STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KEITH ALLGOOD AND KRYSTLE-LYN ARENS, as parents and natural guardians of their minor and dependent son, LOGAN ALLGOOD,	)	
Petitioners,	)	
vs.	)	Case No. 08-4814N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
LAKELAND REGIONAL MEDICAL CENTER, INC.; JEFFREY PURETZ, M.D.; PATRICIA K. RICHEY, MN, RN, ARNP/CNM; and LAKELAND OB-GYN, P.A., d/b/a CENTRAL FLORIDA WOMEN'S CARE,	)	
Intervenors.	)	

FINAL ORDER AWARDING ATTORNEY'S FEES AND OTHER EXPENSES

Upon due notice, a final hearing was held on November 23, 2010, by video teleconference between Tallahassee and West Palm Beach Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Karen E. Terry, Esquire
Brian P. Sullivan, Esquire
Searcy, Denney, Scarola
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For Respondent: Elizabeth W. Voss, Esquire
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STATEMENT OF THE ISSUE

At issue are the attorney's fees and related expenses owed by Respondent Birth-Related Neurological Injury Compensation Association (NICA) pursuant to section 766.31(1)(c), Florida Statutes.

PRELIMINARY STATEMENT

Petitioners filed a Petition (Claim) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan) on September 26, 2008.

By an Order entered April 1, 2009, Division of Administrative Hearings (DOAH) Administrative Law Judge (ALJ) William J. Kendrick, with the concurrence of all parties, entered an Order approving Petitioners' claim as compensable. See §§ 766.302 (2) and 766.305 (7) Fla. Stat. That Order also

provided for the issue of lack of timely notice to be litigated in a full evidentiary hearing at a later date.

The case proceeded before ALJ Kendrick until September 30, 2009, and thereafter before the undersigned, relative to the issue of whether there had been a lack of timely notice by one or more of the Intervenors. A final hearing, devoted solely to the issue of lack of timely notice, vel non, was conducted on March 26, 2010, resulting in a June 11, 2010, Final Order determining that the Intervenors had provided appropriate notice. Jurisdiction as to all expenses was retained.

Thereafter, all expense issues were resolved informally by the parties, via their Stipulation and Joint Petition, filed September 23, 2010, and Addendum thereto filed October 6, 2010, approved by Order of October 8, 2010, except for attorneys' fees and reasonable expenses (costs). See § 766.31(1)(c), Fla. Stat. The case proceeded to final hearing on those issues on November 23, 2010.

At the November 23, 2010, fees and costs hearing, the Joint Pre-Hearing Stipulation was received in evidence as Joint Exhibit A. Petitioners presented the oral testimony of Attorneys Karen Terry and Donald Hinkle. The affidavit of Attorney Brian P. Sullivan, inclusive of time and expense records, was admitted as Exhibit P-1. The affidavit of Attorney James W. Gustafson, inclusive of time and expense records, was

admitted as Exhibit P-2. The time and expense records of Attorney Janet Merrill, and the time and expense records of Attorney Karen Terry and others at Searcy, Denny, Scarola, Barnhart & Shipley, P.A., were received in evidence as Exhibit P-3. An affidavit of Attorney Janice Merrill was offered, but objected-to, which objection was sustained. However, Petitioners were permitted 20 days to take Attorney Merrill's deposition. Ms. Merrill was deposed on December 3, 2010. At hearing, Respondent presented the oral testimony of Attorney John D. Kelner.

The transcript of hearing and the transcript of Ms. Merrill's deposition were filed on December 22, 2010.

The parties stipulated in a telephonic conference call on January 13, 2011, that, regardless of the date of filing, Ms. Merrill's deposition, filed December 22, 2010, and her Amended Affidavit as to Reasonable Attorney's Fees and Expenses, filed January 4, 2011, would be considered as evidence.[1]

It was further stipulated in the January 13, 2011, conference call that Respondent NICA's Proposed Final Order, filed January 7, 2011, and Petitioners' Proposed Final Order, filed January 11, 2011, would each be considered without objection.[2]

FINDINGS OF FACT

The Award Provisions of the Plan

1. At all times material to this case, section 766.31(1)(c) Florida Statutes, sets forth the factors to be considered by the ALJ for purposes of attorney's fees and costs as follows:

> 766.31 Administrative law judge awards for birth-related neurological injuries; notice of award. --
>
> (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:
>
> ***
>
> (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.
>
> Should there be a final determination of compensability, and the claimants accept an award under this section, the claimants shall not be liable for any expenses, including attorney's fees, incurred in connection with the filing of a claim under ss. 766.301-766.316 other than those expenses awarded under this section.

2. 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 Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990); Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985); Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 633 So.2d 1103 (Fla. 3d DCA 1994). "[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 Fla., 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. Fla. Birth-Related Neurological Injury Comp. 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.").[3] 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 Ass'n v. Day, 512 So. 2d 332 (Fla. 3d DCA 1987); Fitzgerald v. State of Fla., 756 So. 2d 110 (Fla. 2d DCA 1999). See also 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.").

