

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ASHLEE HAMMAC AND TIMOTHY
JOLLEY, on behalf of and as
parents and natural guardians of
RYAN MICHAEL JOLLEY, a deceased
minor,

Petitioners,

vs.

Case No. 14-2049N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

SHANDS LAKE SHORE REGIONAL
MEDICAL CENTER,

Intervenor.

_____ /

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on
May 19, 2015, by video teleconference with sites in Tallahassee
and Orlando, Florida, before Barbara J. Staros, an Administrative
Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Peter W. Van den Boom, Esquire
Saray Noda, Esquire
Frost Van den Boom, P.A.
395 South Central Avenue
Bartow, Florida 33830

For Respondent: Brooke M. Gaffney, Esquire
Smith Stout Bigman and Brock PA
444 Seabreeze Boulevard, Suite 900
Daytona Beach, Florida 32118

For Intervenor: No appearance.

STATEMENT OF THE ISSUE

The issue in this case is the amount of attorney's fees and reasonable expenses to be awarded to Petitioner's counsel pursuant to section 766.31(1)(c), Florida Statutes.

PRELIMINARY STATEMENT

On October 16, 2014, the undersigned entered a Summary Final Order finding that Ryan Michael Jolley sustained a birth-related neurological injury which was compensable under the Plan.

The Order read in pertinent part:

1. Respondent's Unopposed Motion for Summary Final Order is granted, and Ryan Michael Jolley sustained a birth-related injury which is compensable under the plan.
2. Jurisdiction is reserved to determine the issue of award pursuant to section 766.31.
3. It is further ORDERED that the parties are accorded 30 days from the date of this Order to resolve, subject to approval of the administrative law judge, the amount and manner of payment of an award to Petitioners; 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.

The parties were able to agree on the amount of compensation; however, the parties did not reach an agreement on the amount of attorney's fees and costs to be awarded to Petitioners' counsel.

A hearing on attorney's fees and costs was noticed for May 19, 2015, and was heard as scheduled. The parties filed a Joint Stipulation on May 15, 2015. At hearing, the parties informed the undersigned that they had entered into an amended joint stipulation. The Amended Joint Stipulation was filed on May 20, 2015.

At hearing, Petitioners presented the live testimony of Ellen B. Burno, Esquire, and Donald Hinkle, Esquire. Ms. Burno is one of Petitioners' attorneys. Mr. Hinkle testified as Petitioners' expert witness as to the reasonableness of the fees sought by Petitioners' counsel. Petitioners' Exhibits A through F were admitted in evidence. Respondent presented the live testimony of John Kelner, Esquire. Respondent's Exhibit A was admitted into evidence.

The one-volume Transcript was filed on June 4, 2015. Petitioners and Respondent filed their Proposed Final Orders on attorney's fees and costs on June 15, 2015. No appearance was made on behalf of Intervenor, Shands Lakeshore Regional Medical

Center, and Intervenor did not file a proposed order. The parties' proposed final orders have been given due consideration in writing this Final Order.

FINDINGS OF FACT

1. As noted in the Preliminary Statement, the parties filed an Amended Joint Stipulation on May 20, 2015. The parties stipulated to the amount and manner of payment of an award to Petitioners. Specifically, the parties agreed to an award of: Actual expenses for ambulance in the amount of \$320; lump sum award to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury in the amount of \$100,000; and a death benefit in the amount of \$10,000.

2. The parties further stipulated to Petitioners' entitlement to \$631.05 in costs which includes the \$15.00 DOAH filing fee and \$616.05 for medical records.

3. The parties also stipulated that the only remaining costs which are at issue are costs for a nursing consultant in the amount of \$1,200 for Karla Olson & Associates, LLC, and expert witness costs for Donald Hinkle, Esquire.

4. Petitioners also seek reasonable attorney's fees. In the Amended Joint Stipulation, Petitioners' counsel agreed to withdraw their request for time expended in seeking attorney's fees from NICA and preparing for the fee hearing. Despite this,

the parties were still unable to agree on the amount of reasonable attorney's fees.

