

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MONICA CORDERO AND CHRISTIAN R.)
MORRILL, SR., ON BEHALF OF AND)
AS PARENTS AND NATURAL)
GUARDIANS OF BABY BOY CHRISTIAN)
ROSS MORRILL, JR., a/k/a BABY)
CORDERO (DECEASED),)
)
Petitioners,)
)
vs.) Case No. 08-4917N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
HELEN ELLIS MEMORIAL HOSPITAL,)
)
Intervenor.)
_____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a hearing on April 21, 2009, by video teleconference, with sites in Tallahassee and Tampa, Florida.

APPEARANCES

For Petitioners: Harold L. Sebring, III, Esquire
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For Respondent: Robert J. Grace, Jr., Esquire
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For Intervenor: Thomas L. Schieffelin, Esquire
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STATEMENT OF THE ISSUES

1. Whether Christian Ross Morrill, Jr., a deceased minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

2. If so, 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 attorney's fees, and the amount owing for expenses previously incurred.

3. Whether the administrative law judge has jurisdiction to determine the applicability of the willful and wanton exception to Plan exclusivity, set forth in Section 766.303(2), Florida Statutes (2007).¹

PRELIMINARY STATEMENT

On October 2, 2008, Monica Cordero and Christian R. Morrill, Sr., on behalf of and as parents and natural guardians of Christian Ross Morrill, Jr. (Christian), a deceased minor, filed a "petition for determination of jurisdiction of NICA Plan, and in the alternative for benefits pursuant to Florida

Statute Section 766.301 et seq." The petition included the following statements:

10. The Petitioners take the position that they are not bound by the provisions of Florida Statute Section 766.301 et seq. (the NICA Plan) due to the fact the conduct of the medical providers in this case, specifically the nursing staff, amounted to willful and wanton conduct demonstrating a reckless disregard for the safety and welfare of this infant and also amounted to bad faith in the care and treatment of this child. In the alternative, Petitioner request the following relief for themselves and their minor child:

a. Expenses for items or services that are medically necessary and reasonable for the child's medical and hospital care.

b. Lump sum of an award to the parents of the minor in an amount not to exceed \$100,000.00.

c. All expenses requested hereunder are to be awarded pursuant to the provisions of Sections 766.301-766.316, Florida Statutes, and subject to exclusions contained in said sections.

d. Reasonable expenses incurred in connection with the filing of this claim.

It is Petitioner's position that the Administrative Law Judge in this matter does not have jurisdiction to determine the allegations set forth, to wit: the conduct of the nursing staff at Helen Ellis Memorial Hospital amounted to willful and wanton conduct demonstrating a reckless disregard for the safety and welfare of this infant and also amounted to bad faith in the care and treatment of this child. Petitioner relies on the authority of *Rinella v. Abifaraj*, 908 So. 2d 1126 (Fla. 1st DCA

2005), Review denied, *Abifaraj v. Rinella*,
921 So. 2d 628 (Fla. 2006).

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on October 3, 2008, and on November 20, 2008, NICA responded to the petition and gave notice that it was of the view the claim was compensable. However, given the issues raised by Petitioners, NICA requested a hearing be held to address compensability.

Thereafter, by motion filed December 9, 2008, Helen Ellis Memorial Hospital requested leave to intervene. That motion included the following allegations:

1. Petitioner previously filed a petition to determine NICA compensability and Intervenor was granted its motion to intervene in the original action.
2. Petitioner subsequently withdrew the petition to pursue claimed damages in civil court.
3. Intervenor, Helen Ellis Memorial Hospital, then filed a declaratory judgment action addressing the issues of exclusivity of NICA remedies for the claimed wrongdoing and damages.
4. In response, Petitioner filed a counterclaim for medical malpractice against Intervenor, Helen Ellis Memorial Hospital.
5. By order of the Circuit Court, John A. Schaefer, Sixth Judicial Circuit, said action has been [abated] pending the determination regarding compensability under the provision of the Birth-Related Neurological Injury Compensation Act. (See Exhibit A)[²]

6. Helen Ellis Memorial Hospital is entitled to intervene for the reason that the underlying issues in the pending litigation in Circuit Court are of such direct and immediate character that Intervenor, Helen Ellis Memorial Hospital, will either gain or lose by direct legal operation and effect of any ruling under the provision of the Birth-Related Neurological Injury Compensation Program

7. Specifically, Intervenor has an interest in the outcome of Petitioner's claim that the care rendered by its nursing staff rises to the level of "willful and wanton disregard" as set forth as exception to the exclusivity of NICA compensation as a remedy and the subordinate issue raised by Petitioner of which forum has jurisdiction to decide applicability of this exception.

