

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRIAN GRAYSON, AS PARENT OF)
KAYLA GRAYSON, A MINOR,)
)
Petitioners,)
)
vs.) Case No. 09-6632N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

SUMMARY 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 April 15, 2010, by telephonic conference call.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether an award authorized in Section 766.31(1)(b)1., Florida Statutes, to the parents of a child found to have

sustained a birth-related neurological injury may exceed \$100,000. (Stipulated Issue.)¹

PRELIMINARY STATEMENT

On March 15, 2006, Rosalin Troupe, "on behalf of and as parent and natural guardian of Kayla Grayson, a minor," filed a Petition with the Division of Administrative Hearings (DOAH) for benefits under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). That cause was assigned DOAH Case No. 06-0923N. After an extended pre-trial period, that cause was resolved by agreement of the parties, and on September 21, 2007, the Administrative Law Judge entered a Final Order Approving Stipulation and Joint Petition for Compensation of Claim Arising Out of Florida Birth Related Neurological Injury Pursuant to Chapter 766, Florida Statutes.

On November 19, 2009, Rosalin Troupe filed, in DOAH Case No. 06-0923N, a "Petition to Enforce Compliance with Stipulation and Joint Petition Pursuant to Final Order of September 21, 2007," claiming that NICA had denied or refused to pay for family residential or custodial care from September 21, 2007, to the date of filing the Petition to Enforce; that a determination such care is necessary was sought; and requesting attorney's fees and reasonable expenses (costs).

On December 4, 2009, Brian Grayson, "as parent of Kayla Grayson, a Minor," filed a "Petition for Parental Award,"

alleging that he is the natural father of Kayla Grayson, and that he (in addition to Rosalin Troupe, Kayla's mother), is entitled to a parental award up to \$100,000. Mr. Grayson's Petition was docketed as new DOAH Case No. 09-6632N, the instant case.

In 2009, both Petitioners were represented by the same counsel.

DOAH Case Nos. 06-0923N and 09-6632N were consolidated by an Order entered February 4, 2010, and hearing was ultimately noticed for April 15, 2010, by video-teleconference.

On March 26, 2010, Respondent NICA filed two Motions for Summary Final Order, one motion addressing each Petition, respectively. Neither Petitioner responded to either motion.

On April 6, 2010, Ms. Troupe filed a Notice of Voluntary Dismissal Without Prejudice in DOAH Case No. 06-0923N.² On April 16, 2010, an Order Closing File 06-0923N was entered.

On April 15, 2010, argument on Respondent's Motion for Summary Final Order, filed March 26, 2010, in the instant case, DOAH Case No. 09-6632N, was heard telephonically. The parties' Joint Prehearing Stipulation (Joint Exhibit A)³ has been considered, as well as stipulated exhibits NICA-1 through NICA-9.⁴

A Transcript was filed on May 3, 2010. Petitioner's Proposed Final Order was filed one day late, but both parties' proposed final orders have been considered.

FINDINGS OF FACT

1. On March 15, 2006, Rosalin Troupe, as parent and natural guardian of Kayla Grayson, a minor, petitioned for benefits pursuant to Florida Statutes Section 766.301, et seq. The case was docketed as DOAH Case No. 06-0923N. (Stipulated Fact No. 1.)

2. 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. (Stipulated Fact No. 2.)

3. Pursuant to Section 766.309, Florida Statutes, the ALJ must make all NICA awards, which includes [sic] 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. (Stipulated Fact No. 3.)

4. In a typical covered claim, NICA does not customarily argue that the parental award should be less than the full \$100,000 authorized. (Stipulated Fact No. 4.)

5. Once the ALJ has ordered payment of a parental award in the amount of \$100,000, unless otherwise ordered by the ALJ, NICA pays the \$100,000 parental award by check made payable to the petitioning parent (if there is only one parent petitioning) or jointly to both parents (if both the parents are petitioning).⁵ (Stipulated Fact No. 5.)