5. Petitioners' attorneys assert an entitlement to attorney's fees in the amount of \$34,728.27; \$1,870 for the services of a paralegal; costs for a nurse's review of the medical records in the amount of \$1,200; and an expert witness fee for Donald Hinkle, Esquire, in the amount of \$2,400.

6. The total amount of attorney's fees sought by Petitioners is broken down as follows: 82.2 hours for Ellen Burno at a rate of \$275.19 per hour; 20.2 hours for Peter Van den Boom at a rate of \$350 per hour; 12.9 hours for David Anderson at a rate of \$225 per hour; and 11.2 hours for Saray Noda at a rate of \$190.64 per hour. In addition to seeking \$2,400 for their expert witness, Donald Hinkle, and \$1,200 for a nurse consultant's review of medical records, Petitioners seek costs for paralegal Ruthie Romero, at \$110 per hour for 17 hours.

7. Ellen Burno is the sole attorney in the Gainesville office of Frost Van den Boom, P.A. She has been licensed as an attorney in Florida since 2013 and has been licensed to practice law in the state of Kentucky since 2004. She has represented clients in medical malpractice cases and has extensive experience in litigation and health care law. She first met with Petitioners in October 2014 after the case was transferred from the firm's Bartow office by senior attorney, David Anderson.

Ms. Burno's initial meeting with Petitioners took place not long after the death of their infant son, Ryan Michael Jolley.

According to the Petition filed in this case, the Petitioners resided in Lake City. It is noted that Gainesville is considerably closer to Lake City than Bartow.

8. Despite having represented multiple personal injury and malpractice clients, NICA was a first impression issue for her and for the other attorneys with the firm.

9. Ms. Burno collaborated with Mr. Anderson on the case until he left the firm on March 7, 2014, when Peter Van den Boom became the senior attorney and partner on the case. Mr. Van den Boom has been licensed as an attorney in Florida since 1998. He has considerable experience handling medical malpractice and personal injury cases, including catastrophic injury due to medical malpractice.

10. Ms. Burno took a 12-week maternity leave in October 2014 at which time Saray Noda began working on the case. Ms. Noda has been a licensed attorney in Florida since 2013.

11. NICA objects to portions of Petitioners' request for fees on numerous grounds including: that much of the time billed by Petitioners' attorneys was unreasonable and unnecessary; that reasonableness of the task and time billed by counsel cannot be ascertained because of vagueness or block-billing; that much of the time billed involves intercommunication among Petitioners'

four lawyers; that much of the time billed represented duplication of efforts; that Petitioners' need for a particular structure of the settlement agreement in order to amicably split the award of NICA benefits should not be awarded; and that time billed by a paralegal was clerical in nature and should not be awarded.

12. As stated previously, David Anderson initially received the case. Mr. Anderson has been licensed as an attorney in Florida since 2007. Mr. Anderson, who is no longer with the firm, seeks compensation for 12.9 hours of work from October 28, 2013, through February 13, 2014. Included in the 12.9 total is an entry for 2.0 hours for "review and analyze case law re: NICA statute" and 2.7 hours for "research regarding filing claim under NICA statute." Mr. Anderson's time entries begin October 28, 2013, and conclude on February 13, 2014. Mr. Anderson's affidavit noted that the case was taken on a contingent fee basis.

13. Ellen Burno initially met with Petitioners in the Gainesville office. She handled the bulk of the case after it was assigned to her by Mr. Anderson. Ms. Burno seeks compensation for 82.2 hours for time spent on the case from October 23, 2013, through October 7, 2014. Ms. Burno's time entries include entries on October 23, 24, and 25 which all reference research of NICA statute and/or NICA case law. Time

entries on December 20, 2013, and January 15, 2014, reference numerous tasks including review of NICA case law. These and many other time entries of Ms. Burno's include multiple tasks. These entries do not set forth with particularity the nature of the service provided, making it impossible for the undersigned to determine reasonableness of the entries. A time entry on February 6, 2014, for 6.4 hours references "research NICA issues re nurse liability," which is not related to a NICA claim for compensation.

