STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| RENEE MICHELLE OLIVER, ON BEHALF OF AND AS PARENT AND NATURAL GUARDIAN OF IAN DAVID OLIVER, A MINOR, AND RENEE MICHELLE OLIVER, INDIVIDUALLY, | ) | |
| Petitioners, | ) | |
| vs. | ) | Case No. 06-0318N |
| FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, | ) | |
| Respondent, | ) | |
| and | ) | |
| CENTRAL FLORIDA REGIONAL HOSPITAL, INC., DAVID C. MOWERE, M.D., and MID-FLORIDA OB/GYN SPECIALISTS, P.A., | ) | |
| Intervenors. | ) | |

FINAL ORDER AWARDING ATTORNEY'S FEES AND OTHER EXPENSES

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a hearing in the above-styled case on October 3, 2008, by video teleconference, with sites in Tallahassee and Lauderdale Lakes, Florida.

## APPEARANCES

For Petitioners: Gary M. Cohen, Esquire
Grossman & Roth
925 South Federal Highway, Suite 775
Boca Raton, Florida 33432

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

At issue is the amount owing for reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees.

## PRELIMINARY STATEMENT

On October 10, 2006, a hearing was held to address compensability and notice, and to afford Petitioners an opportunity to make a record with regard to the constitutional issues they raised. Thereafter, on November 16, 2006, an Order on Compensability and Notice was entered, which concluded:

> ORDERED that the claim for compensation filed by Renee Michelle Oliver, individually, and as parent and natural guardian of Ian David Oliver, a minor, be and the same is hereby approved.
>
> It is FURTHER ORDERED that the participating physician and hospital complied with the notice provisions of the Plan.
>
> It is FURTHER ORDERED that the parties are accorded 45 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, the reasonable expenses incurred in connection with the filing of the claim,

> including reasonable attorneys 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, an award will be made consistent with Section 766.31, Florida Statutes, and a final order issued.

The Order on Compensability and Notice was appealed by Petitioners to the District Court of Appeal, Fifth District, State of Florida, and on June 24, 2008, the court per curiam affirmed the order. Thereafter, on July 11, 2008, the Mandate issued commanding "that further proceedings as may be required be had in said cause in accordance with the ruling of this court . . ., and with the rules of procedure and laws of the State of Florida."

Following issuance of the Mandate, the parties resolved (by stipulation) all issues related to an award, except those related to the amount owing for reasonable attorney's fees and expenses. The parties' stipulation was approved by Order of September 9, 2008, and a hearing was scheduled for October 3, 2008, to address the amount owing for reasonable attorney's fees and expenses.

At hearing, Petitioners called Jonathan M. Pavsner, and Gary M. Cohen, as witnesses; Petitioners' Exhibit 1 was received into evidence; and Respondent called John D. Kelner, as a witness. Thereafter, on October 20, 2008, the parties filed a

Joint Stipulation whereby they "agree[d] and stipulate[d] to the filing of the attached Petitioners' Exhibit 1 and Exhibit 2, in consideration of Petitioners' Amended Motion for Award of Attorney's Fees and Costs." Of note, Petitioners' Exhibit 1, received at hearing, was a composite exhibit that included an Attorney's Fees/Services Statement (4 pages) and Attorney Cost statement (3 pages), that were identical to Petitioners' Exhibit 1 (an Attorney Services (Fees) Statement, 4 pages), and Exhibit 2 (an Attorney Cost statement, 3 pages) attached to the Joint Stipulation filed October 20, 2008. However, Petitioners neglected to attach the paid invoices that were attached to Petitioners' Exhibit 2, which accompanied the Joint Stipulation. In this order, reference will be made to Petitioners' Exhibits 1 and 2, with attached invoices, filed with the parties' Joint Stipulation.

The transcript of the hearing (Tr.) was filed October 22, 2008, and the parties were accorded 10 days from that date to file proposed orders. The parties elected to file such proposals and they have been duly-considered.