6. 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. (Stipulated Fact No. 6.)⁶

7. Ms. Troupe's March 15, 2006 Petition reflects that she was the sole petitioner in DOAH Case No. 06-0923N. (Stipulated Fact No. 7.)

8. NICA, Ms. Troupe, and other parties participating in the proceeding [DOAH Case No. 06-0923N] eventually agreed that Ms. Troupe's claim was compensable and executed a Stipulation, which was approved by Final Order dated September 21, 2007. (Stipulated Fact No. 8. Bracketed material provided for clarity.)

9. NICA issued its check number 60804 in the amount of \$100,000, to Kayla M. Grayson, Minor, and Rosalin Troupe as

Natural Guardian, on October 9, 2007. Ms. Troupe endorsed and cashed the check, and accepted the proceeds. (Stipulated Fact No. 9.)

10. Brian Grayson is the natural father of Kayla Grayson and her older brother, Bryan Grayson, Sr. [sic]. He was not a petitioner in DOAH Case No. 06-0923N, did not enter an appearance therein, and did not execute the Stipulation in that case. (Stipulated Fact No. 10.) The undersigned interprets this stipulation to mean that Brian Grayson, Petitioner herein, is the natural father of Kayla Grayson and Kayla's older brother, Bryan Grayson, Jr., and that Petitioner-parent, Brian Grayson, Sr., the Petitioner herein, was not a Petitioner in DOAH Case No. 06-0923N, did not enter an appearance therein, and did not execute the Stipulation in that case.

11. Mr. Grayson was living with Ms. Troupe at the time of Kayla's birth, and was present when she [Kayla] was born. He and Ms. Troupe met with a NICA representative in their home while Ms. Troupe's petition was pending. (Stipulated Fact No. 11. Bracketed material provided for clarity.)

12. Mr. Grayson accompanied Ms. Troupe and Kayla on medical visits, including Kayla's initial neurological examination arranged by NICA on June 8, 2006, by Dr. Paul Carney at the Shand's [sic] Children's Hospital at the University of Florida in Gainesville, Florida. NICA paid for mileage, hotel

and meals for this trip. Mr. Grayson also accompanied Ms. Troupe and Kayla on a visit to Orlando Regional Healthcare to obtain an EEG for Kayla. Both visits were arranged and paid for by NICA for the purpose of determining whether Kayla's injury was compensable. (Stipulated Fact No. 12.)

13. Mr. Grayson was aware that Ms. Troupe applied for and received NICA benefits for Kayla. (Stipulated Fact No. 13.)

14. Ms. Troupe does not claim that NICA denied or refused to pay for any family residential or custodial care expenses before September 21, 2007. (Stipulated Fact No. 14.)

15. Mr. Grayson, Petitioner herein, has now filed the instant case, requesting that NICA pay an additional parental award of \$100,000 to him, on behalf of Kayla, but NICA has declined, based on its legal interpretation of Section 766.31(1)(b)1., Florida Statutes, which sub-section NICA contends, in this instance, limits the parental award to \$100,000 for both parents, combined.

16. 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.)

17. Petitioner Grayson contended that Subsection 766.31(1)(b)1. entitles him to a parental award of \$100,000. because he is Kayla Grayson's natural father and because an Administrative Law Judge determined in 2007, that Kayla suffered a compensable birth-related neurological injury. He contends that the statute should be interpreted as authorizing an award of up to \$100,000 for each claimant, or potential claimant, independent of the other(s); and that if the statute only authorizes an award of \$100,000 for both parents in the aggregate, whether or not both parents join in the claim, it raises constitutional concerns related to due process, equal protection, and access to the courts.⁷

18. Conversely, NICA contends that Subsection 766.31(1)(b)1. is part of a cohesive statutory scheme established by Sections 766.301-766.316, Florida Statutes, designed to promote a specifically stated legislative goal, and is neither ambiguous nor subject to Petitioner's interpretation.⁸ NICA interprets the subsection as authorizing an award (one award) to the parents or guardians of an eligible infant in a

total amount not to exceed \$100,000, regardless of whether there are one or two parents filing the claim. Thus, NICA argues that if there are two parents involved in the NICA claim, or even if they file sequentially, then a maximum award of \$100,000, is authorized to be awarded to both parents, combined.