3. In applying the statutory factors, Final Orders of DOAH have consistently based awards of attorney's fees and expenses (costs) upon the "award under this section" and upon the pursuit of "expenses, including attorney's fees, incurred in connection with the filing of a claim under ss. 766.301-766.316." However, fees and costs traditionally have not been assessed against NICA for Petitioners' pursuit of the "opt out" option provided by proof of lack of timely notice by participating physicians and hospitals or exploring civil remedies outside the NICA statutory scheme. See Robles v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case No. 07-2186N (Fla. DOAH Dec. 6, 2008); Oliver v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case No. 06-0318N (Fla. DOAH Dec. 19, 2008); Ransom v. Fla. Birth-Related

Neurological Injury Comp. Ass'n, Case No. 03-2213N (Fla. DOAH Oct. 25, 2004); Lendway v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case No. 94-6088N (Fla. DOAH Aug. 1, 1996); and Walker v. Fla. Birth-Related Neurological Injury Comp. Fund, Case No. 94-5386N (Fla. DOAH Nov. 13, 1995).

4. Petitioners' attorneys currently assert an entitlement to attorney's fees in the amount of $102,656.25, on behalf of Searcy, Denney, Scarola, Barnhart, & Shipley, P.A., (hereafter, "the Terry team"), $6,690.72 in expenses for that firm, and $35,096.00 in fees and $3,686.63 in expenses on behalf of Janice Merrill, P.A. (hereafter "the Merrill team").

5. There is no serious contention that Ms. Merrill, Ms. Terry, Mr. Sullivan, or Mr. Gustafson (Messrs. Sullivan and Gustafson being shareholders, with Ms. Terry, of Searcy, Denney, Scarola, Barnhart, & Shipley, P.A.) are not highly skilled medical malpractice attorneys who are both rightfully and properly respected and successful in their legal and geographical communities.

6. These attorneys represent clients in various types of cases, on an hourly basis, but all of them usually charge clients on a contingency fee basis in circuit court for their work on several permutations of catastrophic injury claims. Discussion of their respective qualifications, the qualifications of others (lawyers, law clerks, paralegals, etc.,

within the same firms) who assisted them, in their representation of Petitioners are addressed more fully hereafter.

Attorney's Fees
The Merrill Team

7. Prior to filing the NICA claim, Attorney Janet Merrill had been representing Petitioners with regard to a circuit court medical negligence case related to the birth of their child, Logan, since October 10, 2007. Ms. Merrill's legal representation included, but was not limited to, legal and factual research in preparation for the negligence case, complying with the statutory pre-suit requirements for that case, obtaining necessary documents, filing and serving the circuit court complaint, and abatement proceedings in the circuit court case. Abatement in that case required prior resolution of a NICA claim, before the circuit court case could proceed further. Abatement of the circuit court action, approximately May 2, 2008, precipitated Ms. Merrill filing the NICA claim herein.

8. On September 26, 2008, Petitioners, represented by Attorney Merrill, filed a Petition (Claim) with DOAH to resolve whether or not Logan Allgood (the injured infant) qualified for compensation under the NICA Plan, and whether the hospital at which Logan was born, Lakeland Regional Medical Center, and the

participating physician, Jeffrey Puretz, M.D., who delivered obstetrical services during the required statutory period, had complied with the notice provisions of the Plan. This was Ms. Merrill's first solo NICA claim, although she may have had previous peripheral experience with NICA in connection with other malpractice cases.

9. DOAH perfected service of the Petition on NICA on September 29, 2008.

10. An October 21, 2008, DOAH Order granted Lakeland Regional Medical Center leave to intervene.

11. A November 3, 2008, DOAH Order granted Jeffrey Puretz, M.D.; Patricia K. Richey, MN, RN, ARNP/CNM; Lakeland OB-GYN, P.A.; and Lakeland OB-GYN, P.A., d/b/a Central Florida Women's Care leave to intervene.

12. On February 2, 2009, following extensions of time within which to do so, NICA gave notice that it was of the view that Logan's claim against NICA was compensable, and requested that a hearing be scheduled to resolve compensability. NICA's acceptance of compensability equates with its "Response" required by section 766.305(4), and occurred subsequent to review of medical records by two NICA-selected physicians and a medical examination of the child, Logan, by one of those physicians.

13. On March 11, 2009, a prehearing conference was held. By letter of March 18, 2009, Petitioners' counsel advised the ALJ that they did not intend to dispute or present evidence concerning whether the injured infant had sustained a birth-related neurological injury. By letter to all parties on March 20, 2009, the ALJ responded to Petitioners' counsel's letter of March 18, 2009, and advised that it appeared appropriate at that time to resolve the claim was compensable, absent a dispute that obstetrical services were delivered by a participating physician. In response thereto, Petitioners' counsel wrote the ALJ on March 27, 2009, advising that all parties had agreed that the issue of compensability had been resolved, and the notice issue could be determined in a one-day hearing.