## FINDINGS OF FACT

### Case history

1. On January 25, 2006, Renee Michelle Oliver, on behalf of and as parent and natural guardian of Ian David Oliver (Ian), a minor, and Renee Michelle Oliver, individually, filed a

petition with the Division of Administrative Hearings (DOAH) to resolve whether Ian qualified for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan), and whether the hospital at which Ian was born (Central Florida Regional Hospital) and the participating physician who delivered obstetrical services at Ian's birth (David C. Mowere, M.D.) complied with notice provisions of the Plan. Additionally, the petition raised certain constitutional issues regarding the Plan. More particularly, the petition alleged:

> 2. This Petition is being filed in compliance with the Circuit Court Order of Honorable James Perry dated January 18, 2006.[1] The Petitioners do not believe this claim falls properly under the NICA Act and file this Petition under protest.
>
> 3. Further, Petitioners state that the NICA Act is unconstitutional as written and unconstitutional as specifically applied to this claim.
>
> 4. Further, Petitioners state that clear and concise notice was never given to Renee Oliver by either Dr. Mowere or Central Florida Regional Hospital as required by 766.316, Florida Statutes of her rights and limitations under the NICA plan. Additionally, Petitioners would state that the composition of the NICA Board of Directors is biased on its face and it creates an unconstitutional lack of due process and proper access to the Courts.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on January 25, 2006, and on July 28, 2006, following a

number of extensions of time within which to do so, NICA gave notice that it was of the view the claim was compensable, and requested that a hearing be scheduled to resolve compensability. In the interim, Central Florida Regional Hospital, as well as Dr. Mowere and Mid-Florida OB/GYN Specialists, P.A. (the practice at which Dr. Mowere was a member, and at which Ms. Oliver received her prenatal care), were accorded leave to intervene. (Order on Compensability and Notice, p. 4, and paragraph 8).

3. Given the issues raised by the petition, a hearing was scheduled for October 10, 2006, to address compensability and notice, and leaving issues related to an award, if any, to be addressed in a subsequent proceeding. § 766.309(4), Fla. Stat.[2] The parties were also accorded the opportunity to make a record with regard to the constitutional issues Petitioners had raised.

4. Shortly before hearing, on September 29, 2006, the parties filed a Joint Pre-Hearing Stipulation whereby it was agreed the claim was compensable (a "participating physician" (Dr. Mowere) delivered obstetrical services at Ian's birth and Ian suffered a "birth-related neurological injury"), and that the hospital and the participating physician provided Ms. Oliver a copy of the NICA brochure, as required by Section 766.316, Florida Statutes. Left to resolve, with regard to notice, was whether the NICA brochure "include[d] a clear and concise

explanation of a patient's rights and limitations under the plan," as required by Section 766.316, Florida Statutes. Otherwise, the only unresolved matter pending was the opportunity for the parties to make a record on the constitutional issues Petitioners had raised.

5. As heretofore noted in the Preliminary Statement, the hearing was held as scheduled, on October 10, 2006, and on November 16, 2006, an Order on Compensability and Notice was entered. Thereafter, following Petitioners' unsuccessful appeal of that order to the Fifth District Court of Appeal, the parties resolved all issues related to the award, except those related to the amount owing for reasonable attorney's fees and expenses.

The award provisions of the Plan relating to attorney's fees and costs

6. Pertinent to this case, Section 766.31(1)(c), Florida Statutes, provides for an award of the following expenses:

> (c) Reasonable expenses incurred in connection with the filing of a claim under ss. 766.301-766.316, including reasonable attorney's fees, which shall be subject to the approval and award of the administrative law judge. In determining an award for attorney's fees, the administrative law judge shall consider the following factors:
>
> 1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
>
> 2. The fee customarily charged in the locality for similar legal services.

> 3. The time limitations imposed by the claimant or the circumstances.
>
> 4. The nature and length of the professional relationship with the claimant.
>
> 5. The experience, reputation, and ability of the lawyer or lawyers performing services.
>
> 6. The contingency or certainty of a fee.

The claim for attorney's fees

7. To calculate a reasonable attorney's fee, the first step is to determine the number of hours reasonably expended pursuing the claim. See Standard Guarantee Insurance Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990); Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985); Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 633 So. 2d 1103 (Fla. 3d DCA 1994). Notably, "[u]nder the 'hour-setting' portion of the lodestar computation, it is important to distinguish between 'hours actually worked' versus 'hours reasonably expended'." Carreras, 633 So. 2d at 1110.

