

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ANGELA SAMPLES AND KENNETH RAY )  
SAMPLES, INDIVIDUALLY AND AS )  
PARENTS AND NEXT FRIENDS OF )  
MACKENZIE SAMPLES, A MINOR, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 08-5147N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a hearing in the above-styled case on August 14, 2009, by teleconference.

For Petitioners: Scott R. McMillen, Esquire  
McMillen Law Firm  
390 North Orange Avenue, Suite 140  
Orlando, Florida 32801

For Respondent: Wilbur E. Brewton, Esquire  
Brewton Plante, P.A.  
225 South Adams Street, Suite 250  
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STATEMENT OF THE ISSUE

Whether Section 766.31(1)(b)1., Florida Statutes, authorizes an award to the parents or legal guardians of a sum

not to exceed \$100,000, in total, or whether it authorizes an award to the parents or legal guardians of a sum not to exceed \$100,000, individually.

PRELIMINARY STATEMENT

On October 14, 2008, Petitioners, Angela Samples and Kenneth Samples, individually, and as parents and next friends of MacKenzie Samples (MacKenzie), a minor, filed a petition with the Division of Administrative Hearings (DOAH) for benefits under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on October 15, 2008, and on January 30, 2009, following an extension of time within which to do so, NICA responded to the petition and gave notice that it was of the view the claim was compensable, and expressed its willingness to provide benefits as provided by the Plan.

On May 18, 2009, the parties filed a Stipulation and Joint Petition for Compensation of Claim Arising out of Florida Birth-Related Neurological Injury Pursuant to Chapter 766, Florida Statutes, wherein they agreed the claim was compensable. The stipulation also included the following provisions:

12. The Petitioners disagree as to NICA's interpretation of Section 766.31(1)(b)1., Florida Statutes, with respect to the

payment of the parental award. Section 766.31(1)(b)1., Florida Statutes, . . . [provides that the administrative law judge shall make an award including]:

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

The Petitioners reserve the right to argue, at a hearing before the Administrative Law Judge, the sole issue of the constitutionality of, and interpretation of Section 766.31(1)(b)1., Florida Statutes, and whether such statute authorizes payment of an award which shall not exceed \$100,000 to both parents, combined, or whether that section authorizes payment of an award which shall not exceed \$100,000 to each parent, individually.

13. NICA agrees to pay to Petitioners, contingent upon approval of this Stipulation by the Administrative Law Judge, the following:

(a) The Petitioners shall receive from NICA One Hundred Thousand Dollars (\$100,000.00) to be paid as a lump sum to the parents. This payment is authorized pursuant to Section 766.31(1)(b)1., Florida Statutes.

(b) Payment of benefits up to and including the effective date of this Stipulation under Section 766.31(1)(a), Florida Statutes, subject to the provisions of Paragraph 20 of this Stipulation.

(c) Pursuant to Section 766.31(1)(c), Florida Statutes, payment of reasonable expenses to Scott R. McMillen, Esquire, or

the McMillen Law Firm, incurred in connection with the filing of a claim under Sections 766.301-766.316, Florida Statutes, including reasonable attorney's fees, to be agreed upon at the resolution of this claim. At that time, if the Parties cannot reach an agreement as to the reasonable expenses to be paid, the Parties shall request a hearing before the Administrative Law Judge to resolve such issue.

14.(a) With the exception of the issue reserved in Paragraph 12 of this Stipulation, including any attorney's fees and costs the Petitioners may be entitled to as a result thereof, the Petitioners further agree that upon the making of the payments outlined in paragraph 13 of this Stipulation, this shall serve as a full, complete and absolute discharge of any and all responsibility and liability NICA and the persons outlined in Section 766.303(2), Florida Statutes, may have to the Petitioners in their capacity as the parents and legal guardians of MacKenzie and each Petitioner in their individual capacity.

(b) The Petitioners and NICA agree that NICA will pay future expenses as incurred. See § 766.31(2), Fla. Stat. . . .