14. As a result of the parties' agreement on compensability, on April 1, 2009, ALJ Kendrick entered an Order, which provided, in pertinent part:

> Respondent's request that issues of compensability and notice be bifurcated from those relating to an award is granted § 766.309(4), Fla. Stat.
>
> Respondent's proposal to accept the claim as compensable is approved. § 766.305(7), Fla. Stat.
>
> By separate Notice of Hearing, a hearing will be scheduled to resolve whether the health care providers complied with the notice provisions of the Plan. Thereafter,

> a Final Order will be entered resolving that the claim is compensable, and whether the health care providers complied with the notice provisions of the Plan.

15. Petitioners' position herein is based, in part, on their suggestion, for purposes of the present proceeding, that compensation was not fully determined by the April 1, 2009, Order. This new position is in direct juxtaposition to Petitioners' previous active agreement to compensability, including informing the ALJ that there was no disagreement that a NICA-participating physician delivered obstetrical services and that there had been a qualifying injury to the child, Logan, during the statutory time period. See Finding of Fact 13.

16. Pertinent to any determination of compensability are the statutory requirements that the ALJ approve NICA's acceptance "for compensation" and the statutory requirements which define "compensability." §§ 766.305(7) and 766.309, Fla. Stat.

17. Specifically, the statute provides that if NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, NICA may award compensation to the claimant, provided that the award is approved by the ALJ to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, NICA disputes the claim, the dispute must be resolved by the assigned ALJ in accordance with the

provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

18. In discharging this responsibility, the ALJ must make the following determination:

> (a) Whether the injury claimed is a birth-related neurological injury. If the claimant has demonstrated, to the satisfaction of the administrative law judge, that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.303(2).
>
> (b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital; or by a certified nurse midwife in a teaching hospital supervised by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital.

§ 766.309(1), Fla. Stat. An award may be sustained only if the ALJ concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth." § 766.31(1), Fla. Stat.

19. "Birth-related neurological injury" is defined by section 766.302(2), to mean:

> injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a

> single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

20. Therefore, it is clear that the ALJ, in determining "compensability" on April 1, 2009, simultaneously determined that the infant had sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury during the statutory period; that the infant was thereby rendered permanently and substantially mentally and physically impaired; and that obstetrical services had been delivered by a physician participating in the NICA Plan. Therefore, it cannot reasonably be found, as Petitioners have suggested anew in the fees and costs phase of this case, that the issue of the provision of obstetrical services by a "participating physician" was left undetermined by the April 1, 2009, Order; that the "compensability" issue encompassed the "notice" issue; or that the remaining "notice" issue encompassed the "compensability" issue herein. Concomitantly, NICA's suggestion that compensability was determined by NICA's acceptance/response or by various letters of Petitioners' attorney, Ms. Merrill, is

rejected. The ALJ's Order of April 1, 2009, was the watershed mark for the determination of compensability.

21. Up to the April 1, 2009, Order determining compensability, Attorney Merrill's firm was the only one representing Petitioners. She currently asserts that up to that point in time, she and others in her office had expended time on this claim as follows:

> I am seeking an award for my attorney's fees totaling $18,576.00, reflecting my reasonable time necessarily expended in pursuit of NICA benefits (68.80 hours) at the reasonable rate of $270.00 per hour; my associate Shannon P. Liatos attorney's fees totaling $12,165.00 (81.10 hours) at the reasonable rate of $150.00 per hour; my paralegal McKenzie Stewart's fees totaling $3,302.00 (50.80 hours) at the reasonable rate of $65.00 per hour; my Law Clerk Tina Mesiboz' fees totaling $227.50 (3.50 hours) at the reasonable rate of $65.00 per hour; my Law Clerk Chanel Mosley's fees totaling $825.50 (12.70 hours) at the reasonable rate of $65.00 per hour, for a total claim of Attorney's and Paralegal fees in the amount of $35,096.00. The reasonable hourly rates reflect the complexity of the case, the contingent nature of the fee, the substantial risk of non-recovery, and the other factors set forth in section 766.31(1)(c)(1-6), Florida Statutes.

(P-5: Merrill's Amended Affidavit as to Reasonable Attorney's Fees and Expenses.)

22. NICA disputes fees claimed by the Merrill team for any time billed by either Ms. Merrill or her support staff that

related to the circuit court action or the issue of lack of notice by the Intervenors.

23. The time sheets originally provided by Ms. Merrill totaled 216.90 hours worked by all firm personnel. Attorney Donald Hinkle, testifying as an expert witness on behalf of Petitioners, and basing his opinion on the factors to be considered under section 766.31(1)(c) of the NICA Plan, eliminated hours related to the circuit court case and arrived at the conclusion that only 146.30 hours of the Merrill team's time, up to April 1, 2009, had been necessary and reasonable in achieving the compensability ruling of April 1, 2009. However, Mr. Hinkle was less than precise in explaining which of the hours listed by Ms. Merrill and her team might be included in his 146.30 hours figure. Mr. Hinkle's testimony in response to questions of whether or not any work performed by any lawyer with regard to the notice issue is to be compensated by NICA, may be characterized as, "If it isn't, it should be."[4]

