

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AURORA BRYANT and ANTHONE )  
BRYANT, individually and as )  
parents and next friends for )  
BRAZIL BRYANT, a minor, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 09-1750N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
ST. JOSEPH'S HOSPITAL, INC., )  
d/b/a ST. JOSEPH'S WOMEN'S )  
HOSPITAL, )  
 )  
Intervenor. )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge, Ella Jane P. Davis, held a hearing in the above-styled case on February 19, 2010, by telephonic conference call.

APPEARANCES

For Petitioners: Allison C. McMillen, Esquire  
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For Respondent: Robert J. Grace, Jr., Esquire  
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STATEMENT OF THE ISSUES

(1) 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.

(2) Whether the Stipulation and Joint Petition for attorney's fees and expenses filed January 5, 2010, may be approved.

PRELIMINARY STATEMENT

On April 3, 2009, Petitioners, Aurora Bryant and Anthone Bryant, individually, and as parents and next friends of Brazil Bryant (Brazil), 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 April 6, 2009. On July 15, 2009, following an extension of time

within which to do so, NICA responded to the Petition, giving notice that it was of the view the claim was compensable, and expressing its willingness to provide benefits as provided by the Plan.

On October 23, 2009, following an extended period of time during which the parties attempted to resolve the claim by stipulation, 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, whereby they agreed the claim was compensable. That 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), 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 McMillen Law Firm, P.A. 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 Brazil 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.

On November 13, 2009, the Order Approving Stipulation and Joint Petition for Compensation of Claim Arising Out of Florida Birth-Related Neurological Injury Pursuant to Chapter 766, Florida Statutes, was entered, approving the parties' foregoing Stipulation and Joint Petition. The November 13, 2009, Order also included the following provisions:

2. Petitioners, Aurora Bryant and Anthone Bryant, as the parents and legal guardians of Brazil Bryant, 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), and past benefits/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 benefits/expenses, and attorney's fees and other expenses of the claim, a hearing will be scheduled by a separate notice of hearing to address those issues . . . .

Following the parties' provision of mutually available dates for hearing, a Notice of Telephonic Final Hearing, dated

December 7, 2009, scheduled a hearing for February 19, 2010, upon the following issue:

As reserved in Paragraph 12 of the parties' Stipulation and Joint Petition for Compensation, the parties will offer 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 any remaining dispute regarding past expenses.

On January 5, 2010, the parties filed a Stipulation and Joint Petition for Resolution of Reasonable Expenses Incurred by Petitioners in Connection with Filing of Claim, agreeing thereby to attorney's fees of \$10,000.00 and costs of \$1,290.48, to be awarded in connection with the filing of the claim, and waiving any appeal with respect to those sums for past fees and costs. The parties have orally stipulated that, for the sake of convenience, these amounts may be addressed in the instant Final Order.<sup>1</sup>

At the telephonic hearing, held February 19, 2010, Joint Exhibits 1-10, as identified in the Stipulated Composite of Exhibits filed February 18, 2010,<sup>2</sup> were received into evidence, as well as the parties' Joint Pre-Hearing Stipulation, marked as Joint Exhibit 11. No witnesses were called, and no further exhibits were offered.

A Transcript of the February 19, 2010 hearing was filed on March 15, 2010.

The parties filed their respective memoranda of law before the hearing, and waived the opportunity to file post-hearing proposed final orders.

#### FINDINGS OF FACT

Stipulated Facts addressing the issue of statutory interpretation reserved in Paragraph 12 of the Stipulation and Joint Petition for Compensation of Claim Arising Out of Florida Birth-Related Neurological Injury filed October 23, 2009<sup>3</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>4</sup>

6. "Aurora Bryant and Anthone Bryant 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 November 13, 2009, NICA issued a check made payable to Aurora Bryant and Anthone Bryant, jointly, for \$100,000. This payment was made and accepted, subject to a stipulation that the Bryants' claim for a larger parental award would be preserved."

Additional Facts Found as to Section 766.31(1)(b)1., Florida Statutes, 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. In the present hearing, Petitioners contended that Subsection 766.31(1)(b)1. is ambiguous; should be interpreted as authorizing an award of up to \$100,000 for each parent or guardian, independent of the other; and that if the statute only authorizes an award of \$100,000 for both parents in the aggregate, it raises equal protection concerns under state and federal law, by discriminating against two-parent families making claims. Petitioners further asserted that because Section 766.31(1)(b)1. can be read to authorize an award of \$100,000 for each parent, then it should be read that way to preserve the statute's constitutionality. See St. Mary's Hosp., Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000).

10. Conversely, NICA put forth that Subsection 766.31(1)(b)1. is not ambiguous, and NICA interprets the subsection as authorizing an award (one award) to the parents in a total amount not to exceed \$100,000, regardless of whether there are one or two parents filing the claim. Thus, if there are two parents involved in the NICA claim, then a maximum award of \$100,000, is authorized to be awarded to both parents, combined. 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.

11. The statutory 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.

12. During the 1989 regular session, Section 766.31(1)(b), Florida Statutes,<sup>5</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>6</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. (Joint Exhibit 2).

Facts Found as Addressing the Stipulation and Joint Petition for Resolution of Reasonable Expenses, filed January 5, 2010

13. The parties agree in their Stipulation and Joint Petition with regard to fees and expenses, that NICA will pay Petitioners' attorneys, the McMillen Law Firm, attorney's fees of \$10,000 and costs of \$1290.48. This resolution is reasonable and appropriate, but the Stipulation and Joint Petition requires approval by the Administrative Law Judge.