15. The Petitioners represent and acknowledge to the Administrative Law Judge of the Division of Administrative Hearings that they understand that this Stipulation is a complete and final settlement in its entirety, and further represent and acknowledge that they have retained legal counsel which has provided legal advice in regard to this Stipulation, and the option of accepting this Stipulation as opposed to whatever other rights and remedies the Petitioners otherwise have had, either in their individual capacity or personal capacity, and that their legal counsel has advised them of the legal significance of each and every part of this Stipulation.

Further, the Petitioners represent and acknowledge to the Administrative Law Judge of the Division of Administrative Hearings that they understand that the Petition which has been filed seeking compensation from NICA is hereby deemed to be satisfied in its entirety, except for the issue of the proper interpretation of Section 766.31(1)(b)1., Florida Statutes, and the payment of reasonable expenses pursuant to Section 766.31(1)(c), Florida Statutes.

16. The Parties to this Stipulation agree that they will not appeal any of the issues specifically resolved by this Stipulation. However, any Final Order of the Administrative Law Judge resolving the issue of the proper interpretation of Section 766.31(1)(b)1., Florida Statutes, may be subject to appeal as to that issue only.

By letter/e-mail agreement dated June 12, 2009, filed June 15, 2009, the parties agreed to attorney's fees of \$10,000.00 and costs of \$898.13 to be awarded in connection with the filing of the claim, subject to an additional award if Petitioners prevailed in the dispute regarding the proper interpretation of Section 766.31(1)(b)1., Florida Statutes.

On June 17, 2009, an Order was entered approving the parties' stipulations. The Order also included the following provisions:

2. Petitioners, Angela Samples and Kenneth Ray Samples, Jr., as the parents and natural guardians of MacKenzie Samples, a minor, are awarded One hundred thousand dollars (\$100,000.00), pursuant to Section 766.31(1)(b)1., Florida Statutes, to be paid in lump sum.

3. Upon payment of the award of One hundred thousand dollars (\$100,000.00), attorney's fees and other expenses of Ten thousand eight hundred and ninety-eight dollars and thirteen cents (\$10,898.13), and past expenses, the claims of Petitioners (Claimants) shall be deemed fully satisfied and extinguished, except for the issues reserved in paragraph 12 of the parties' Stipulation, including attorney's fees and costs the Petitioners may be entitled to as a result thereof, and Respondent's continuing obligation under Section 766.31(2), Florida Statutes, to pay future expenses as incurred.

4. With regard to the issues reserved in paragraph 12 of the parties' Stipulation, and with regard to any dispute regarding past expenses, a hearing will be scheduled by a separate notice of hearing to address those issues . . . .

By Notice of Hearing dated June 25, 2009, a hearing was scheduled for August 14, 2009, to allow the parties an opportunity to (1) "offer any proof they perceive pertinent to the proper interpretation of Section 766.31(1)(b)1., Florida Statutes, as well as any proof they perceive pertinent to make a record regarding their perception of the constitutionality of Section 766.31(1)(b)1., Florida Statutes, with regard to the parental award; and (2) any remaining dispute regarding past expenses." At the parties' request, it was agreed any remaining dispute regarding past expenses would be resolved at a later date, if necessary.

At hearing, Respondent's Exhibits 1-7, as identified in the Joint Pre-Hearing Stipulation filed August 4, 2009, were received into evidence, as well as a CD, which contained a copy of Respondent's Exhibits 3-7 in electronic format, here identified as Respondent's Exhibit 8. Without objection, official recognition was taken of the Final Order entered July 22, 1994, in Wojtowicz v. Florida Birth-Related Neurological Injury Compensation Association, DOAH Case No. 93-4268N, and the Final Order entered May 11, 1999, in Waddell v. Florida Birth-Related Neurological Injury Compensation Association, DOAH Case No. 98-2991N.<sup>1</sup> No witnesses were called, and no further exhibits were offered.

The parties filed memorandum of law before the hearing, and waived the opportunity to file further written argument or proposed orders post-hearing.

#### FINDINGS OF FACT

##### Stipulated Facts<sup>2</sup>

1. "Once NICA ascertains that a claim is covered, NICA frequently offers a lump sum payment of a parental award totaling \$100,000, regardless of whether there are one or two parents involved in the claim. Such offer is subject to the subsequent approval of the ALJ."