24. NICA's expert witness, Attorney John D. Kelner, concurred with Mr. Hinkle that the circuit court work should be eliminated from consideration of fees in the NICA case. He also testified, in line with the case law, that NICA owes no fees for work on establishing lack of notice by the healthcare providers. Unfortunately, Mr. Kelner's vagueness rivaled Mr. Hinkle's concerning which of the Merrill team's charges might be valid

(that is, directed to the NICA compensability issue as opposed to the circuit court malpractice issues, NICA notice by the health care providers, or peripheral services, such as communication with various agencies). Initially, Mr. Kelner attempted to parse out each time and expense entry of the Merrill team's records; gave up; and finally opined that although Ms. Merrill was a highly skilled and respected attorney, even a moderately-skilled attorney could have completed the NICA compensability case (by itself) in 20-30 hours. In his opinion, the only attorney time required to pursue the NICA compensability issue in this case would have been spent communicating with the parent-clients on a variety of levels; obtaining medical releases; obtaining medical records; assembling the medical records; analyzing the medical records; being certain the medical records were complete; determining which type of health care professional might be needed to analyze the medical records; possibly consulting appropriate health care professionals to make a more in-depth assessment of the medical records; and drafting and submitting the claim to NICA.

25. It does not appear that Mr. Kelner viewed as valid, or took into consideration, the time, if any, devoted to the NICA claim by Ms. Merrill's team. Mr. Hinkle viewed all the Terry

team as appropriately skilled, reasonably priced, and as having devoted the necessary and reasonable time to this case.

26. As testified and as provided by statute and case law, it is found that Ms. Merrill (and derivatively, her team) is not entitled to fees from NICA for time not reasonably devoted to the compensability issue in the NICA case. Specifically, Ms. Merrill (and derivatively her team) is not entitled to be paid in this forum for time or expenses related solely to her circuit court work or to advancing the notice issue before DOAH. In accord with the statute, the case law, and both experts' testimony, the undersigned has devoted considerable time to assessing which of the hours listed for her team, as part of Ms. Merrill's Amended Affidavit, actually went into advancing the NICA claim, as opposed to the circuit court case. Also, in accord with the statute, the case law, and Mr. Kelner's testimony, time exclusively devoted to advancing the notice issue before DOAH has been subtracted.

27. Considering all the evidence and giving Ms. Merrill the benefit of the doubt that lack of NICA experience required time devoted to greater detailed research than a NICA claim "form" would provide, it is determined that 36.7 hours were reasonably expended by the Merrill team on the NICA claim.

28. In reaching the foregoing determination, the undersigned has relied in large part on the elements emphasized

by Mr. Kelner, including the need to repeatedly explain all elements of the case to the parent-clients. See Finding of Fact 24.

29. The following facts have been considered of more weight than others in reducing the hours accepted from the hours claimed: The Merrill team spent significant time pursuing the medical malpractice claim. Mixed issues (notice and compensability or compensability and circuit court work) could not always be separated out. There was much duplication of research effort (such as multiple revisions of letters and legal documents), and except for Ms. Merrill and another attorney, the team's work was more in the nature of clerical work than legal practice (predominantly assembling medical, legal and trial notebooks). Ms. Merrill testified that she was able to multi-task while doing some of her legal research and that parts of her research, of necessity, addressed both notice and compensability issues. Exhibit P-4A: Merrill Deposition page 30.

30. Also, except for the notice issue, this was a straightforward claim. The Petition was very professionally drafted by Ms. Merrill to protect the medical malpractice case, and the Petition explicitly set forth all aspects of the notice issue. However, "but for" the notice aspects, a petition form downloaded from NICA's internet site would have sufficed. The

medical aspects of the NICA case also were relatively straightforward, and the earliest medical records revealed the birth-related neurological injury. Therefore, NICA was able to make a decision to accept the claim, based, in large part, on the same medical records submitted with the Petition. Even so, where the undersigned could determine from the fee and expenses exhibits that NICA had requested additional records, that time has been considered herein in the Merrill team's favor.

31. Petitioners also did not have to locate, consult, or hire, expert medical witnesses of their own to refute NICA's physicians or for any other reason related to a compensability determination. On the other hand, where the records suggest that the Merrill team consulted medical personnel in relation to presuit requirements in circuit court or the notice issue, those hours have not been totaled in their favor. Medical examinations were rapidly scheduled by NICA, and compensability was readily agreed-to, once NICA's experts had examined Logan. Time that Ms. Merrill attributed to obtaining a copy of one or both NICA physicians' reports was excessive. No depositions of any experts were necessary to persuade NICA to accept the claim.

32. Finally, the statute aspires for every administrative case to go to hearing within 120 days of the filing of the Petition. § 766.307, Fla. Stat. Here, NICA accepted compensability within approximately 126 days without an

adversarial evidentiary hearing, and NICA's acceptance was confirmed by an Order of the ALJ within approximately 181 days.