> . . . "Hours actually worked" is not the issue. The objective instead is for the trier of fact
>
> to determine the number of hours reasonably expended in providing the service. 'Reasonably expended' means the time that ordinarily would be spent by lawyers in the community to resolve this particular type of dispute. It is not necessarily the number of hours actually expended by counsel in the case. Rather,

> the court must consider the number of hours that should reasonably have been expended in that particular case. The court is not required to accept the hours stated by counsel.
>
> In re Estate of Platt, 586 So. 2d 333-34 (emphasis in original). The trier of fact must determine a reasonable time allowance for the work performed-which allowance may be less than the number of hours actually worked. Such a reduction does not reflect a judgment that the hours were not worked, but instead reflects a determination that a fair hourly allowance is lower than the time put in.

Id. Moreover, only time incurred pursuing the claim is compensable, not time incurred exploring civil remedies or opportunities to opt out of the Plan through lack of notice or otherwise. Carreras, 633 So. 2d at 1109. See also Braniff v. Galen of Florida, Inc., 669 So. 2d 1051, 1053 (Fla. 1st DCA 1995)("The presence or absence of notice will neither advance nor defeat the claim of an eligible NICA claimant who has decided to invoke the NICA remedy . . .; thus, there is no reason to inquire whether proper notice was given to an individual who has decided to proceed under NICA. Notice is only relevant to the defendants' assertion of NICA exclusivity where the individual attempts to invoke a civil remedy."). Accord, O'Leary v. Florida Birth-Related Neurological Injury Compensation Plan, 757 So. 2d 624, 627 (Fla. 5th DCA 2000)("We recognize that lack of notice does not affect a claimant's

ability to obtain compensation from the Plan."). Finally, a fee award must be supported with expert testimony, and cannot be based entirely on the testimony of the claimant's attorney. Palmetto Federal Savings and Loan Association v. Day, 512 So. 2d 332 (Fla. 3d DCA 1987); Fitzgerald v. State of Florida, 756 So. 2d 110 (Fla. 2d DCA 1999). See Nants v. Griffin, 783 So. 2d 363, 366 (Fla. 5th DCA 2001)("To support a fee award, there must be evidence detailing the services performed and expert testimony as to the reasonableness of the fee . . . . Expert testimony is required to determine both the reasonableness of the hours and reasonable hour rate.").

8. To support the claim for attorney's fees, Petitioners offered an "Attorney Services" statement, which reflects a claim for 81 hours Petitioners' counsel, Gary Cohen, claims he dedicated to the claim. (Petitioners' Exhibit 1). Notably, the statement is not a business record, since Mr. Cohen did not, and does not in the ordinary course of his practice, maintain time records. Rather, the statement represents an effort to construct a time record to support Petitioners' claim for fees, and provides a summary of activities performed, with an estimate of time expended for each activity documented. The major activities were noted as "Meeting with Clients (2005)," 4.0 hours; "Preparation of Petition for Benefits," .5 hours; "Research before Petition re: NICA" (five areas listed), 10.5

hours; "Medical Records Review" (21 providers listed), 17.5 hours; "Depositions: Preparation and Attendance at" (6 depositions), 16.5 hours; "Hearings: Preparation and Attendance at" (9 entries), 8.75 hours; "Motions and Pleadings" (23 entries), 9.25 hours; "Correspondence: 2/06-9/06 77 letters and attachments," 10 hours; and "Expert Conferences" (with Dr. Mary Minkin, Dr. James Balducci, Frederick Raffa, Ph.D., and Paul Deutch, Ph.D., at 1 hour each), 4 hours.