2. "Pursuant to Section 766.309, Florida Statutes, the ALJ must make all NICA Awards, which includes the parental award

pursuant to Section 766.31(1)(b)1., Florida Statutes. An ALJ has never ordered NICA to pay a parental award in excess of \$100,000, regardless of whether there was one parent or two parents involved in the claim."

3. "In a typical covered claim, NICA does not customarily argue that the parental award should be less than the full \$100,000 authorized."

4. "Once the ALJ has ordered payment of a parental award in the amount of \$100,000, NICA pays the \$100,000 parental award by check made payable to both parents jointly, unless otherwise ordered by the ALJ."

5. "In the past, when there was a dispute between the parents with respect to the amount of the parental award to go to each parent, the ALJ has specified in the Final Order how much of the parental award would be paid to the mother and how much would be paid to the father. In those instances, the combined parental award was typically for the full \$100,000."<sup>3</sup>

6. "Angela Samples and Kenneth Samples have requested that NICA pay a parental award of \$100,000 for each parent, but NICA has declined, based on legal interpretations of Section 766.31(1)(b)1., Florida Statutes, which limits the parental award to \$100,000 for both parents, combined."

7. "Pursuant to paragraph 13(a) of the Parties' Stipulation filed in this case and pursuant to the Order



approving such Stipulation dated June 17, 2009, NICA issued a check on June 24, 2009, made payable to Angela and Kenneth Samples, jointly, for \$100,000. This payment was made and accepted subject to a stipulation that the Samples' claim for a larger parental award would be preserved."

Section 766.31(1)(b)1., Florida Statutes, an award to the parents or legal guardians

8. Section 766.31(1), Florida Statutes, provides that upon determining a claim is compensable, the administrative law judge must make an award providing compensation for a number of items, as prescribed by subparagraphs (a)-(c). Pertinent to this case, Subsection 766.31(1)(b)1., Florida Statutes, provides that such an award shall include:

(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. [Emphasis added.]

9. Here, Petitioners are of the view that Subsection 766.31(1)(b)1., is ambiguous, and should be interpreted as authorizing an award of up to \$100,000 for each parent or guardian, independent of the other. To do otherwise, Petitioners suggest, would raise equal protection concerns under federal and Florida law. See St. Mary's Hospital, Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000). Conversely, NICA is of

the view that the subsection is not ambiguous, and that the maximum award of \$100,000 is for both parents or legal guardians, combined, and not for each parent or legal guardian, individually. Moreover, NICA is of the view that the administrative law judge is without authority to address the constitutionality of Subsection 766.31(1)(b)1., Florida Statutes.

#### Legislative History

10. The provision at issue was first enacted during a special session in 1988, as part of Chapter 88-1, Laws of Florida. At that time, Section 766.31(1)(b), Florida Statutes (1988 Supp.), provided:

(b) Periodic payments of an award to the parent or legal guardian 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 deputy commissioner, such award may be made in a lump sum.

11. During the 1989 regular session, Section 766.31(1)(b), Florida Statutes,<sup>4</sup> was amended, as follows:

(b) Periodic payments of an award to the parents ~~parent~~ or legal guardians ~~guardian~~ 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 deputy commissioner,<sup>5</sup> such award may be made in a lump sum.

Ch. 89-186, § 5, at 768, Laws of Fla. The stated reason for the amendment was "to clarify the fact that the maximum award of \$100,000 is for both parents or legal guardians and is not intended to award up to \$100,000 for each parent or legal guardian." Florida House of Representatives, Insurance Committee, Final Staff Analysis & Economic Impact Statement (June 30, 1989), p. 3. (Respondent's Exhibit 2).

#### CONCLUSIONS OF LAW

12. The ultimate goal in construing a statutory provision is to give effect to legislative intent. BellSouth Telecommunications, Inc. v. Meeks, 863 So. 2d 287 (Fla. 2003). "In attempting to discern legislative intent, we first look to the actual language used in the statute." Id. at 289. "If the statutory language used is unclear, we apply rules of statutory construction and explore legislative history to determine legislative intent." Id. at 289. "Ambiguity suggests that reasonable persons can find different meanings in the same language." Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452, 455 (Fla. 1992). "[I]f the language of the statute under scrutiny is clear and unambiguous, there is no reason for construction beyond giving effect to the plain meaning of the statutory words." Crutcher v. School Board of Broward County, 834 So. 2d 228, 232 (Fla. 1st DCA 2002).