19. However, both parties concede that the Administrative Law Judge is without authority to address the constitutionality of Subsection 766.31(1)(b)1., Florida Statutes.

20. 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.

21. During the 1989 regular session, Section 766.31(1)(b), Florida Statutes,⁹ 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,¹⁰ 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), Section 5, page 3. (NICA Exhibit 4.)

CONCLUSIONS OF LAW

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

23. Initially, Petitioner contended that Subsection 766.31(1)(b)1., Florida Statutes, provides for \$100,000 to be paid to each parent individually. Overall, Petitioner did not so much argue that the statute clearly provides for such awards or that the statute creates ambiguity so that it may be interpreted to require that \$100,000 be paid to each parent individually. Rather, he argued that the statute should be interpreted to authorize an award of up to \$100,000 for each parent or guardian, independent of the other, and regardless of whether one parent joins in the claim prior to payout. According to Petitioner, to do otherwise would raise constitutional concerns under federal and Florida law. He also asserted the desirability of the Legislature amending NICA's

existing unified statutory "no fault" scheme to conform, at least in disbursement aspects, to Florida's tort system within the circuit courts of this state, and conceded that his recourse is not in this forum where NICA has already disbursed the entire \$100,000 to one parent.

24. 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).

25. Here, it is unnecessary to address Petitioners' constitutional concerns, since Section 766.31(1)(b)1. clearly speaks of an award, in the singular, to the parents, in the plural, and, 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, who make a claim on the Neurological Birth-Related Injury Compensation Plan, and not for each parent or legal guardian, individually,¹¹ whether they file a claim or not. 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), or to effect the legislative changes Petitioner seeks. Nevertheless, since Petitioner may challenge the constitutionality of Subsection 766.31(1)(b)1., Florida Statutes, by appeal, he has that right, and he has been accorded here the opportunity to build a 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:

1. Respondent Florida Birth-Related Neurological Injury Compensation Association's Motion for Summary Final Order is granted.

2. Petitioner Grayson's (father's) claim for additional compensation (a second \$100,000.00) above and beyond that \$100,000.00 already paid to the mother, under the provisions of Subsection 766.31(1)(b)1., Florida Statutes, is denied and dismissed with prejudice.

DONE AND ORDERED this 19th day of May, 2010, in Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of May, 2010.

ENDNOTES

1/ Because, in this case, an award of \$100,000, was previously made to only one of the parents, a more accurate way to state the issue might be, "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/ At a telephonic prehearing conference on April 9, 2010, the parties orally stipulated that the effect of this Notice of Voluntary Dismissal Without Prejudice had no effect on NICA's continuing obligation for expenses under the prior Stipulation and Joint Petition and Final Order Approving Stipulation and Joint Petition for Compensation of Claim, but that it did terminate the claim for family residential or custodial care filed November 19, 2009, titled "Petition to Enforce Compliance with Stipulation and Joint Petition Pursuant to Final Order of September 21, 2007".

3/ By agreement of the parties (TR-5), the undersigned made handwritten interlineations on this exhibit and initialed them "ALJ".