9. Where, as here, "attorneys have not kept contemporaneous time records, it is permissible for a reconstruction of time to be prepared." Brake v. Murphy, 736 So. 2d 745, 747 (Fla. 3d DCA 1999). However, the attorney must present evidence of his services in "sufficient . . . detail to allow a determination of whether each activity was reasonably necessary and whether the time allocation for each was reasonable." Id. (Emphasis omitted). See Florida Patient's Compensation Fund v. Rowe, 472 So. 2d at 1150 ("Inadequate documentation may result in a reduction of hours claimed, as will a claim for hours that the court finds to be excessive or unnecessary."); Lubkey v. Compuvac Systems, Inc., 857 So. 2d 966, 968 (Fla. 2d DCA 2003)("[T]he party seeking fees has the burden to allocate them to the issues for which fees are awardable or to show that the issues were so intertwined that allocation is not feasible.").

10. Here, counsel claims 4 hours for a "Meeting with Clients (2005)," that likely predated the trial court's order of abatement and likely involved a discussion of matters not directly related to the NICA claim (Tr., p. 37). Nevertheless, an initial conference with a client, and the information obtained regarding her circumstances, is a natural starting point for any claim, be it a NICA claim or one sounding in medical malpractice. Consequently, the time claimed (4 hours) being reasonable, counsel should be compensated for his time. Also reasonable, is counsel's claim of .5 hours for "Preparation of Petition for Benefits." However, counsel's claim for "Research before Petition re: NICA," 10.5 hours, is, but for the claim of "NICA statute 766.302," 1 hour, rejected as the activities noted were not shown to be reasonably necessary to filing or pursuing the claim, and the time allocation for each activity was not shown to be reasonable. In so concluding, it is noted that the research activities mentioned ("Benefit Handbook," 2 hours; "NICA Notice and handout," .5 hours; "Case law re: NICA," 2.5 hours; and "Task Force Recommendation," 4.5 hours) are vague on specifics, and not demonstrative of necessity to filing a petition. It is further noted that the requisites for filing a claim are straight forward, and an attorney of moderate experience should experience no difficulty in filing a claim. Additionally, it is noted that counsel's

testimony revealed he had filed 24 to 36 claims for compensation, and presumably was familiar with the requisites to file a claim. Consequently, if such "research" was done, apart from reviewing the statutory provisions of the Plan, it likely related to the issues of notice and constitutionality, and not issues related to compensability or benefits, which are prescribed by Sections 766.301, et seq., Florida Statutes. Finally, there is nothing to support a conclusion that the time claimed for each task was reasonable. Consequently, for Petitioners' claim for "Research before Petition re: NICA," 1 hour is considered reasonable.

11. Next, counsel claims 17.5 hours for "Medical Records Review." Included are the medical records of 19 providers, and the reports of Michael Duchowny, M.D. (Respondent's Exhibit 2), and Donald Willis, M.D. (Respondent's Exhibit 1). With regard to the time claimed for reviewing (reading) Dr. Duchowny's report (.5 hours) and Dr. Willis' report (.5 hours), that time is disallowed as unreasonable (excessive) and redundant, since counsel requested and was granted credit, discussed infra, under "Motions and Pleadings" for .5 hours associated with "Receipt and review of NICA's Notice of Compensability, which included a copy of the reports of Doctors Duchowny and Willis. Otherwise, the remaining record review, as well as the time allocation (16.5 hours), was reasonable.

12. Next, counsel claims 16.5 hours for "Depositions: Preparation and Attendance at " the depositions of Renee Oliver, on July 17, 2006; Patty Osbourne, R.N., on July 20, 2006; Jenette Dorff, R.N., on July 20, 2006; Debra Brinkmeyer, R.N., M.D., on July 20, 2006; David Mowere, M.D., on August 3, 2006; and Kenney Shipley, on September 27, 2006.

13. With regard to the time claimed incident to the depositions of Dr. Mowere and Ms. Shipley (6 hours), it must be resolved that such time was not shown to be reasonably necessary to the pursuit of the claim. In so concluding, it is noted that by the time Dr. Mowere was deposed (August 3, 2006), NICA had agreed the claim was compensable. Under such circumstances it is unreasonable to expect NICA to pay for time expended that addressed compensability and notice. With regard to Ms. Shipley's deposition, taken September 27, 2006, it is also observed that when she was deposed, NICA had agreed the claim was compensable, and the only issues pertinent to her deposition were notice and the constitutionality of the Plan. Indeed, those were the announced reasons Petitioners requested, and were accorded leave to take her deposition. (See Petitioners' Motion for Request of the Deposition of Kenney Shipley, Executive Director of NICA, filed May 1, 2006; Order, July 13, 2006.) Such being the case, it is not reasonable to expect NICA to pay for time associated with Ms. Shipley's deposition.