13. Here, Petitioners contend that language of Subsection 766.31(1)(b)1., Florida Statutes, may be interpreted in two ways. It may be interpreted as authorizing an award of up to \$100,000 for each parent or guardian, independent of the other, or an award to the parents or legal guardians of up to \$100,000, in total.

14. Perceiving ambiguity, Petitioners reason the statute should be interpreted to authorize an award of up to \$100,000 for each parent or guardian, independent of the other, since to do otherwise would raise equal protection concerns under federal and Florida law. St. Mary's Hospital, 769 So. 2d at 972 ("It is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional.").

15. Here, it is unnecessary to address Petitioners' constitutional concerns since, given the legislative history of the subsection, the legislature clearly intended that the maximum award of \$100,000 was for both parents or legal guardians, and not for each parent or legal guardian, individually. State v. Elder, 382 So. 2d 687, 690 (Fla. 1980)("In construing [a statute], we are mindful of our responsibility to resolve all doubts as to the validity of a statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative

intent . . . . This Court will not, however, abandon judicial restraint and invade the province of the legislature by rewriting its terms.). Moreover, an administrative law judge does not have jurisdiction to consider or resolve constitutional issues. Florida Hospital v. Agency for Health Care Administration, 823 So. 2d 844, 849 (Fla. 1st DCA 2002). Nevertheless, since Petitioners may challenge the constitutionality of Subsection 766.31(1)(b)1., Florida Statutes, on appeal, they have the right, as they have been accorded here, to build their record for appeal. Anderson Columbia v. Brown, 902 So. 2d 838, 841 (Fla. 1st DCA 2005).

CONCLUSION

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

ORDERED that Petitioners' claim for additional compensation under the provisions of Subsection 766.31(1)(b)1., Florida Statutes, is denied.

DONE AND ORDERED this 1st day of September, 2009, 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  
Division of Administrative Hearings  
this 1st day of September, 2009.

ENDNOTES

1/ By Notice of Filing Supplemental Authority, filed August 13, 2009, Petitioners filed a copy of the Final Order entered in Wojtowicz, and by Notice of Filing, dated August 24, 2009, the administrative law judge filed a copy of the Final Order entered in Waddell. Orders of the Division of Administrative Hearings may also be accessed at the website of the Division of Administrative Hearings ([www.doah.state.fl.us](http://www.doah.state.fl.us)).

2/ Joint Pre-Hearing Stipulation, paragraph E, Admitted Facts.

3/ Such a dispute has been raised on two occasions, and memorialized in Final Orders entered in Wojtowicz and Waddell.

4/ In 2001, Section 766.31(1)(b), Florida Statutes, was amended to provide for the payment of funeral expenses not to exceed \$1,500, and renumbered as Section 766.31(1)(b)1. and 2., with Subsection 1. addressing the parental award and Subsection 2. addressing payment of funeral expenses. Ch. 01-277, § 150, at 3154, Laws of Fla. Then, in 2003, Section 766.31(1)(b), Florida Statutes, was amended to substitute a death benefit for the infant in the amount of \$10,000, for an award of funeral expenses, with Subsection 1. addressing the parental award and

Subsection 2. addressing the death benefit. Ch. 03-416, § 78, at 4118, Laws of Fla.

5/ In 1993, jurisdiction to resolve claims under the Plan was transferred to the Division of Administrative Hearings, and in 1994 the provisions of Section 766.31(1)(b), Florida Statutes, were amended to substitute "hearing officer" for "judge of compensation claims," previously titled "deputy commissioner." Ch. 93-251, § 3, at 2477, Laws of Fla.; Ch. 94-106, § 4, at 345, Laws of Fla. Thereafter, in 1996, following a title change of "hearing officer" to "administrative law judge," Section 766.31(1)(b), Florida Statutes, was amended to substitute "administrative law judge" for "hearing officer." Ch. 96-410, § 313, at 3104, Laws of Fla.

COPIES FURNISHED:

(Via Certified Mail)

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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.