33. That said, Respondent's assertions that no fees or costs can be owed for legal work accomplished by Petitioners' counsel after NICA's filing of the Response or, alternatively, after the filing of Petitioners' acceptance letter, are rejected based on sections 766.304 and 766.305 (7), which provide that a claim is not compensable until approved by the ALJ. See Finding of Fact 20. Therefore, Ms. Merrill's and her firm's time and activity up to the April 1, 2009, Order has all been considered in reaching the foregoing finding of 36.7 hours expended by the Merrill team on the compensability claim.

34. Mr. Hinkle opined that Ms. Merrill's claimed rate of $270.00 per hour was more "low" than "reasonable," but was certainly "reasonable" as that term is commonly understood in fees and costs proceedings, and that the respective hourly rates of Ms. Merrill's staff were also reasonable.

35. Mr. Kelner, while conceding that $200.00-$300.00 per hour might be a reasonable rate for Ms. Merrill's services, initially viewed $200.00 to be a more reasonable rate per hour for Ms. Merrill's services, based on all factors to be considered under the statute, particularly her education, training, and lesser experience in NICA cases at the times relevant to her NICA work in this case. He ultimately settled

on $250.00 per hour as a reasonable rate for her legal efforts in the instant case, opining that less experienced lawyers should charge less for more hours and more experienced lawyers can do the same work at a higher fee per hour, while expending less time doing it.

36. Given the closeness of the hourly fee claimed by Ms. Merrill and those hourly fee rates respectively assigned by the two experts, NICA urges that the "average" of $260.00 per hour should be assigned to Ms. Merrill's work in this case. However, considering the evidence as a whole, including but not limited to Mr. Kelner's testimony that he has not personally handled a NICA case limited to compensability issues in approximately 13 years, it is found that Ms. Merrill's requested hourly rate of $270.00 per hour is reasonable.

37. Therefore, having considered Mr. Hinkle's 146.30 hours figure, Mr. Kelner's 20-30 hours figure, the records themselves, such as they are, and giving Ms. Merrill every benefit of the doubt that her lack of NICA experience required greater and more detailed research and petition-drafting time than might be utilized by a more experienced attorney, it is concluded that strictly in pursuing the NICA compensability claim, Attorney Merrill is entitled to 36.7 hours at $270.00 per hour for a total of $9,909.00 as attorney's fees from NICA. This finding

subsumes all fees allegedly owed on behalf of the remainder of the Merrill team.

Expenses
The Merrill Team

38. NICA does not object to the following expenses incurred by the Merrill team:

1/23/08	Medical Records	$24.00
2/7/08	Medical Records (Dr. Arasu)	$ 8.21
9/23/08	DOAH filing fee	$15.00
		$47.21

39. The undersigned has made a careful assessment of the costs/expenses documented by the Merrill team, and finds no further expenses to be recoverable as limited solely to the NICA claim. In making this finding, the undersigned has been guided by Ocean Club Community Ass'n, Inc. v. Curtis, 935 So. 2d 513 (Fla. 3d DCA 2006), holding that the party seeking costs has the burden 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. Furthermore, the general rule is that certain costs and expenses such as copies, scans, and online research are not taxable costs because they are considered overhead. Accord Landmark Winter Park LLC v. Colman, 24 So. 3d 787, (Fla. 5th DCA 2009); Robbins v. McGrath, 955 So. 2d 633 (Fla. 1st DCA 2007). Moreover, the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, as Amended November 17, 2005, effective January 1, 2006 (915 So. 2d

612 at 616), provides that the following litigation costs should not be taxed as costs: long distance telephone calls with witnesses; expenses related to consulting but non-testifying witnesses; costs incurred in connection with any matter which was not reasonably calculated to lead to the discovery of admissible evidence; travel time of attorneys or experts; and travel expenses of attorneys. See also Miller v. Hayman, 766 So. 2d 1116 (Fla. 4th DCA 2000); Dep't of Transp. v. Skidmore, 720 So. 2d 1125 (Fla. 4th DCA 1998).

40. The Merrill team did not prove all expenses claimed but is entitled to an award of $47.21 in expenses.

Attorney's Fees
The Terry Team

41. Ms. Merrill could not take this case with her to a new firm she was joining, so on or about April 27, 2009, after the ALJ had already ruled the claim compensable on April 1, 2009, Attorney Karen Terry of the law firm of Searcy, Denney, Scarola, Barnhart & Shipley, P.A., replaced the Merrill team in representation of Petitioners.

42. After significant further discovery, much of which was acrimonious as between Petitioners' new legal representatives and one or more of Intervenors, Intervenors' legal representatives, or Intervenors' witnesses, a final hearing on the sole issue of notice was held on March 26, 2010.

43. NICA had no obligation at law to address the notice issue. Intervenors bore the burden of proving timely and appropriate notice had been given, and they met their burden. On June 11, 2010, a Final Order was entered, determining that there had been no lack of notice by any Intervenor. The Terry team never established "lack of timely notice" by any Intervenor, so Petitioners cannot be said to have prevailed on the notice issue.

44. The notice issue herein was complicated, and, to a degree, novel, but not such that "the compensation issue encompassed the notice issue," or that the "notice issue encompassed the compensation issue," as currently suggested by Petitioners. See Finding of Fact 20. At all times material to the instant case, "compensability" and "notice" have been separate issues within the NICA statutory scheme. At all times material, the opportunity of proving lack of appropriate notice represented only the potentiality of Petitioners being able to exercise an "opt out" of NICA, so that they could pursue a recovery against one or more health care providers in circuit court.

