

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JENNIFER ANDREWS AND CHRISTIAN )  
CHENIER, individually and on )  
behalf of AVALINE MARIE )  
CHENIER, a minor, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 11-1639N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
ST. JOSEPH'S HOSPITAL, d/b/a )  
ST. JOSEPH'S WOMEN'S HOSPITAL )  
AND HELENA REICHMAN, M.D., )  
 )  
Intervenors. )  
\_\_\_\_\_ )

FINAL ORDER ON ATTORNEY'S FEES AND COSTS

Pursuant to notice, a final hearing was held in this case on June 19, 2012, by video teleconference with sites in Tallahassee and Tampa, Florida, before Susan Belyeu Kirkland, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: David D. Dickey, Esquire  
The Yerrid Law Firm  
Bank of America Plaza, Suite 3910  
101 East Kennedy Boulevard  
Tampa, Florida 33602-5192

For Respondent: Robert J. Grace, Esquire  
Stiles and Grace, P.A.  
315 South Plant Avenue  
Tampa, Florida 33606

For Intervenor St. Joseph's Hospital, d/b/a Joseph Women's Hospital:

No appearance.

For Intervenor Helena Reichman, M.D.:

No appearance.

STATEMENT OF THE ISSUE

The issue in this case is the amount owing for reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees, pursuant to section 766.31(1)(c), Florida Statutes.

PRELIMINARY STATEMENT

On September 1, 2011, 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. The parties agreed that Avaline Marie Chenier (Avaline) suffered a "birth-related neurological injury" as that term is defined by section 766.302(2) and that the legal requirements for compensability under the Florida Birth-Related

Neurological Injury Compensation Plan (Plan) had been met. On September 12, 2011, an 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 and provided:

With regard to the issues reserved, and specifically 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. As for the date of hearing, the parties shall, within 45 days of the date of this Order, advise the undersigned Administrative Law Judge, with specificity, of the matters remaining in dispute, of several mutually agreeable dates for hearing on those issues to occur no later than December 30, 2011, and of the amount of time required for such hearing.

On November 15, 2011, the parties advised that they were unable to resolve Petitioners' claim for reasonable expenses incurred in connection with the filing of the claim as provided in section 766.31(1)(c), including reasonable attorney's fees and costs, and requested a hearing be scheduled to address this issue. A Notice of Hearing by Video Teleconference was issued on February 6, 2012, scheduling the hearing for April 19, 2012.

On April 16, 2012, Petitioners filed a Motion to Reschedule Hearing on Petitioners' Expenses. The motion was granted, and the hearing was rescheduled for June 19, 2012.

At the hearing, Petitioners called Richard A. Gilbert, Esquire, as their expert witness. Petitioners' Exhibits 1 through 4 were admitted in evidence. Respondent provided the expert testimony of Francis E. Pierce, III, Esquire, by deposition. The errata sheet for Mr. Pierce's deposition was filed on July 13, 2012. Respondent's Exhibits 1 through 4 were admitted in evidence.

The Transcript of the hearing was filed on July 6, 2012. Petitioners filed their proposed final order on July 13, 2012. Respondent filed its proposed final order on July 16, 2012. Both Petitioners' and Respondent's proposed final orders have been considered in the preparation of this Final Order.

#### FINDINGS OF FACT

1. Avaline was born on April 2, 2010. Four days after her birth, Petitioners met with David Dickey (Mr. Dickey) of the Yarrid Law Firm on the issue of a claim against the Plan.

2. Petitioners filed a claim for benefits on April 30, 2011, and Respondent filed a response on July 6, 2011, stating that it had determined that the claim was compensable and met the definition of a birth-related neurological injury. On September 12, 2011, an Order was entered approving the stipulation.

3. Based on the medical records entered in evidence, it is clear that Avaline sustained oxygen deprivation during delivery.

Petitioners argue that there was uncertainty as to whether Avaline sustained permanent and substantial mental and physical impairments. However, the medical records show that as of the first day of Avaline's life that she was diagnosed with hypoxic ischemic encephalopathy, moderate-to-severe.

4. Based on the listing of attorney hours for Mr. Dickey, which was attached to Mr. Dickey's affidavit submitted at hearing, Mr. Dickey is claiming 80.2 hours as the reasonable number of attorney hours expended in the case. The Yarrid Law Firm charges \$400 per hour for Mr. Dickey's time, and Mr. Dickey is claiming that a reasonable rate for his services is \$400 per hour.

5. Richard A. Gilbert, Esquire, testified as an expert on behalf of Petitioners. He opined that a reasonable rate for such legal services as provided by Mr. Dickey ranged from \$375 to \$450 per hour. He further opined that a reasonable rate for Mr. Dickey's legal services in this case was in the range of \$400 to \$450 per hour. Mr. Gilbert based this opinion on Mr. Dickey's experience, reputation, and ability. Mr. Gilbert had previously worked with Mr. Dickey and was familiar with Mr. Dickey's experience and ability. Mr. Gilbert also opined that between 75 and 85 hours was a reasonable amount of time expended for the legal provided by Mr. Dickey.