14. With regard to time associated with the depositions of Ms. Oliver, taken by Intervenors on July 17, 2006, and Nurses Osbourne, Dorff, and Brinkmeyer, taken July 20, 2006, the circumstances are different since NICA had not yet agreed the claim was compensable. Consequently, since Nurse Osborne's deposition addressed compensability, the 1.5 hours incurred attending her deposition was reasonably related to the claim. With regard to the depositions of Ms. Oliver, and Nurses Dorff and Brinkmeyer, those depositions addressed both compensability and notice. However, the time associated with notice was de minimus. Consequently, the 5 hours incurred in attending their depositions (Ms. Oliver, 3.5 hours, Nurse Dorff, .5 hours, and Nurse Brinkmeyer, 1 hour) were reasonably related to the claim. Also reasonably related to the claim were the 4 hours incurred preparing for Ms. Olivers' and the nurses' depositions. In all, 10.5 hours were reasonably dedicated to preparation and attendance at depositions.

15. Next, counsel claims 8.75 hours for "Hearings: Preparation and Attendance at," 7 hearings (items a-f and h), preparation for final hearing (item g), and review of judge's final order (item i). With regard to the time claimed for a hearing on February 23, 2006 (.25 hours) and September 15, 2006 (.25 hours), no hearing was held, and that time is disallowed. However, with regard to the hearing of March 22, 2006 (item b),

Petitioner overlooked noting time dedicated to that hearing, and is entitled to a .5 hour credit.[3] With regard to the time claimed for attendance at the final hearing of October 10, 2006 (2.0 hours), given that issues related to compensability were resolved prior to hearing, and most of the time at hearing involved issues related to notice and compensability, only .5 hours are approved as reasonably related to the claim. Moreover, given the issues left to address at hearing, of the time claimed for preparation for hearing (4.0 hours), only 1 hour will be approved as reasonable. Petitioners' claim of .5 hours to review the final order is reasonable. In all, under the activity "Hearings: Preparation and Attendance at," 4.25 hours are found to be reasonably incurred in pursuing the claim.

16. Next, counsel claims 9.25 hours for various activities associated with "Motions and Pleadings," such as preparation, receipt, review, and research, and has documented a claim for 23 entries (items a-w). With regard to Petitioners' claim of 1.0 hour for "Receipt, review, research into Defendant Mowere & Hosp Motion to Intervene; Petitioners' Objection to Motion to Intervene" (item a), that claim is disallowed as such activities that related to Petitioners' objection (apart from receipt and review of the motions, which time was de minimus), were frivolous.[4] As for Petitioners' claim of .5 hours related to preparation of motion to depose Ms. Shipley (item i), and .25

hours related to review of Respondent's response (item k), that .75 hours is disallowed, as it relates to Petitioners' notice and constitutional claims. As for items f (.25 hours), j (.25 hours), n (.25 hours), o (.25 hours), p (.25 hours), s (.25 hours), and u (.25 hours), 1.75 hours, those activities only warrant a claim for .1 hours each (.7 hours). The other activities (5.75 hours) are reasonable. In all, 6.45 hours were reasonably expended on motions and pleadings.

17. Next, counsel claims 10.0 hours for preparing or reviewing, from "2/06-9/06 [,] 77 letters and attachments by and between counsel for Petitioner, counsel for NICA and Judge Kendrick." Notably, there was no explanation of what those letters related to, what issues they addressed, or any method offered to assess whether the time allocation was reasonable. Accordingly, the proof failed to support a conclusion that the activity or hours claimed was reasonable, and the 10 hours claimed is disallowed.