45. After determining that the notice requirements of the statute had been complied with, the Final Order of June 11, 2010, reserved jurisdiction to schedule further hearings on the following terms:

> 4. 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 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 advise the administrative law judge, and a hearing will be scheduled to address these remaining issues.

46. Petitioners and NICA avoided further litigation by entering into a Stipulation and Joint Petition, filed September 23, 2010, and an Addendum to Stipulation, filed October 6, 2010.[5] These were approved by an October 8, 2010, Order, resolving all issues related to the parental award and payment of past benefits/expenses (see sections 766.31(1)(a) and (b)), but leaving open for resolution by the ALJ the amount owing for reasonable attorney's fees and expenses related thereto. The final hearing on reasonable attorney's fees and expenses was held November 23, 2010.

47. Attorney Terry and her firm currently claim (through her testimony, her firm's time and expense records, and Messrs. Sullivan's and Gustafson's affidavits) attorney's fees and expenses in relationship to their entire representation of Petitioners since April 27, 2009, as follows: Attorney Karen Terry: 110 hours at $500.00 per hour; Attorney Brian P. Sullivan: 40 hours at $350.00 per hour; Attorney James W.

Gustafson: 22.9 hours at $500.00 per hour;[6] Attorney William King: 43 hours at $450.00 per hour;[7] Paralegal Bonnie Stark: 4.20 hours at $175.00 per hour; Paralegal Vince Leonard: 2.75 hours at $175.00 per hour; and the firm's research associates for 5.3 hours at $300.00 per hour.

48. Mr. Hinkle testified that upon his knowledge of usual rates and court awards, together with his personal knowledge of the qualifications and reputation of most of the Searcy, Denny & Associates firm members in their Palm Beach and Tallahassee offices, the hourly rates for the foregoing persons were reasonable.

49. Petitioners now seek only the foregoing hourly rates, despite having also presented evidence that much higher hourly fees recently have been awarded by the circuit courts in Palm Beach and Leon counties for allegedly "similar" or "comparable" medical malpractice legal work by Ms. Terry, some of her attorney associates, some of her non-attorney associates, and one of her firm's senior partners and another lawyer outside the firm. Without "enhancement," which does not apply in this case, the amount per hour claimed prevails over comparisons with attorneys of comparable skill, Linton v. Birth-Related Neurological Injury Compensation Fund, Case 05-2210N (Fla. DOAH Feb. 15, 2007). This is especially true where the comparison is made to legal work in other forums in other types of cases.

50. That said, it is indisputable that all DOAH litigation between April 1, 2009, and the June 11, 2010 Final Order was clearly directed toward attempts by Petitioners to opt-out of NICA. The 15 months of litigation following the April 1, 2009 Order on compensability, including all discovery and depositions, were directed toward the notice issue and to otherwise avoiding NICA. The notice issue is irrelevant to whether or not Logan Allgood qualified for coverage under the NICA Plan. Petitioners' decision to pursue the notice issue and all time devoted to that issue, including review of the June 11, 2010, Final Order, is not time for which NICA is legally responsible to pay attorney's fees. It is irrelevant to the legal issue of compensation from NICA whether notice was provided by a health care provider or why it was excused. Therefore, all the Terry team hours and expenses up to the June 11, 2010, Final Order on notice, plus any time thereafter reviewing that Final Order, are clearly irrelevant to the fees and costs issues now under consideration, and no fees or costs related thereto should be awarded.

51. However, Petitioners next submit that the Terry team's time spent in determining the dollar amounts of the items reserved in the June 11, 2010, Final Order (the parental award and award of past expenses) and their time spent negotiating and presenting the largely formulaic September 23, 2010, Stipulation

and Joint Petition and the October 6, 2010, Addendum thereto (see Finding of Fact 46) entitle them to some limited fees and costs.

52. Mr. Kelner, testifying on behalf of NICA, first represented that these were ministerial matters, not worthy of attorney's fees, but upon cross-examination, conceded that he did not know if these hours were worthy of fees. TR-139.

53. Ms. Terry and Mr. Hinkle testified globally that the foregoing were not merely "ministerial" acts on the part of the Terry team and that clients in these situations both expect, and require, assistance with these issues. Mr. Hinkle considered the total time claimed to be "reasonable." The affidavits of Attorneys Sullivan and Gustafson support this global view.