6. Francis Pierce, Esquire, testified as an expert for Respondent. Mr. Pierce opined that the reasonable amount of time for services rendered by Mr. Dickey was 74.7 hours. Mr. Dickey had listed 6.5 hours as the amount of time to prepare the petition. Mr. Pierce thought that 1.5 hours is reasonable. Mr. Dickey listed .3 hours as the amount of time expended to review a motion to act as qualified representative filed by Respondent. Mr. Pierce felt that a reasonable amount of time would be .1 hours. Mr. Dickey listed .6 hours to review the motions to intervene filed by Intervenors. Mr. Pierce concluded that a reasonable amount of time to review the two motions was .4 hours. Mr. Dickey listed one hour as the amount of time expended to review the response to the petition with attached reports from Dr. Fernandez and Dr. Willis. Mr. Pierce opined that a reasonable time would be .5 hours. Mr. Dickey listed .5 hours as the time for reviewing an order on the need for a hearing. Mr. Pierce concluded that the reasonable amount of time would be .1 hours.

7. The reasonable amount of hours necessary for the legal services provided is 76.9 hours. The reasonable amount of time necessary for drafting the petition is 2 hours; for reviewing the motion to act as qualified representative is .2 hours; for reviewing two motions to intervene is .4 hours; for reviewing the response to the petition and the attached reports is .5

hours; and for reviewing the order regarding the need for a hearing is .2 hours. The 76.9 hours is a result of the reduction of time for the above services.

8. Mr. Pierce opined that a reasonable hourly rate for Mr. Dickey's time is \$200 per hour. Mr. Pierce based his opinion used rates for medical malpractice services.

9. A reasonable hourly rate for Mr. Dickey's services is \$300 per hour. The case was fairly straight forward. Mr. Dickey filed the petition; Respondent reviewed the petition and determined that the claim was compensable; and the parties entered into a stipulation, resulting in an order awarding benefits.

10. The reasonable amount for attorney's fees in this case is \$23,070.

11. The parties have agreed that a reasonable rate for the paralegal services performed is \$100 per hour and that the reasonable amount of hours expended by the paralegal is 9.8 hours. The rate and time for paralegal services is reasonable. The total fee for paralegal services is \$980.

12. Petitioners are claiming the following expenses which were incurred in connection with the filing of the claim: (a) \$773.74 for medical records; (b) \$15 filing fee; and (c) \$800 for expert services. Respondent does not dispute the claims for

medical records and filing fee. Respondent does dispute the claim for \$800 for the services of an expert.

13. Mr. Dickey retained the services of Steven M. Weisburg, M.D., for an opinion, based on medical records supplied by Mr. Dickey, on whether Avaline had a claim against the Plan due to oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate postdelivery period of Avaline's Birth. Mr. Dickey paid Dr. Weisburg a retainer of \$800 based on a rate of \$400 per hour charged by Dr. Weisburg. Mr. Dickey discussed Dr. Weisburg's opinions with him prior to Mr. Dickey drafting a claim for benefits.

#### CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat.

15. When the Administrative Law Judge makes a determination that a claim qualifies for coverage under the Plan, a determination must also be made on the amount of reasonable expenses incurred in connection with the filing of the claim. Section 766.31(1) provides:

(1) Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge



shall make an award providing compensation for the following expenses relative to such injury:

\* \* \*

(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.
6. The contingency or certainty of a fee.

16. Petitioners' claim for benefits was resolved based on a stipulation of the parties. No discovery was necessary and no litigation was necessary. A claim for attorney's fees of \$33,080 is excessive in these circumstances. Based on the testimony of the experts the range of fees charged for similar services ranged from \$200 to \$450 per hour. Both parties agreed

that Mr. Dickey was an experienced attorney with a good reputation and able skills. There were no time limitations imposed by the client or the circumstances. There was no long-term relationship between Petitioners, as clients, and Mr. Dickey. Based on the medical records, there was a good chance that Petitioners would prevail on their claim.

17. A reasonable attorney's fee for Mr. Dickey's services is \$23,070. A reasonable amount for the services of the paralegal is \$980.

18. There is no dispute that Petitioners are entitled to recover the costs of the medical records and the filing fee. The cost of the expert retained by Mr. Dickey is not unreasonable. Although the expert did not testify, there was no hearing held. It was prudent and reasonable for Petitioners to have an expert review the medical records prior to the filing of the claim. Petitioners are entitled to recover costs in the amount of \$1,588.74, which includes the costs of the expert.

#### CONCLUSION

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

1. Petitioners are awarded \$23,070 for attorney's fees.
2. Petitioners are awarded \$980 for the services of the paralegal.

3. Petitioners are awarded \$1,588.74 for other expenses/costs.

4. Consistent with section 766.312, the Division of Administrative Hearings retains jurisdiction over this matter to enforce all awards.

DONE AND ORDERED this 25th day of July, 2012, in Tallahassee, Leon County, Florida.



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SUSAN BELYEU KIRKLAND  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 25th day of July, 2012.

COPIES FURNISHED:  
(Via Certified Mail)

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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).