18. Finally, counsel claims 4 hours for "Expert Conferences" with Dr. Minkin (1 hour), Dr. Balducci (1 hour), Dr. Raffa (1 hour), and Dr. Deutch (1 hour). However, there was no explanation of when the conference occurred, what was discussed, or any proof to support a conclusion that the time allocation was reasonable and related to the pursuit of the

claim. Accordingly, the proof failed to support the conclusion that the activity or hours were reasonable.[5]

19. Here, the total time and labor reasonably expended to pursue the claim was 43.20 hours.

20. The next consideration in establishing a reasonable fee is the determination of the fee customarily charged in the locality for similar legal services, when the fee basis is hourly billing for time worked. Carreras, 633 So. 2d at 1108. Here, given the nature of the expertise and legal skills required, for what may be described as a moderately complex case, the proof supports the conclusion that the "market rate" (a rate actually being charged to paying clients) is $300.00 an hour.

21. A reasonable fee under the methodology established by Florida Patient's Compensation Fund v. Rowe, supra, and Florida Birth-Related Neurological Injury Compensation Association v. Carreras, supra, is determined by multiplying the hours reasonably expended by the reasonable hourly rate. The results produce the "lodestar figure" which, if appropriate, may be adjusted because of the remaining factors contained in Section 766.31(1)(c), Florida Statutes. Applying such methodology to the facts of this case produces a "lodestar figure" of $12,960.00 (43.20 hours x $300 per hour).

22. Upon consideration of the facts of this case, and the remaining criteria established at Section 766.31(1)(c)3-6, Florida Statutes, there is no apparent basis or reason to adjust the "lodestar figure." In this regard, it is observed that there were no significant time limitations shown to have been imposed by the claimants or the circumstances in this particular case, and the nature and length of the professional relationship with the claimants was likewise a neutral consideration. The experience, reputation and ability of the lawyer who performed the services has been considered in establishing the reasonable hours and reasonable hourly rate and does not, in this case, afford any additional basis to adjust the "lodestar figure." Finally, although counsel was employed on a contingency fee basis and stood to recover no fee if he proved unsuccessful in pursuing the claim or, alternatively, in pursuing a malpractice action, the contingency nature of the fee arrangement does not warrant an adjustment of the "lodestar figure." Given the nature of the claim, which was relatively straight-forward, lacked any novel aspects, and the earliest medical records disclosed the infant had likely suffered a significant brain injury during birth, the risk of nonrecovery was not sufficient to warrant any adjustments.

The claim for other expenses

23. Finally, Petitioners' counsel incurred certain expenses in his representation of Petitioners for which he seeks recovery. (Petitioners' Exhibit 2). Such costs total $33,075.24. However, at hearing, Petitioners withdrew the claim for "Services," set forth at the top of page 1, Petitioners' Exhibit 2, in the sum of $3,537.50, leaving a claim for $29,537.74. (Tr., pp. 73 and 73). Of those costs, NICA did not object to the following expenses:

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| 08/09/05 | OB/GYN Clinic Records | $ 19.31 |
| 09/07/05 | West Volusia Pediatrics | $ 150.00 |
| 09/08/05 | Pediatric Surgery | $ 4.00 |
| 09/13/05 | Community Medical Assoc. | $ 7.82 |
| 09/16/05 | Florida Hospital | $ 1,360.55 |
| 09/21/05 | Seminole County | $ 3.50 |
| 09/28/05 | Childrens Resp. Care | $ 9.00 |
| 09/28/05 | Donald Willis, M.D. | $ 1,000.00 |
| 10/11/05 | Pediatric Neurology | $ 7.00 |
| 01/20/06 | DOAH Filing Fee | $ 15.00 |
| 08/09/06 | Depo. Renee Oliver | $ 496.30 |
| 11/01/06 | Hearing Transcript | $ 604.72 |
| 12/04/06 | Halifax Med. Center | $ 68.10 |
| | | $ 3,745.30 |

Accordingly, such expenses, totaling $3,745.30, are awarded without further discussion.

24. Pertinent to an award of expenses, the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, effective January 1, 2006, provide:

> Purpose and Application. These guidelines are advisory only. The taxation of costs in any particular proceeding is within the broad discretion of the trial court. The

trial court should exercise that discretion in a manner that is consistent with the policy of reducing the overall costs of litigation and of keeping such costs as low as justice will permit.