54. By referral to the testimony of Attorney Terry, all time and expense records, and the affidavits of Messrs. Sullivan and Gustafson, the undersigned has been able to determine that, strictly in the time period between the June 11, 2010, Final Order and the October 8, 2010, approval of the parties' Stipulation and Addendum, 1.5 hours were exclusively expended on this by Attorney Terry, mostly in phone calls to NICA and to Petitioners and in drafting lien letters; 2.6 hours of Mr. Gustafson's time was utilized in researching Medicaid setoffs, and 29.30 hours of Attorney Sullivan's time was devoted to researching Medicaid issues and to the following general

categories: calculating and documenting Logan's past hospital and doctor visits; calculating and documenting mileage to and from these visits; calculating and documenting time Logan's parents had spent over the five years since Logan's birth providing him with custodial care; and addressing some undefined issues with regard to Medicaid setoffs and a proposed irrevocable trust for Logan.[8] The undersigned reached the foregoing finding in accord with the body of case law and the Guidelines, as follows: Time the attorneys spent talking to each other (per the timesheets) have been credited only once. Phone calls to unidentified persons or in connection with the irrevocable trust issue have not been credited. Phone calls or discussions with more than one attorney participating have been credited only once. However, although Ms. Stark's memorandum on Medicaid reimbursements has not been separately catalogued, the time devoted by the three attorneys, and possibly Ms. Stark, to discussing her memorandum or the Medicaid issue is included. Time spent pursuing attorney's fees and costs has not been credited.

55. However, examination of the time and expense records and of the affidavits provides little concrete information about either the need or the success of these efforts. There is nothing to show that NICA ever denied any requests for payment during this period or did more than require adequate

documentation in order to reimburse Logan's parents for the "actual expenses" provided for under section 766.31(1)(a) and (b). There were no hearings to address any entitlement or payment issues and no pleadings other than the Stipulation and Joint Petition and its Addendum.[9]

56. In Ransom v. Florida Birth-Related Neurological Injury Compensation Ass'n, supra, NICA opposed a similar fee claim. The Final Order did not resolve whether or not attorney's fees and costs might be owed, upon proper documentation of time incurred by counsel, for exploring the issue of unpaid expenses or for finalizing the parental award, stating, " . . . but for the time that may have been spent formulating a parental award that preserved [the mother's] state and federal aid, as well as time spent to recover past expenses, NICA's view [that fees were not owed] has merit."

57. However, after subtracting attorney time with regard to opting out of NICA, the Final Order in Ransom added the following:

> As for the remaining time, which was generally incurred to address Ms. Ransom's concerns, it was unnecessary to the resolution of the claim, which at the time counsel was employed, only required that the manner of payment of the parental award be finalized and any unpaid expenses be identified. See §766.31(1) Fla. Stat.,

> which specifies the items includable in the award.

(Emphasis added.)

In Ransom, no unpaid expenses were identified, and the manner of payment of the parental award was finalized without difficulty. The same is true here.

58. There is, however, case law rejecting certain items as not supporting an award of attorney's fees or costs. Time devoted to securing a special needs trust was not awarded fees and costs in Robles v. Florida Birth-Related Neurological Injury Compensation Ass'n, supra. Pursuit of a life care plan was ruled irrelevant in Oliver v. Florida Birth-Related Neurological Injury Compensation Ass'n, supra. These cases would seem to militate against awarding fees based on the irrevocable trust issue explored by counsel herein.

59. Absent there being proof of disputed items, sections 766.31(1)(a) and (b) set out what is to be paid. Upon the evidence as a whole, and in the absence of any proof of resistance by NICA to any specific submission by the Terry team of any bill or proposal for reimbursement, it is determined that Petitioners did not prove an entitlement to attorney's fees based on activities in the period after the Final Order of June 11, 2010. However, rejection of these fees claims should not in any way be construed adversely to the fine reputations of

Ms. Terry's team, nor reflect adversely on any witness to this proceeding. There is just insufficient evidence herein to show entitlement to fees and expenses on the basis of Petitioners' lawyers' activities in the post-Final Order phase.

Expenses:
The Terry Team

60. Petitioners assert that $6,690.79 is owed to the Terry team as expenses (costs) reasonably related to prosecution of the NICA claim.

61. NICA contends it owes nothing by way of expenses to the Terry Team, both on the theory that nothing is owed by NICA for costs incurred in pursuing the notice issue or with regard to recovering expenses not specifically provided for and/or never denied or litigated. The undersigned concurs.

62. Mr. Hinkle's testimony as an expert attorney's fee and cost witness in this cause was billed to Ms. Terry's firm at $475.00 per hour for a total of $2,875.52. Ms. Terry's firm incurred a court reporter and transcript cost of $629.00 for the attorney's fee and expenses hearing on November 23, 2010. Since Petitioners have not prevailed on those issues, they are not entitled to reimbursement for these items.

CONCLUSIONS OF LAW

63. The Division of Administrative Hearings has jurisdiction of the parties to, and subject matter of, this cause. § 766.301, et seq., Fla. Stat.

64. Although the undersigned accepts both the adage that attorney's fees and costs constitute the average citizen's "key to the courthouse," and further accepts the assertion of Petitioners' attorneys' and expert witness' contention that it would not have served the claimants' best interests for their attorneys to have ignored the issue of notice (indeed, there was testimony that under the state of the law at all times material to this case it bordered on legal malpractice to not pursue, or at least to not thoroughly examine, the issue of notice before DOAH), those sentiments do not establish a legal requirement that NICA "pay the freight" for Petitioners' counsel to pursue the notice issue in the administrative forum.

