) the total number of hours for June 2006, less a two-day hospitalization, is miscalculated as 696, and should read 672. As corrected, the document will reflect the following nurse and aide services: for July 19, 1999 through December 31, 1999, 3,960 hours; for the year 2000, 8,784 hours; for the year 2001, 8,520 hours; for the hear 2002, 8,760 hours; for the year 2003, 8,520 hours; for the year 2004, 8,784 hours; for the year 2005,

8,760 hours; and for the period of January 1, 2006 through June 30, 2006, 4,296 hours, or a total of 60,384 hours.

16/ Where, as here, professional care is rendered, market rate may be based on the hourly rate paid healthcare providers in the community or other appropriate measures (i.e., by evidence of the cost of a hired full time live-in attendant). See Dalton v. Orange County Sheriff, 503 So. 2d 406 (Fla. 1st DCA 1987). Here, the parties only offered evidence of an hourly rate.

17/ The cost of the under-vehicle lift is not of record, but presumably is more than the standard lift.

18/ NICA also opposed payment to Mrs. Million for professional care. First NICA contended that the provision of attendant care by Mrs. Million was not an "actual expense" because the care provided was gratuitous or not associated with an obligation for payment, as would exist with a third party provider. Second, NICA contended that the parental award of $100,000, accorded the parents under the provisions of Subsection 766.31(1)(b), Florida Statutes (1999), was the only compensation the parents could receive under the Plan, until it was amended. NICA's contentions are rejected as unpersuasive.

In rejecting NICA's contentions, it is first observed that Petitioners have suffered an "actual" ("[i]n existence; real; factual") "expense" ("[t]he cost involved in some activity; a sacrifice; a price"). The American Heritage Dictionary of the English Language, New College Edition. (1979). Such "actual expense" is represented by the time Mrs. Million dedicated to provide the nursing/attendant care Simeon required, which time she could have dedicated to other pursuits. That she chose to provide such services for familial reasons (without regard for compensation) does not render the expense less real and does not otherwise render her claim for compensation (absent express waiver) less deserving or meritorious than one by a third party provider. See Dawson v. Blue Cross Assoc., 366 So. 2d 536 (Fla. 1st DCA 1979).

NICA's alternative contention (that the parental award was the only compensation they could receive under the Plan, until the amendment, and that only professional care by third party providers could be compensated under the Plan) is likewise unpersuasive. In so concluding, it is observed that Section 766.31(1), Florida Statutes (1999), provides that when a claim is deemed compensable, "the administrative law judge shall make

an award providing for compensation for the following items relative to such injury:"

> (a) Actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, residential, and custodial care and service, for medically necessary drugs, special equipment, and facilities, and for related travel . . . .
>
> (b) 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 administrative law judge, such award may be made in a lump sum.

The foregoing provisions offer 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. 1997)(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.).

Pertinent to this case, the parent of a child who has suffered a significant injury resulting in permanent total disability has been recognized to have "a cause of action in his own name for medical, hospital, and related expenditures, indirect economic losses such as income lost by a parent in caring for the child, and for the loss of the child's companionship, society, and services, including personal services to the parent and income which the child might earn for the direct and indirect benefit of the parent." Yordon v. Savage, 279 So. 2d 844, 846 (Fla. 1973). Accord U.S. v. Dempsey, 635 So. 2d 961 (Fla. 1994).

Construing the provisions of Section 766.31(1)(a) and (b) with due regard for the principles of common law heretofore noted, it would appear that the parental award contemplated by Subsection

766.31(1)(b) was intended to compensate the parent for loss of consortium ("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"), as well as any indirect economic losses such as income lost by the parent in caring for the child, but not direct economic losses such as medical, hospital, and related expenditures. U.S. v. Dempsey, supra, at page 965. Such conclusion is compelling, since the Legislature provided separately, at Subsection 766.31(1)(a), for the recovery of medical, hospital and related expenditures, as incurred. Whether those services are provided by a parent or third party provider would appear to be inconsequential under the statutory scheme.

COPIES FURNISHED:

William V. Carcioppolo, Esquire
Conrad & Scherer, LLP
Post Office Box 14723
Fort Lauderdale, Florida 33302

David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest Sixth Court
Plantation, Florida 33324

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
2360 Christopher Place, Suite 1
Tallahassee, Florida 32308

Jerome R. Silverburg, Esquire
Peterson, Bernard, Vandenberg, Zei,
Geisler & Martin
Post Office Drawer 14126
Fort Lauderdale, Florida 33302

Altom M. Maglio, Esquire
Maglio, Christopher & Toale Law Firm
2480 Fruitville Road, Suite 6
Sarasota, Florida 34237-6223

Henry T. Courtney, Esquire
Courtney Law Firm
The Merrick Plaza
2199 Ponce de Leon Boulevard, Suite 301
Coral Gables, Florida 33134