#### CONCLUSIONS OF LAW

##### Jurisdiction

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

##### Interpretation of Subsection 766.31(1)(b)1.

15. The ultimate goal in construing a statutory provision is to give effect to legislative intent. BellSouth Telecomm.,

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. "Ambiguity suggests that reasonable persons can find different meanings in the same language." Forsythe v. Longboat Key Beach Erosion Control Dist., 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 Bd. of Broward County, 834 So. 2d 228, 232 (Fla. 1st DCA 2002).

16. Herein, Petitioners do not contend that the language of Subsection 766.31(1)(b)1. clearly provides for \$100,000 to be paid to each parent individually. Rather, Petitioners contend that the language of Subsection 766.31(1)(b)1., Florida Statutes, may be interpreted in two ways. (Transcript, pg. 18.) Petitioners assert that it may be interpreted as authorizing an award of up to \$100,000 for each parent or guardian, independent of the other parent or guardian, or an award to the parents or legal guardians of up to \$100,000, in total.

17. 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 Hosp., 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.").

18. 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. Fla. Hosp. v. Agency for Health Care Admin., 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).

Stipulation and Joint Petition as to fees and costs/expenses

19. Petitioners' and Respondent's Stipulation and Joint Petition for Resolution of Reasonable Expenses Incurred by Petitioners in Connection with Filing of Claim, filed January 5, 2010, provided for Respondent to pay the McMillen Law Firm \$10,000.00 in attorney's fees and \$1,290.48 in costs/expenses up to that point in time. Those amounts address Paragraph 13 (c) of the parties' Stipulation and Joint Petition for Compensation of Claim Arising Out of Florida Birth-Related Neurological Injury Pursuant to Chapter 766, Florida Statutes, filed October 23, 2009, and are unaffected by the reservations of Paragraphs 12 and 13(a) thereof, which paragraphs gave rise to the instant proceeding and the issues of statutory interpretation and constitutionality of Section 766.31(1)b.1., Florida Statutes.

20. The agreed fees and costs/expenses are reasonable and appropriate and should be approved now, in this Final Order, pursuant to the parties' further oral stipulation.

CONCLUSION

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

(1) That Petitioners' claim for additional compensation (a second \$100,000.00) under the provisions of Subsection 766.31(1)(b)1., Florida Statutes, is denied; and

(2) That Petitioners' and Respondent's Stipulation and Joint Petition for Resolution of Reasonable Expenses Incurred by Petitioners in Connection with Filing of Claim, filed January 5, 2010, providing for an award of attorney's fees of \$10,000.00 and for costs/expenses of \$1,290.48, for past work, is approved, and Respondent shall pay those sums to the McMillen Law Firm forthwith.

(3) Jurisdiction is retained as previously provided-for in the November 13, 2009 Order Approving Stipulation and Joint Petition for Compensation of Claim.



DONE AND ORDERED this 23rd day of March, 2010, in  
Tallahassee, Leon County, Florida.



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ELLA JANE P. DAVIS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of March, 2010.

ENDNOTES

- 1/ A hearing by telephonic conference call was held on February 2, 2010, and the parties' several oral stipulations were memorialized by an Order entered February 3, 2010.
  
- 2/ Joint Exhibit 1: Chapter 89-186, Laws of Florida (1989); Joint Exhibit 2: Florida House of Representatives Insurance Committee Final Staff Analysis & Economic Impact Statement of CS/CS/HB 339 (1989); Joint Exhibit 3: Academic Task Force for Review of the Insurance and Tort Systems, "Preliminary Fact-Finding Report on Medical Malpractice," August 14, 1987, Joint Exhibit 4: Academic Task Force for Review of the Insurance and Tort Systems, "Medical Malpractice Recommendations," November 6, 1987; Joint Exhibit 5: Academic Task Force for Review of the Insurance and Tort Systems, "Final Fact-Finding Report on Insurance and Tort Systems, March 1, 1988; Joint Exhibit 6: Academic Task Force for Review of the Insurance and Tort Systems, "Final Recommendations," March 1, 1988; Joint Exhibit 7: Governor's Select Task Force on Health Care Professional Liability Insurance, "Report and Recommendations," January 29, 2003 (excerpts pertaining to NICA—pages 301-308), Joint Exhibit 8: Final Order in Angela Samples and Kenneth Ray Samples, Individually and as Parents and Next Friends of MacKenzie Samples, a Minor, v. Florida Birth-Related Neurological Injury

Compensation Association, DOAH Case No. 08-5147N (Final Order: September 1, 2009) currently on appeal before Florida's Fifth District Court of Appeals; Joint Exhibit 9: Final Order in Sarah Wojtowicz as Parent and Natural Guardian of Levi Wojtowicz and James M. Wojtowicz v. Florida Birth Related Neurological Injury Compensation Association, DOAH Case No. 93-4268N (Final Order: July 22, 1994); Joint Exhibit 10: Crystal Waddell as Parent and Natural Guardian of Chelsey Davis, a Minor v. Florida Birth Related Neurological Injury Compensation Association and William Davis, DOAH Case No. 98-2991N, (Final Order: May 11, 1999); Joint Exhibit 11: Joint Prehearing Stipulation. (It is also noted that the parties' Joint Prehearing Stipulation contemplated the admission of the Petition in the instant cause.)

3/ Joint Exhibit 11: Joint Pre-Hearing Stipulation, Paragraph E, Admitted Facts.

4/ Such a dispute has been raised on two occasions, and memorialized in Final Orders entered in Wojtowicz and Waddell, supra, at n.2.

5/ 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.

6/ 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:

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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.