. . . Burden of Proof. Under these guidelines, it is the burden of the moving party to show that all requested costs were reasonably necessary either to defend or prosecute the case at the time the action precipitating the cost was taken.

I. Litigation Costs That Should Be Taxed.

A. Depositions

1. The original and one copy of the deposition and court reporter's per diem for all depositions.

2. The original and/or one copy of the electronic deposition and the cost of the services of a technician for electronic depositions used at trial.

3. Telephone toll and electronic conferencing charges for the conduct of telephone and electronic depositions.

B. Documents and Exhibits

1. The costs of copies of documents filed (in lieu of "actually cited") with the court, which are reasonably necessary to assist the court in reaching a conclusion.

2. The costs of copies obtained in discovery, even if the copies were not used at trial.

C. Expert Witnesses

1. A reasonable fee for deposition and/or trial testimony, and the costs of preparation of any court ordered report.

D. Witnesses

1. Costs of subpoena, witness fee, and service of witnesses for deposition and/or trial.

E. Court Reporting Costs Other than for Depositions

1. Reasonable court reporter's per diem for the reporting of evidentiary hearings, trial and post-trial hearings.

* * *

III. Litigation Costs That Should Not Be Taxed as Costs.

A. The Cost of Long Distance Telephone Calls with Witnesses, both Expert and Non-Expert (including conferences concerning scheduling of depositions or requesting witnesses to attend trial)

B. Any Expenses Relating to Consulting But Non-Testifying Experts

C. Cost Incurred in Connection with Any Matter Which Was Not Reasonably Calculated to Lead to the Discovery of Admissible Evidence

D. Travel Time

1. Travel time of attorney(s).
2. Travel time of expert(s)

E. Travel Expenses of Attorney(s)

25. Also pertinent to an award of expenses are the following decisions: Miller v. Hayman, 766 So. 2d 1116 (Fla. 4th DCA 2000)(recognizing that in the absence of exceptional circumstances, travel expenses for attorney to attend depositions should not be taxed as costs); Department of Transportation v.

Skidmore, 720 So. 2d 1125 (Fla. 4th DCA 1998)(recognizing that postage, long distance calls, fax transmissions, delivery service, and computer research are overhead and not properly taxable as costs); Gray v. Bradbury, 668 So. 2d 296, 298 (Fla. 1st DCA 1996)("The prevailing party's burden, at an evidentiary cost hearing, to recover an expert witness fee is 'to present testimony concerning the necessity and reasonableness of the fee.'"); Powell v. Barnes, 629 So. 2d 185 (Fla. 5th DCA 1993)(recognizing that evidence to support an award for expert witness fees must come from witnesses qualified in the areas concerned); Gray v. Bradbury, 668 So. 2d at 298. (Testimony of "a trial attorney and an insurance casualty claim manager, who were not shown to have proficiency in the various fields of expertise at issue (ranging from accident reconstruction to neurosurgery)," was not competent to support an award for expert witness fees.); Carreras, 633 So. 2d at 1109 ("[T]he exploration of the possibility of opting out of NICA through the 'bad faith' exception or otherwise is not, as the statute requires, work performed 'in connection with the filing of a claim . . . .'").

26. Considering the foregoing standards, Petitioners have established their entitlement to the recovery of $828.00 as the court reporter's fee for the depositions of Nurses Osbourne, Brinkmeyer, and Dorff. However, since the electronic depositions were not used at hearing, those expenses are not recoverable. Expenses associated with the depositions of Dr. Ravello, which addressed notice; Dr. Mowere, the only relevant portion of which, at the time it was taken, dealt with notice; and Ms. Shipley,

which addressed notice and the constitutionality of the Plan, are not recoverable. Also not recoverable are the fees Petitioners paid their various experts, since they were neither deposed nor testified at hearing, and there was no showing that their consideration of the claim was necessary or that their fee was reasonable. Finally, the remaining items were either not explicated or are considered overhead, and not taxable.