14. Mr. Van den Boom began working on the case about two months after Mr. Anderson left the firm. The first two time entries on Mr. Van den Boom's time report reflect dates that are in error in that they reference time in 2012. Those first two entries totaling 0.5 hours must be excluded. The third time entry dated October 25, 2013, indicates that he expended two hours of time reviewing the NICA statute and case law. There are no time entries from the October 25, 2013, entry until an entry on March 25, 2014, described as "review file, NICA" reflecting 4.9 hours, until March 25, 2014, which contains an entry described as "review summary; legal research NICA; review file in its entirety. Telephone conference with EB" reflecting 8.6 hours expended. Following those entries, there are many entries from July 2014 through October 7, 2014, reflecting receipt and review of e-mails or telephone conferences with Ms. Burno, many of which

match entries on Ms. Burno's time sheet for times they were exchanging e-mails or having a telephone status conference. Thus these entries are duplicative. Moreover, while each attorney working on the case understandably wanted to be familiar with NICA law, the number of total hours for research was excessive.

15. Ms. Noda seeks attorney's fees for 11.2 hours. Her time entries begin November 4, 2014, through December 23, 2014. It is noted that all of the entries on Ms. Noda's time report were made subsequent to the entry of the Summary Final Order on compensability entered on October 16, 2014. Some of her time entries concerned the settlement agreement which involved the uneven distribution of funds between the parents, who are not married.^{1/} In any event, since compensability had already been determined, Ms. Noda's hours have been excluded in calculating the fee award.

16. Petitioners seek paralegal fees for 17 hours of paralegal work by Ruthie Romero. Her time entries begin on October 28, 2013. Other than a final time entry for one hour on July 16, 2014, Ms. Romero's time entries end on April 29, 2014, just prior to the filing of the Petition for Benefits. Virtually all of the time entries for Ms. Romero deal with requesting medical records, bates numbering of the medical records, and scanning, copying and redacting the medical records. These tasks are clerical in nature.

17. Donald Hinkle, Esquire, testified as Petitioners' expert witness on attorney's rates and hours. Mr. Hinkle is a board-certified civil trial lawyer who practices law in Tallahassee. He has been practicing law since 1980. He is familiar with the NICA statutes and NICA cases and has testified in a previous NICA case as an expert witness. He specializes in civil trial practice, primarily in medical malpractice. Mr. Hinkle reviewed the file materials from the claimants' file, but did not review the medical records. He also reviewed the time records of the four attorneys who represented Petitioners in this case, as well as the NICA statutes and case law. Mr. Hinkle opined that the time billed by all four of Petitioners' attorneys was reasonable and that the respective rate for each attorney was reasonable, and actually low in comparison to fee awards given in the community to attorneys of comparable experience.

18. Mr. Hinkle is claiming a rate of \$600 per hour for four hours as his expert witness fee, despite the fact that he had already expended 4.2 hours on this case prior to the hearing, and was present throughout most of the hearing which lasted three hours. Petitioners seek \$2,400 for his time which, taking into consideration the time he actually spent, comes to less than \$350 per hour. Based on Mr. Hinkle's experience and expertise, a total fee of \$2,400 is quite reasonable.

19. Additionally, Mr. Hinkle is of the opinion that the hiring of a nurse consultant to review the medical records was reasonable to determine whether a birth-related neurological injury occurred.

20. Regarding the paralegal fees, it was Mr. Hinkle's opinion that the tasks performed were those typically done by a paralegal, but acknowledged that the tasks were not tasks that an attorney typically performs.

21. John Kelner, Esquire, testified on behalf of the Respondent as an expert in attorney's fees. Mr. Kelner has been practicing law since 1980. He practices in the area of civil litigation, primarily medical negligence, and he has experience with NICA claims and also testified in a previous NICA hearing. Mr. Kelner approached the case from the aspect of what would be reasonable time to expend in light of the facts of the case. Mr. Kelner opined that it would be reasonable to allocate between 5 to 8 hours over the course of the case to communicate with Petitioners; it would be reasonable to allocate between 1 to 3 hours to researching the law pertaining to NICA; and it would be reasonable to allocate between 3 to 5 hours to reviewing pleadings filed. In total, Mr. Kelner opined that a reasonable amount of time to attribute to this case is 16 hours, and that a reasonable fee for an experienced attorney to handle this matter is \$300 per hour.