4/ NICA Exhibit 1: Stipulation and Joint Petition for Compensation Arising Out of Florida Birth-Related Neurological Injury Pursuant to Chapter 766 Florida Statutes, with regard to the 2006-0923N case. NICA Exhibit 2: Final Order Approving Stipulation and Joint Petition for compensation of Claim Arising out of Florida Birth-Related Neurological Injury Pursuant to Chapter 766, with regard to the 2006-0923 case. NICA Exhibit 3: Chapter 89-186, Laws of Florida (1989); NICA Exhibit 4: Florida House of Representatives Insurance Committee Final Staff Analysis & Economic Impact Statement on CS/CS/HB 339 (1989); NICA Exhibit 5: Academic Task Force for Review of the Insurance and Tort Systems, "Medical Malpractice Recommendations, November 6, 1987; NICA Exhibit 6: Academic Task Force for Review of the Insurance and Tort Systems, "Final Fact Finding Report on Insurance and Tort Systems." NICA Exhibit 7: Academic Task Force for Review of the Insurance and Tort Systems, "Final Recommendations", March 1, 1988; Joint Exhibit 8: Governor's Select Task Force on Health Care Professional Liability Insurance, "Report and Recommendations," January 29, 2003 (excerpts pertaining to NICA-pages 301-308); and NICA Exhibit 9: Academic Task Force for Review of the Insurance and Tort

Systems, "Preliminary Fact Finding Report on Medical Malpractice," August 14, 1987.

5/ A typographical error in the Parties' Stipulated Fact No. 5 has been corrected. The Stipulation actually reads " . . . if there both parents are petitioning)."

6/ Such a dispute has been raised on two occasions, and memorialized in Sarah Wojtowicz as Parent and Natural Guardian of Levi Wojtowicz and James M. Wojtowicz v. Fla. Birth Related Neurological Injury Comp. Ass'n., DOAH Case No. 93-4268N (Final Order: July 22, 1994), and Crystal Waddell as Parent and Natural Guardian of Chelsey Davis, a Minor v. Fla. Birth Related Neurological Injury Comp. Ass'n. and William Davis, DOAH Case No. 98-2991N, (Final Order: May 11, 1999).

7/ Although the record is silent as to whether Petitioner Grayson shared in the proceeds of Ms. Troupe's 2006 NICA claim on behalf of Kayla, the record clearly shows that he knew about Ms. Troupe's March 2006 NICA claim and \$100,000 award in September 2007, and that he did not attempt to intervene in that claim. Moreover, benefits paid to a parent(s) or guardian(s) are intended for the benefit of the child.

Petitioner suggested NICA should have an obligation to search out all potential claimants, such as himself, and that NICA and/or the ALJ should have an obligation to apply to a Circuit Court, pursuant to Section 744.387(3)(a), Florida Statutes, for an order permitting distribution of all or a part of the \$100,000, to one or all of the potential claimants named in Section 766.302 (3), regardless of whether any of them actually intervene. However, the NICA statutory scheme imposes no such obligations.

Petitioner's position causes one to wonder how to address a situation where a father or mother abandons the adult relationship and has no presence in the infant's life, or what variety of payment scenarios could be envisioned if a claiming mother does not name a "father" on a child's birth certificate or a putative father turns out not to have sired the infant on whose behalf the mother makes the claim. These are apparently not problems in the instant case.

8/ Section 766.301 discusses the legislative intent in establishing the Neurological Birth-Related Injury Compensation Plan and in removing such cases from the tort system. Sections 766.301-766.316, establish a cohesive statutory scheme, state no

authority for NICA or the ALJ to search out potential claimants, and vests exclusive jurisdiction in the ALJ to make any and all awards. Respondent suggests that Petitioner proposes obligations inconsistent with the applicable statutes.

9/ 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.

10/ 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.

11/ Accord, Final Order in Angela Samples and Kenneth Ray Samples, Individually and as Parents and Next Friends of MacKenzie Samples, a Minor v. Fla. Birth-Related Neurological Injury Comp. Ass'n., DOAH Case No. 08-5147N (Final Order: September 1, 2009) oral argument heard in Florida's Fifth District Court of Appeals on May 4, 2010; and Aurora Bryant and Anthone Bryant individually and as parents and next friends for Brazil Bryant v. Fla. Birth-Related Neurological Injury Comp. Ass'n., DOAH Case No. 09-1750N (Final Order: February 19, 2010) on appeal to the Second District Court of Appeal.

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 Fla. Birth-Related Neurological Injury Comp. Ass'n. 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.