

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CALLENA JONES, on behalf of and )  
as parent and natural guardian )  
of NAZYRAH JONES, a minor, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-0938N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
NORTH FLORIDA REGIONAL MEDICAL )  
CENTER, INC.; ANTHONY AGRIOS, )  
M.D.; DEIDRE MICHELLE RUSSELL, )  
MSN, ARNP; AND ANTHONY AGRIOS, )  
M.D., P.A., d/b/a ALL ABOUT )  
WOMEN OBSTETRICS AND )  
GYNECOLOGY, )  
 )  
Intervenors. )  
\_\_\_\_\_ )

SUMMARY FINAL ORDER

This cause came on for consideration upon Petitioner's Motion to Dismiss, Petitioner's Notice of Election of Civil Action, Respondent NICA's Response to Petitioner's Motion to Dismiss and Intervenor North Florida Regional Medical Center, Inc.'s Memorandum in Opposition to Petitioner's Motion to Dismiss.

STATEMENT OF THE CASE

1. On February 16, 2011, Callena Jones, on behalf of and as parent and natural guardian of Nazzyrah Jones, a minor, filed a petition for benefits pursuant to sections 766.301-766.316, Florida Statutes.

2. On February 20, 2011, the Division of Administrative Hearings (DOAH) served the Neurological Injury Compensation Association (NICA) and served Anthony Agrios, M.D. On or about February 28, 2011, DOAH served North Florida Regional Medical Center.

3. On April 20, 2011, NICA filed its response to the petition, stating that NICA was of the view that the claim was compensable and offering to pay all benefits authorized by law.

4. On April 22, 2011, North Florida Regional Medical Center filed a petition to intervene, which was granted by an Order entered May 4, 2011. On April 29, 2011, Anthony Agrios, M.D.; Deidre Mitchelle Russell, MSN, ARNP; and Anthony Agrios, M.D., P.A., d/b/a All About Women Obstetrics and Gynecology filed a petition for leave to intervene, which was granted by an Order entered May 10, 2011.

5. On October 11, 2011, Petitioner filed a Notice of Election of Civil Action and a Motion to Dismiss. Petitioner's Motion to Dismiss, states that:

There is no dispute between [sic] the parties that: . . . Nazzyrah Jones sustained a compensable neurological injury; . . . that obstetrical services were provided by a participating physician; . . . that petitioner is entitled to medical benefits as defined in Fla. Stat. 766.31(1)(a); . . . that petitioner is also entitled to \$100,000 as provided in 766.31(1)(b); . . . that petitioner's attorneys are entitled to fees and costs pursuant to Section 766.31(1)(c). [endnote omitted].

6. Petitioner's motion seeks an order finding that:

. . . Nazzyrah Jones sustained a compensable neurological injury; . . . Nazzyrah Jones' obstetrical services were delivered by a participating physician; . . . Nazzyrah Jones is entitled to receive medical benefits as defined in Fla. Stat. 766.31(1)(a); . . . Nazzyrah Jones' parents are entitled to \$100,000 as provided in 766.31(1)(b); . . . There is no dispute that the notice requirements in s. 766.316 were satisfied; . . . Nazzyrah Jones' attorneys are entitled to a payment of costs and fees related to pursuit of this claim; and . . . That in light of the Notice of Election of Civil Action filed in this matter by the petitioner, wherein petitioner has elected to pursue a civil action in lieu of the acceptance of any of the awards stated above, this petition is hereby dismissed.

7. NICA's Response to the Motion to Dismiss states:

. . . NICA has previously advised Petitioner and the Division of Administrative Hearings that NICA has concluded that Nazzyrah Jones suffered a birth-related neurological injury as defined in section 766.302(2) Florida Statutes and that NICA was prepared to offer Petitioner benefits pursuant to section 766.301-766.316, Florida Statutes. However, as set forth in the Motion to Dismiss and the attached Notice of Election of Civil

Action, Petitioner has elected to forego any payment of NICA benefits to pursue a civil action. . . . Consequently, in view of the election made by Petitioner . . . this administrative proceeding should be dismissed with prejudice.

8. Intervenor North Florida Regional Medical Center filed a Memorandum in Opposition to Petitioner's Motion to Dismiss on October 19, 2011. That Memorandum addresses matters with regard to the authority and anticipated actions of the infant's Guardian ad Litem and the Petitioner's attorney in the Circuit Court case arising from Nazyrah Jones' birth, and does not suggest that the claim against NICA is untimely or invalid.

9. The remaining Intervenors filed no response in opposition to Petitioner's Motion to Dismiss.

10. Petitioner seeks to finalize the proceedings before DOAH, which can only be accomplished by a final, appealable order. As a result, an Order to Show Cause was entered on November 10, 2011, which provided, in pertinent part:

All parties are granted to and until November 29, 2011, in which to show cause, in writing, filed with the Division of Administrative Hearings, why a summary final order should not be entered finding and concluding that:

1. Nazyrah Jones suffered a "birth-related neurological injury" as defined at section 766.302(2).
2. A participating physician as defined at section 766.302(7), delivered obstetrical services during labor, delivery and/or

resuscitation in the immediate postdelivery period in the hospital at Nazzyrah's birth; and

3. Petitioner is entitled to all applicable compensatory awards as set out in section 766.31, Fla. Stat., including but not limited to past expenses, future expenses, the \$100,000 parental award, and reasonable expenses in connection with the filing of the claim (e.g. attorney's fees and costs).

Failure of all parties to show good cause [sic] to enter such a summary final order, will result in the entry of a summary final order, which Petitioner may elect against or not within the time provided by law.<sup>1/</sup>

#### ENDNOTE

1/ Section 766.303(2), provides:

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).