22. In reaching this opinion, Mr. Kelner took into consideration that there was no discovery conducted in this case, no depositions taken, and no hearings held. The Motion for Summary Final order was unopposed.

23. Given the closeness of the hourly rates claimed by Petitioners' attorneys, NICA urges that the average of \$260 per hour should be assigned to Petitioners' counsel's work in this case. In consideration of Mr. Hinkle and Mr. Kelner's testimony in this regard, that suggestion is accepted. However, since the fees attributable to Ms. Noda have been excluded, her rate has also been excluded in calculating the average fee rate.

24. Petitioners' counsel request \$34,728.27 in attorney's fees. NICA suggests an award of \$3,536 in attorney's fees. In consideration of the evidence presented by the parties, including the testimony of the respective fee experts and in light of the prevailing case law which will be more fully explained in the Conclusions of Law, and having removed excessive, vague, block-billed, intercommunication, and duplicative time, the undersigned finds that Petitioners' counsel is entitled to 58.5 hours of time at \$283 per hour for a total of \$16,555.50 as attorney's fees from NICA.

25. Respondent does not object to the following expenses incurred by Petitioners: \$15 for the DOAH filing fee and \$616.05 for medical records, for a total of \$631.05.

26. Petitioners seek payment of \$2,400 to Donald Hinkle, Esquire. The undersigned agrees that Petitioners are entitled to these expert witness fees.

27. Petitioners seek payment of \$1,200 for a nurse consultant. Mr. Kelner noted that the nurse's review of the medical records was conducted after the claim was filed, indicating that she may have been hired for reasons other than compensability. Mr. Hinkle acknowledged that he would have had the nursing expert review done before filing the Petition. The undersigned notes that within Ms. Burno's time records are found entries regarding research on issues regarding "nurse liability." This indicates that the nurse consultant was, at least in part, advising on matters not related to a NICA claim for compensation. The undersigned concludes that Petitioners are not entitled to the \$1,200 sought for the nurse consultant.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 766.301-766.316, Fla. Stat. (2013)

29. Section 766.31(1)(c) provides for an award of reasonable expenses including attorney's fees, as follows:

(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 professional relationship with the claimant.
5. The experience, reputation, and ability of the lawyer or lawyers performing services.
6. The contingency or certainty of the fee.

30. To calculate a reasonable attorney's fee, the first step is to determine the number of hours reasonably expended pursuing the claim. See Standard Guarantee Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990); Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985); Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 633 So. 2d 1103 (Fla. 3d DCA 1994). Notably, "[u]nder the 'hour-setting' portion of the lodestar computation, it is important to distinguish between 'hours actually worked' versus 'hours reasonably expended.'" Carreras, 633 So. 2d at 1110.

"Hours actually worked" is not the issue. The objective instead is for the trier of fact

to determine the number of hours reasonably expended in providing the service. 'Reasonably expended' means the time that ordinarily would be spent by lawyers in the community to resolve this particular type of dispute. It is not necessarily the number of hours actually expended by counsel in the case. Rather, the court must consider the number of hours that should reasonably have been expended in that particular case. The court is not required to accept the hours stated by counsel.

In re Estate of Platt, 586 So. 2d 333-34. The trier of fact must determine a reasonable time allowance for the work performed--which allowance may be less than the number of hours actually worked. Such a reduction does not reflect a judgment that the hours were not worked, but instead reflects a determination that a fair hourly allowance is lower than the time put in.

Id. Moreover, only time incurred pursuing the claim is compensable, not time incurred exploring civil remedies or opportunities to opt out of the Plan through lack of notice or otherwise. Carreras, 633 So. 2d at 1109. Finally, a fee award must be supported with expert testimony, and cannot be based entirely on the testimony of the claimant's attorney. Palmetto Fed. Savings and Loan Ass'n v. Day, 512 So. 2d 332 (Fla. 3d DCA 1987); Fitzgerald v. State of Fla., 756 So. 2d 110 (Fla. 2d DCA 1999). See Nants v. Griffin, 783 So. 2d 363, 366 (Fla. 5th DCA

2001) ("To support a fee award, there must be evidence detailing the services performed and expert testimony as to the reasonableness of the fee Expert testimony is required to determine both the reasonableness of the hours and reasonable hour rate.").