## CONCLUSIONS OF LAW

### Jurisdiction

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

### Award of Attorney's fees and other expenses

28. Where, as there, it has been resolved that a claim qualifies for coverage under the Plan, the administrative law judge is required to make an award for reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees. § 766.31(1), Fla. Stat.

29. Here, for the reasons noted in the Findings of Fact, it has been resolved that Petitioners receive an award of attorney's fees in the sum of $12,960.00, and an award for other expenses (costs) in the sum of $4,573.30.

## CONCLUSION

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

ORDERED that Petitioners are awarded $12,960.00 for

attorney's fees and $4,573.30 for other expenses reasonably incurred in pursuing the claim.

It is further ORDERED that, consistent with Section 766.312, Florida Statutes, the Division of Administrative Hearings, retains jurisdiction over this matter to enforce all awards.

DONE AND ORDERED this 19th day of December, 2008, in Tallahassee, Leon County, Florida.

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 19th day of December, 2008.

ENDNOTES

1/ Judge Perry abated a pending medical malpractice claim pending a decision as to whether the child's injury was compensable under the Plan. (Tr., p. 48).

2/ Section 766.309(4), Florida Statutes, provides:

> (4) If it is in the interest of judicial economy or if requested to by the claimant, the administrative law judge may bifurcate the proceeding addressing compensability and notice pursuant to s. 766.316 first, and addressing an award pursuant to s. 766.31, if any, in a separate proceeding. The administrative law judge may issue a final order on compensability and notice which is subject to appeal under s. 766.311, prior to issuance of an award pursuant to s. 766.31.

3/ Although, as discussed infra, Petitioners' objection to Intervention was frivolous, no time associated with hearing that objection was deducted because such time was de minimus.

4/ In objecting to the intervention of Dr. Mowere, Mid-Florida OB/GYN Specialists, P.A., and Central Florida Regional Hospital's petition to intervene, Petitioners averred "Florida Statute 766.307(2) indicates that 'the parties to the hearing shall include the claimant and association.' There is no provision provided for in the NICA statute for the doctor, hospital, or any other healthcare provider to intervene in this matter and the Petitioner/Claimant would object to same." (Petitioners' Objection to . . . Petition for Leave to Intervene, filed March 13, 2006). Notably, Section 766.307(2), Florida Statutes, prescribes the necessary parties to a NICA proceeding. It does not purport to limit who may be proper parties, if their substantial interests may be affected. In this case, it should not be subject to serious debate that the participating physician, his professional association, and the hospital where Ian was born were substantially affected and therefore proper parties. Moreover, as a participant in prior proceedings, Mr. Cohen was aware such requests were routinely

granted, yet he has never sought appellate review of such decision. (Tr., pp. 71 and 72).

5/ Dr. Raffa prepared a "present value assessment of the loss or diminution of the future earning capacity and the cost of the future life care needs of . . . Ian" (based on Dr. Deutsch's life care plan). (Petitioners' Exhibit 9, to Order on Compensability and Notice). Dr. Deutsch prepared a life care plan for Ian. (Petitioners' Exhibit 8, to Order on Compensability and Notice). Neither report is relevant to the claim, either to compensability or award, and appear to have been used to support Petitioners' claim that the Plan was unconstitutional. (See Petitioners' Motion for Request of the Deposition Kenney Shipley, Executive Director of NICA, filed May 1, 2006; deposition of Kenney Shipley, Respondent's Exhibit 3, to Order on Compensability and Notice). In any event, neither Dr. Raffa nor Dr. Deutsch were deposed or testified at hearing, and their reports were hearsay. § 90.801, Fla. Stat. However, in administrative proceedings "[h]earsay 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." § 120.57(1)(c), Fla. Stat. Here, no such exception is apparent, and their reports do not supplement or explain other evidence. Therefore, the reports had no evidentiary value. See Yost v. Unemployment Appeals Commission, 848 So. 2d 1235 (Fla. 2d DCA 2003); Strickland v. Florida A&M University, 799 So. 2d 276 (Fla. 1st DCA 2001); Durall v. Unemployment Appeals Commission, 743 So. 2d 166 (Fla. 4th DCA 1999).

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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.