65. It is also noted that the Intervenors, as the proponents of a finding that proper notice had been given, bore the burden of proving that proper notice had been given. Using Petitioners' analogy comparing the similarities of NICA litigation to medical malpractice litigation, it is clear that attorneys for a petitioner who raise and prevail on a "lack of notice" issue in a NICA case before DOAH do so in anticipation of having the opportunity to elect NICA payments or to reject

NICA and take their chances on recovering probably greater damages for Petitioners, and a contingency fee for themselves, by way of a circuit court award. However, that opportunity for ultimate choice does not mean that NICA should owe a fee to Petitioners in respect to the notice issue, particularly when Petitioners do not prevail before DOAH on that notice issue. See Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, supra.

66. NICA was enacted by the Florida Legislature with the intent to stabilize and reduce malpractice insurance premiums for physicians practicing obstetrics. § 766.301(1)(c), Fla. Stat. A fund was created by the Legislature to provide compensation, on a no-fault basis, for birth-related neurological injuries. Fla. Birth-Related Neurological Injury Comp. Ass'n v. Dep't. of Admin. Hear., 29 So. 3d 992, 995 (Fla. 2010). Financing for the fund was provided through assessments made against hospitals and physicians, section 766.314, and limitations were placed on amounts recoverable by claimants, section 766.31. In essence, NICA was intended to establish a limited system of compensation irrespective of fault, section 766.301(1)(d), and to operate in the least litigious manner possible. Because NICA's remedies are limited, obstetric patients subject to limited compensation under NICA are entitled

to receive pre-delivery notice of their rights and limitations under the Act.

67. It is useful to reiterate that "the Legislature viewed [the Plan] as a relatively simple no-fault process for the care of infants with very severe, very expensive permanent disabilities." Carreras. As a no-fault process, the Plan "contemplates routine claim processing where eligibility determinations should ordinarily be straightforward. Id. at 1106. As a creature of statute, NICA cannot be stretched beyond its legislative intent.

68. Following the Order of April 1, 2009, the majority of all further actions of Petitioners' counsel were directed toward avoiding being foreclosed from a civil lawsuit against the healthcare providers by the exclusivity of the NICA Plan. Only those actions and expenses directed to the claim itself are subject to assessment against NICA. Actions and expenses directed toward the circuit court action, toward the notice issue before DOAH, or toward never-contested bills are not subject to an award of fees or costs.

CONCLUSION

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

Petitioners are awarded $9,909.00 in attorney's fees and $47.21 in expenses related thereto.

DONE AND ORDERED this 18th day of February, 2011, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of February, 2011.

ENDNOTES

1/ Upon reading the copy of Ms. Merrill's deposition which was filed on December 22, 2010, it became obvious that Ms. Merrill's original, unnotarized affidavit had been intended to be attached as Exhibit 1 to this deposition, but that the unnotarized affidavit had not been physically attached to the copy of the deposition mailed to the ALJ. However, a copy of this unnotarized affidavit had been filed with the Division on November 17, 2010, prior to the final hearing on fees and expenses, and that copy has been marked and utilized as "Exhibit 1 to Merrill Depo. of 12/3/2010". To preserve a comprehensive record of these proceedings, the undersigned has designated Ms. Merrill's after-filed deposition and the unnotarized affidavit as Petitioners' "Composite Exhibit P-4, parts A and B". The unnotarized affidavit is superceded by Ms. Merrill's notarized "Amended Affidavit as to Reasonable Attorney's Fees and Expenses," dated December 22, 2010, and filed January 4, 2011, which Amended Affidavit has been marked as "P-5".

2/ Petitioners attached to their Proposed Final Order the bill of Mr. Donald Hinkle, their attorney's fees and expenses expert, and the bill of the court reporter for services with regard to

the November 23, 2010, fees and expenses hearing and with regard to Ms. Merrill's after-filed deposition.

3/ At all times material to the instant case, jurisdiction of the notice issue has resided in DOAH, but Petitioners and their expert witness asserted that Carreras and all similar cases should not be considered because they allegedly pre-date statutory amendments, which removed the notice determination from the jurisdiction of the circuit court and placed it within DOAH, and because prior to certain amendments, Petitioners had been permitted to pay their own attorneys. This argument is unpersuasive.

4/ See n. 3.

5/ The Addendum was only filed at the suggestion of the undersigned to clarify that the parties had not yet resolved the issue of entitlement to attorney's fees and expenses.

6/ Mr. Gustafson's affidavit (P-2) also attests to the nature and time of Paralegal Stark's participation.

7/ This new hourly rate is apparently in response to Mr. Hinkle's testimony that he would accept as reasonable the other Terry team members' claimed hourly rates but would assign $450 per hour to Mr. King because of the short time Mr. King had been practicing in Florida, instead of Ms. Terry's originally-claimed amount of $600 per hour for Mr. King's work,

8/ Ms. Terry also testified that at some point she requested that the Director of NICA phone Logan's mother directly, without going through the Terry team attorneys, to determine Logan's eligibility for a van.

9/ See n. 5.

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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.