Helen Ellis Memorial Hospital's motion to intervene was granted by Order of December 10, 2008.

By Notice of Hearing dated January 14, 2009, a hearing was scheduled for April 21, 2009, to resolve whether the claim was compensable and, if so, 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 attorney's fees, and the amount owing for expenses previously incurred. Subsequently, it was agreed the administrative law judge would also address whether he had jurisdiction to resolve the willful and wanton exception to Plan exclusivity, set forth in Section 766.303(2), Florida Statutes.

The parties' Pre-Hearing Stipulation was filed April 15, 2009, and at hearing Joint Exhibits 1-3 were received into evidence. No witnesses were called, and no other exhibits were offered.

The parties were accorded 10 days from the date of the hearing to file written argument or proposed orders. Respondent elected to file a proposed order and it has been duly-considered.

FINDINGS OF FACT

Stipulated facts

1. Monica Cordero and Christian R. Morrill, Sr., are the natural parents of Christian R. Morrill, Jr. (Christian), a deceased minor. Christian was born a live infant on June 21, 2007, at Helen Ellis Memorial Hospital, a licensed Florida hospital, located in Tarpon Springs, Florida, and his birth weight exceeded 2,500 grams. Christian died June 27, 2007.

2. Obstetrical services were delivered at Christian's birth by Brooke Slaton, M.D., who, at all times material hereto, was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan as defined by Section 766.302(7), Florida Statutes.

3. The participating physician (Dr. Slaton) and the hospital (Helen Ellis Memorial Hospital) complied with the notice provisions of the Plan.

4. Petitioners and NICA have further stipulated, which stipulation Intervenor "does not oppose . . . and intends to offer no evidence to rebut," that Christian suffered a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, in that he suffered an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital, which rendered him permanently and substantially mentally and physically impaired.

Coverage under the Plan

5. Pertinent to this case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as an "injury to the brain . . . of a live infant weighing at least 2,500 grams for a single gestation . . . at birth caused by oxygen deprivation . . . 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." § 766.302(2), Fla. Stat. See also §§ 766.309 and 766.31, Fla. Stat.

6. Here, the parties' agreement that Christian suffered a "birth-related neurological injury" is consistent with the objective proof which demonstrates that Christian suffered an

injury to the brain caused by oxygen deprivation occurring in the course of labor, delivery, and the immediate postdelivery period that, following withdrawal of life-support at day 6 after birth, resulted in death. Consequently, since obstetrical services were provided by a "participating physician" at birth, the claim is compensable. §§ 766.309(1) and 766.31(1), Fla. Stat.

The award

7. Where, as here, it has been resolved that a claim is compensable, the administrative law judge is required to make a determination of how much compensation should be awarded. § 766.31(1), Fla. Stat. Pertinent to this case, Section 766.31(1), Florida Statutes, provides for an award of the following items:

(a) Actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, family residential or custodial care, professional residential, and custodial care and service, for medically necessary drugs, special equipment, and facilities, and for related travel. However, such expenses shall not include:

1. Expenses for items or services that the infant has received, or is entitled to receive, under the laws of any state or the Federal Government, except to the extent such exclusion may be prohibited by federal law.

2. Expenses for items or services that the infant has received, or is contractually entitled to receive, from any prepaid health plan, health maintenance organization, or

other private insuring entity.

3. Expenses for which the infant has received reimbursement, or for which the infant is entitled to receive reimbursement, under the laws of any state or the Federal Government, except to the extent such exclusion may be prohibited by federal law.

