

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JANELL COBLE AND DAVID COBLE, )  
as natural parents and legal )  
guardians of JORY COBLE, a )  
minor, and individually, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 06-3883N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
WELLINGTON REGIONAL MEDICAL )  
CENTER, INC., AND OB/GYN )  
SPECIALISTS OF THE PALM )  
BEACHES, )  
 )  
Intervenors. )  
\_\_\_\_\_ )

FINAL ORDER

This cause came on for consideration upon Respondent NICA's Motion to Determine that NICA is Not Required to Pay an Award in This Case and to Close Administrative Proceeding (Motion), served and filed November 29, 2011, and the Order to Show Cause entered December 19, 2011.

FINDINGS OF FACT

1. By an Order on Compensability and Notice entered May 4, 2007, and an Order Correcting Scrivener Error entered May 8,

2007, the ALJ determined that Petitioners' claim against NICA was compensable and that appropriate notice, pursuant to section 766.316, Florida Statutes, had not been given by Wellington Regional Medical Center. On October 10, 2008, the ALJ's May 4, 2007/May 8, 2007, Order was per curiam affirmed by the First District Court of Appeal. On June 4, 2009, the parties filed a fully-executed Stipulation for Entry of Award, and agreed, among other things, that

\* \* \*

. . . it is acknowledged that the Petitioners may pursue a State Court medical malpractice action against Wellington Regional Medical Center, Inc. . . . At such time as it is appropriate, the Petitioners may make an Election of Remedies, if required by law, which Petitioners dispute, within the State Court proceeding as to whether to accept payment of benefits under this Award, or recovery under the State Court medical malpractice action.

3. Until such time that it is determined whether or not an Election of Remedies is necessary and if so, until such time as Petitioners have made an Election of Remedies, and properly notified NICA, NICA shall not be required to pay any portion of this Award.

\* \* \*

2. A Final Order Approving Stipulation for Entry of Award was entered on June 4, 2009.

3. On November 29, 2011, Respondent NICA served and filed its Motion. By its Motion and the documentation attached to the

Motion, NICA demonstrated that Petitioners obtained state circuit court approval of a civil settlement with Wellington Medical Center, Inc., and alleged that, as a result of that state court settlement, Petitioners are barred from recovery under the NICA Plan.

4. Petitioners did not file a response to NICA's Motion, so in an abundance of caution, on December 19, 2011, an Order to Show Cause was entered, which provided, in part:

This cause came on for consideration upon the Florida Birth-Related Neurological Injury Compensation Association's Motion to Determine that NICA Is Not Required to Pay an Award in This Case and to Close Administrative Proceeding, served and filed November 29, 2011, to which no timely response in opposition has been filed.

Respondent NICA, by its foregoing pleading and attached exhibits, has established a prima facie case that Petitioners Janell Coble and David Coble, individually and on behalf of Jory Coble, a minor, (Petitioners and claimants before DOAH), have recovered some amount of money, either by settlement or final judgment, in a civil action arising from the labor, delivery, or immediate post-delivery resuscitation of Jory Coble in a hospital.

\* \* \*

Inasmuch as section 766.304, Florida Statutes, is clear that, " . . . An award may not be made or paid under ss. 766.301-766.316 if the claimant recovers under a settlement or final judgment is entered in a civil action. . . ." Respondent's pending motion, seeking an order determining that

NICA is not required to pay an award in this case appears well-taken.

However, in an abundance of caution, Petitioners and Intervenors are granted to and until January 3, 2012, to show cause why the relief sought by Respondent should not be granted.

Failure of all parties to timely show good cause will result in a final order finding that Petitioners have, in effect, already made an election against receiving NICA benefits by accepting a settlement from other entities (Wellington Regional Medical Center, Inc., an Intervenor herein) and providing that, pursuant to section 766.304, NICA owes nothing to Petitioners, and shall pay nothing to Petitioners, as the result of the Final Order on Compensability and Notice entered May 4, 2007, as amended by that certain Order Correcting Scrivener Error entered May 8, 2007, which Order was subsequently per curiam affirmed by the First District Court of Appeal.

5. No party has shown any cause why the requested final order should not be entered, nor has any party shown reason to doubt NICA's allegation, with supporting documentation, that Petitioners have recovered some amount of money from a civil action arising from the labor, delivery, or resuscitation in the immediate postdelivery period associated with Jory Coble's birth.

6. Accordingly, it is determined that Petitioners have recovered an amount of money, either by settlement or final judgment in Janell Coble and David Coble, as Natural Parents and Guardians of Jory Coble, a Minor, Individually v. Wellington

Regional Medical Center, Inc., Case No. 2006 CA 0003239AG, in the Circuit Court of the Fifteenth Judicial Circuit In and For Palm Beach County, Florida, from or against Wellington Medical Center, Inc., the hospital wherein Jory was born and an Intervenor herein.

7. Petitioners made a de facto election against receiving the NICA benefits provided-for in the Final Order entered on May 4, 2007, as amended by the Order Correcting Scrivener Error entered May 8, 2007, which was per curiam affirmed on appeal.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 766.301-766.316, Fla. Stat.

9. Section 766.304, Florida Statutes, in effect at the time of Jory Coble's birth on February 18, 2004, and at all times thereafter to date, has provided, in pertinent part:

. . . An award may not be made or paid under §§ 766.301-766.316 if the claimant recovers under a settlement or a final judgment is entered in a civil action. . . .

10. Petitioners, having recovered in a circuit court medical malpractice action against Intervenor Wellington Regional Medical Center, are precluded from recovery of an award against NICA.

11. The determination of exclusivity and immunity are reserved to the circuit court. See Gugelmin v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 882 So. 2d 517 (Fla. 4th DCA 2004); Romine v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 842 So. 2d 148 (Fla. 5th DCA 2003). The parties' Stipulation for Entry of An Award herein contemplated Petitioners applying to the circuit court to address the election issue. However, to date, no circuit court has made this determination.

12. Petitioners were given an opportunity to show cause why the relief now sought by NICA should not be granted in this forum, and Petitioners having failed to show cause why Respondent's requested relief should not be granted in this forum, the relief sought is granted.

#### CONCLUSION

Upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

1. Petitioners have made a de facto election against receiving NICA benefits pursuant to sections 766.301-766.316, Florida Statutes.

2. NICA owes nothing and shall pay nothing to Petitioners as a result of the Final Order entered herein on May 4, 2007, as amended by the Order Correcting Scrivener Error entered May 8, 2007.

3. This cause is dismissed with prejudice.

DONE AND ORDERED this 13th day of January, 2012, in  
Tallahassee, Leon County, Florida.



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WILLIAM J. KENDRICK  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
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this 13th day of January, 2012.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

Review of a final order of an administrative law judge shall be by appeal to the District Court of Appeal pursuant to section 766.311(1), Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal. See § 766.311(1), Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992).