11. On November 29, 2011, Intervenor North Florida Regional Medical Center filed a Response to the Order to Show Cause that does not dispute any of paragraphs 1-3 (proposed findings) of the November 10, 2011, Order to Show Cause.<sup>1/</sup> Accordingly, no good cause has been shown why a summary final order as proposed in the November 10, 2011, Order to Show Cause should not be entered.

12. Given the record, there is no genuine issue as to any material fact. See § 120.57(1)(h), Fla. Stat. Specifically, there is no dispute that Nazzyrah's injury is compensable pursuant to section 766.302(2) and (7); that appropriate notice was given pursuant to section 766.316; or that Petitioner is entitled to all benefits/expenses provided-for in section 766.31.

#### CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 766.301-766.316, Fla. Stat.

14. The Florida Birth-Related Neurological Injury Compensation Plan was established by the Legislature "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" relating to births occurring on or after January 1, 1989. § 766.303(1), Fla. Stat.

15. The injured "infant, her or his personal representative, parents, dependents, and next of kin," may seek compensation under the Plan by filing a claim for compensation with the Division of Administrative Hearings. §§ 766.302(3), 766.303(2), 766.305(1), and 766.313, Fla. Stat. The Florida Birth-Related Neurological Injury Compensation Association, which administers the Plan, has "45 days from the date of service of a complete claim . . . in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." § 766.305(4), Fla. Stat.

16. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the administrative law judge to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned Administrative Law Judge in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

17. In discharging this responsibility, 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. 766.302(2).

(b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery 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 post-delivery 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 birth." § 766.31(1), Fla. Stat.

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

injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate



postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

19. "Participating physician" is defined at section 766.302(7), to mean:

Participating physician means a physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full time or part time and who had paid or was exempted from payment at the time of the injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred. Such term shall not apply to any physician who practices medicine as an officer, employee, or agent of the Federal Government.

20. There is no dispute that Nazzyrah Jones suffered a "birth related neurological injury" as defined by section 766.302(2) or that a participating physician as defined at section 766.302(7), delivered obstetrical services during labor, delivery, and/or resuscitation in the immediate postdelivery period in the hospital at Nazzyrah's birth.

21. Likewise, there is no dispute regarding whether or not appropriate notice was provided.<sup>2/</sup>

22. Petitioner has indicated her intent to waive NICA benefits and to elect to proceed to circuit court pursuant to provisions of section 766.303, related to ". . . 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 sections 766.301-766.316." That statutory section also provides: "Such suit shall be filed before the award of the division becomes conclusive and binding as provided for in section 766.311."<sup>3/</sup>

#### CONCLUSION

Based on the foregoing Statement of the Case and Conclusions of Law, it is

ORDERED that the claim for compensation filed by Callena Jones, on behalf of and as parent and natural guardian of Nazzyrah Jones, a minor, is approved.

It is further ORDERED that the participating physician and hospital named in the petition/claim complied with the notice provisions of the Birth-Related Neurological Injury Compensation Plan.

It is further ORDERED that the parties are accorded 30 days from the date of this Summary Final Order to resolve, subject to approval of the Administrative Law Judge, the amount and manner of payment of an award to the mother; the reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees and costs; and the amount owing for expenses previously incurred. If not resolved within such period, the parties shall so advise the Administrative Law

Judge, and a hearing will be scheduled to resolve such issues. Once resolved, an award will be made consistent with section 766.31.

It is further ORDERED that in the event Petitioner files an election of remedy declining or rejecting NICA benefits, this case will be dismissed and DOAH's file will be closed.

DONE AND ORDERED this 7th day of December, 2011, 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 7th day of December, 2011.

ENDNOTES

1/ North Florida Regional Medical Center's Response states, in pertinent part,

. . . this Intervenor agrees that the healthcare providers that were involved in delivering obstetrical services were participants as defined in Section 766.302(7) and that Petitioner is entitled to all applicable compensatory awards. . . . [F]or purposes of this administrative proceeding only, Intervenor will not dispute

in this proceeding that this is a birth-related injury, solely for the purposes of allowing the Guardian ad Litem to elect benefits pursuant to the Florida Birth-Related Neurological Compensation Association and the statutory scheme set forth [sic] 766.301, et seq.

The Intervenor reserves all the rights, remedies and limitations set forth in Section 766.304, as findings of facts and conclusions of law in this administrative proceeding are not admissible in any subsequent proceeding including the concurrent civil lawsuit and anticipated trial of that lawsuit. The Intervenor reserves the right to dispute in the pending circuit court case (Callena Jones vs. North Florida Regional Medical Center et al., Case No. 01-2010-CA-005778, pending in the Circuit Court of the Eight [sic] Judicial Circuit in and for Alachua County) that this is a birth related injury, if the Guardian ad Litem does not elect NICA benefits.

2/ Section 766.316 provides:

Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the

notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when notice is not practicable.

Section 766.309 provides, in pertinent part:

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

\* \* \*

(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.

3/ Herein, no party has raised any issue regarding whether or not an Administrative Law Judge of DOAH may order a claimant/petitioner to file such an election; however, it appears that an Administrative Law Judge has no jurisdiction to resolve the willful and wanton exception to Plan exclusivity. See Cordero v. Fla. Birth-Related Neurological Injury Comp. Ass'n and Helen Ellis Mem. Hosp., Case No. 08-4917N (Fla DOAH June 2, 2009), and cases cited therein.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

Review of a final order of an administrative law judge shall be by appeal to the District Court of Appeal pursuant to section 766.311(1), Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal. See § 766.311(1), Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992).