4. Expenses for which the infant has received reimbursement, or for which the infant is contractually entitled to receive reimbursement, pursuant to the provisions of any health or sickness insurance policy or other private insurance program.

* * *

(b)1. Periodic payments of an award to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury, which award shall not exceed \$100,000. However, at the discretion of the administrative law judge, such award may be made in a lump sum.

2. Death benefit for the infant in an amount of \$10,000.

(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.

8. In this case, Petitioners and NICA have agreed that, should Petitioners elect to accept benefits under the Plan, Monica Cordero and Christian R. Morrill, Sr., as the parents of Christian, be awarded One hundred thousand dollars (\$100,000.00), pursuant to Section 766.31(1)(b.)1., Florida Statutes, and a death benefit of Ten thousand dollars (\$10,000.00), pursuant to Section 766.31(1)(b)2., Florida Statutes, all to be paid in lump sum. The parties have further agreed to an award of Two thousand six hundred twenty-five dollars (\$2,625.00) for attorney's fees and other expenses incurred in connection with the filing of the claim. Moreover, the parties have agreed no monies are owing for past expenses. Such agreement is reasonable, and it is approved.

CONCLUSIONS OF LAW

Jurisdiction

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

Compensability and award

10. In resolving whether a claim is covered by the Plan, the administrative law judge must make the following determination based upon the available evidence:

- (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 administrative law judge concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth." § 766.31(1), Fla. Stat.

11. "Birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, 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.

12. In this case, it has been established that the physician who provided obstetrical services at Christian's birth was a "participating physician," and that Christian suffered a "birth-related neurological injury." Consequently, Christian qualifies for coverage under the Plan, and Petitioners are entitled to an award of compensation. §§ 766.309 and 766.31, Fla. Stat. Here, the parties have stipulated to such award, as set forth in paragraph 8 of the Findings of Fact.

Whether the administrative law judge has jurisdiction to determine the applicability of the willful and wanton exception to Plan exclusivity, set forth in Section 766.303(2), Florida Statutes

13. Here, Intervenor is apparently of the view that the administrative law judge must resolve whether there is "clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property" before claimants, such as Petitioners, may elect (under the provisions of Section 766.303(2), Florida Statutes) to pursue a civil action in lieu of accepting an award under the Plan. Petitioners and NICA are of a contrary view.

14. Pertinent to the issue raised, the Plan provides:

766.301 Legislative findings and intent.-
(1) The Legislative makes the following findings:

* * *

(d) The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault. The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding.

766.303 Florida Birth-Related Neurological Injury Compensation Plan; exclusiveness of remedy.-

(1) There is established the Florida Birth-Related Neurological Injury Compensation Plan for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims

(2) The rights and remedies granted by this plan on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, her or his personal representative, parents, dependents, and next of kin, at common law or otherwise, against any person or entity directly involved with the labor, delivery, or immediate postdelivery resuscitation during which such injury occurs, arising out of or related to a medical negligence claim with respect to such injury; except that a civil action shall not be foreclosed where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property, provided that such suit is filed prior to and in lieu of payment of an award under ss. 766.301-766.316. Such suit shall be filed before the award of the division becomes conclusive and binding as provided for in s. 766.311. (Emphasis added).

766.304 Administrative law judge to determine claims.- The administrative law judge shall hear and determine all claims filed pursuant to ss. 766.301-766.316 and shall exercise the full power and authority granted to her or him in chapter 120, as

necessary, to carry out the purposes of such sections. The administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, or if the claimant accepts an award issued under s. 766.31, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303

766.309 Determination of claims; presumption; findings of administrative law judge binding on participants.-

(1) The administrative law judge shall make the following determinations based upon all available evidence;

(a) Whether the injury claimed is a birth-related neurologically 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. 766.302(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.

(c) How much compensation, if any, is awardable pursuant to s. 766.31.

(d) Whether, if raised by the claimant or other party, the factual determinations regarding the notice requirements in s. 766.316 are satisfied. The administrative law judge has the exclusive jurisdiction to make these factual determinations.