31. The attorney must present evidence of his services in "sufficient . . . detail to allow a determination of whether the time allocation for each was reasonable." Brake v. Murphy, 736 So. 2d 745, 747 (Fla. 3d DCA 1999). (emphasis omitted). See Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d at 1150 ("Inadequate documentation may result in a reduction of hours claimed, as will a claim for hours that the court finds to be excessive or unnecessary."); Lubkey v. Compuvac Systems, Inc., 857 So. 2d 966, 968 (Fla. 2d DCA 2003) ("[T]he party seeking fees has the burden to allocate them to the issues for which fees are awardable or to show that the issues were so intertwined that allocation is not feasible.").

32. Duplicative time "reflected on counsels' respective time sheets as time communicating with each other . . . should be eliminated." Carreras, 633 So. 2d at 1110 (finding that "we do not think that the intercommunication time can be fairly charged against NICA"). "Duplicative time charged by multiple attorneys working on the case are generally not compensable." North Dade Church of God, Inc. v. JM Statewide, Inc., 851 So. 2d 194, 196

(Fla. 3d DCA 2003) (remanding for the reduction of attorney's fees awarded where time sheets reflected a significant amount of time spent in conferences between the partner and the associate who were working on the case as well as multiple attorneys performing or reviewing the same items).

33. "A court may award fees for work done by law clerks or paralegals only when they perform work typically done by lawyers." Kearney v. Auto-Owners Ins. Co., 713 F. Supp. 2d at 1378 (M.D. Fla. 2010) (reducing the requested attorney's fees substantially for time billed for clerical work better performed by non-lawyers). See also § 57.104, Fla. Stat. "In any action in which attorney's fees are to be determined or awarded by the court, the court shall consider, among other things, time and labor of any legal assistants who contributed non-clerical, meaningful legal support to the matter involved and who are working under the supervision of an attorney."

34. Based upon the above Findings of Fact and applicable law, a reasonable hourly rate for the work done by Petitioners' attorneys is \$283 an hour. This hourly rate was calculated by averaging the hourly rates of the three attorneys representing Petitioners.

35. Based on the above Findings of Fact and law, Mr. Hinkle is entitled to an expert witness fee of \$2,400, representing 4.0 hours at \$600 per hour.

36. Based on the stipulation of the parties, Petitioners are entitled to \$631.05 for reasonable expenses incurred in pursuing the NICA claim.

CONCLUSION

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

ORDERED that Petitioners and their attorneys are awarded:

1. Petitioners are awarded actual expenses for an ambulance in the amount of \$320.

2. Petitioners, as parents of the child who sustained a birth-related neurological injury, are awarded a lump sum in the amount of \$100,000.

3. Petitioners are awarded a death benefit of \$10,000, for the death of their infant son, Ryan Michael Jolley.

4. The firm of Frost Van den Boom, P.A., is awarded \$16,555.50, representing an hourly rate of \$283 per hour for 58.5 hours.

5. Donald Hinkle, Esquire, is awarded \$2,400, representing an hourly rate of \$600 for 4.0 hours.

6. The firm of Frost Van den Boom, P.A., is awarded \$631.05, representing costs reasonably incurred in pursuing the NICA claim.

It is further ORDERED that, consistent with section 766.312, the Division of Administrative Hearings retains jurisdiction over this matter to enforce all awards.

DONE AND ORDERED this 7th day of July, 2015, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
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 July, 2015.

ENDNOTE

^{1/} Ms. Noda's time sheet initially included time entries from January 6, 2015, through May 5, 2015. However, these entries dealt with times expended in settling/accepting NICA benefits and the distribution of award to parents. Petitioners are no longer seeking payment for those entries. Any stipulation regarding distribution of funds, other than in paragraph 3 of the Amended Joint Stipulation filed on May 20, 2015, has not been submitted to the undersigned.

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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).