766.311 Conclusiveness of determination or award; appeal-

(1) A determination of the administrative law judge as to qualification of the claim for purposes of compensability under s. 766.309 or an award by the administrative law judge pursuant to s. 766.31 shall be conclusive and binding as to all questions of fact. Review of an order of an administrative law judge shall be by appeal to the District Court of Appeal. Appeals shall be filed in accordance with rules of procedure prescribed by the Supreme Court for review of such orders.

15. As enacted, Section 766.304, Florida Statutes, grants the administrative law judge exclusive jurisdiction to determine whether a claim is compensable, and refers to Section 766.309, as the determinations an administrative law judge must make in resolving a claim. Those determinations are: (a) "[w]hether the injury claimed is a birth-related neurological injury," (b) "[w]hether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital," (c) "[h]ow much compensation, if any, is awardable," and (d) "[w]hether, if raised by the claimant or other party, the factual determinations regarding the notice requirements in s. 766.316 are satisfied."

16. Notably, there is nothing in the language of the Plan, that grants the administrative law judge jurisdiction to resolve the willful and wanton exception to Plan exclusivity. Consequently, it must be resolved that the administrative law judge lacks jurisdiction to resolve the issue. Rinella v. Abifaraj, 908 So. 2d 1126, 1130 (Fla. 1st DCA 2005)("[U]nder the plain meaning of the statute as written, the ALJ properly determined that he did not have jurisdiction to decide the willful and wanton issue."). See also City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So. 2d 493, 495-96 (Fla. 1973)("All administrative bodies created by the Legislature are not constitutional bodies, but, rather, simply mere creatures of statute. This, of course, includes the Public Service Commission As such, the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, . . . and the further exercise of the power should be arrested.") and Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So. 2d 787, 793 (Fla. 1st DCA 1982)("An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a

creature of statute, has no common law jurisdiction or inherent power such as might reside in . . . a court of general jurisdiction.").

CONCLUSION

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

ORDERED that the claim filed by Monica Cordero and Christian R. Morrill, Sr., on behalf of and as parents and natural guardians of Christian R. Morrill, Jr., a deceased minor, is approved, as compensable.

It is FURTHER ORDERED that the following benefits are awarded:

1. Monica Cordero and Christian R. Morrill, Sr., as the parents of Christian R. Morrill, Jr., a deceased minor, are awarded One hundred thousand dollars (\$100,000.00), pursuant to Section 766.31(1)(b)1., Florida Statutes, and a death benefit of Ten thousand dollars (\$10,000.00), pursuant to Section 766.31(1)(b)2., Florida Statutes, all to be paid in lump sum.

2. Petitioners' counsel is awarded Two thousand six hundred twenty-five dollars (\$2,625.00) for attorney's fees and other expenses incurred in connection with the filing of the claim.

3. No award is made for past expenses, as none are owing, and no provision is made for the payment of future expenses, as Christian is deceased.

It is FURTHER ORDERED that the administrative law judge lacks jurisdiction to determine the applicability of the willful and wanton exception to Plan exclusivity, set forth in Section 766.303(2), Florida Statutes.

It is FURTHER ORDERED that pursuant to Section 766.312, Florida Statutes, jurisdiction is reserved to resolve any disputes, should they arise, regarding the parties' compliance with the terms of this Final Order.

DONE AND ORDERED this 2nd day of June, 2009, 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 2nd day of June, 2009.

ENDNOTES

1/ Unless otherwise noted, all statutory references are to the 2007 version of the Florida Statutes.

2/ The order of Judge Schaefer included the following conclusion:

1. The motion to abate of Plaintiff/Counter-Claim Defendant, Helen Ellis Memorial Hospital Foundation, Inc., is GRANTED. The Court finds that the determination of NICA compensability by the appropriate Administrative Law Judge to determine all claims of NICA compensability within the jurisdiction of the Administrative Law Judge is prerequisite to the Corderos' instituting their potential civil action. The Court makes no determination at this time whether the "willful and wanton" exception to the exclusivity provisions of NICA is within the jurisdiction of the Administrative Law Judge or this Court to decide.

COPIES FURNISHED:
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Sections 120.68 and 766.311, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 766.311, Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992). The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.