

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHERRY LEONARD, AS LEGAL
GUARDIAN OF COURTNEY LINDSEY, AS
PARENT OF KAMARI JACKSON, A
MINOR,

Petitioner,

vs.

Case No. 15-2499N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

PUTNAM COMMUNITY MEDICAL CENTER,
LLC, d/b/a PUTNAM COMMUNITY
MEDICAL CENTER; AND MOHAMED
AKHIYAT, M.D.,

Intervenors.

_____ /

FINAL ORDER AWARDING ATTORNEYS' FEES AND OTHER EXPENSES

A final hearing was held in this case before Todd P. Resavage, an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH), on March 2, 2018, by video teleconference at sites in Orlando and Tallahassee, Florida.

APPEARANCES

For Petitioner: Ronald S. Gilbert, Esquire
Jonathan T. Gilbert, Esquire
Colling, Gilbert, Wright & Carter, LLC
801 North Orange Avenue, Suite 830
Orlando, Florida 32801

For Respondent: Brook M. Gaffney, Esquire
Smith, Stout, Bigman & Brock, P.A.
444 Seabreeze Boulevard, Suite 900
Daytona Beach, Florida 32118

STATEMENT OF THE ISSUE

At issue are the attorney's fees and related expenses owed by Respondent Florida Birth-Related Neurological Injury Compensation Association (NICA), pursuant to section 766.31(1)(c), Florida Statutes.

PRELIMINARY STATEMENT

On April 29, 2015, Petitioner, Courtney Lindsey, individually and as parent of Kamari Jackson, a minor, filed a Petition for Determination of Compensability Pursuant to Florida Statute 766.305 (Petition) with DOAH for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).^{1/} The Petition named Mohamed M. Akhiyat, M.D., as the physician who provided obstetric services at the birth of Kamari Jackson on August 28, 2014, at Putnam Community Medical Center in Palatka, Florida.

DOAH served NICA with a copy of the Petition on May 6, 2015. DOAH served Putnam Community Medical Center (PCMC) with a copy of the Petition on May 7, 2015. On May 29, 2015, DOAH received a return receipt from the United States Postal Service showing that Dr. Akhiyat had been served with a copy of the Petition.

On May 26, 2015, PCMC filed a Petition to Intervene, which was granted by Order dated June 3, 2015. On November 18, 2015, Dr. Akhiyat filed a Petition to Intervene, which was granted by Order dated November 30, 2015.

On September 23, 2015, NICA filed its Response to Petition for Determination of Compensability, wherein NICA asserted that Kamari Jackson had suffered a birth-related neurological injury as defined by section 766.302(2), Florida Statutes, and, therefore, Petitioner's claim was compensable.

On January 28, 2016, NICA filed a Motion for Summary Final Order, or in the Alternative, Motion for Partial Summary Final Order. The Motion for Summary Final Order addressed the issues of birth-related neurological injury and notice, and the Alternative Motion for Partial Summary Final Order addressed the issue of birth-related neurological injury only. On February 2, 2016, Petitioner filed an Interim Response to Motion for Summary Final Order and Alternative Motion for Extension of Time to Respond. On February 22, 2016, PCMC filed a Motion for Partial Summary Final Order on the issue of notice.^{2/} Petitioner was granted an extension of time to respond to the issue of notice raised by both Respondent and Intervenor PCMC's motions. Intervenor did not object to NICA's motion. Petitioner did not contest NICA's motion on the issue of compensability.

On March 4, 2016, Judge Barbara Staros issued a Partial Summary Final Order, concluding that Kamari Jackson had

sustained a birth-related neurological injury. Judge Staros granted Respondent's Motion for Partial Summary Final Order on the issue of birth-related neurological injury, and found and determined Petitioner's claim to be compensable. Jurisdiction was reserved to determine the issue of an award pursuant to section 766.31 and to determine whether the notice requirements of section 766.316 were satisfied.

On August 26, 2016, Judge Staros entered a Partial Summary Final Order on the issue of notice, concluding that Intervenor Dr. Akhiyat provided notice in compliance with section 766.316; and that Intervenor PCMC provided notice in compliance with section 766.316, although they were not obligated to do so as Petitioner presented to the hospital in an emergency medical condition as defined in section 395.002(8)(b), Florida Statutes. Additionally, the parties were ordered and accorded 30 days to resolve, subject to approval of Judge Staros, the amount and manner of payment of an award to Petitioner; 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, the parties were ordered to advise Judge Staros, and a hearing would be scheduled to resolve such issues.

On September 20, 2016, Petitioner filed her Notice of Appeal to the First District Court of Appeal, regarding the August 26, 2016, Order. On June 8, 2017, the First District

Court of Appeal issued its Mandate and the Per Curiam opinion dated May 23, 2017, remanding the case to Judge Staros for further proceedings, if required. On June 30, 2017, the file was re-opened to address the award and reasonable expenses as set forth in the Summary Final Order on Notice.

On September 28, 2017, this matter was reassigned to the undersigned for all further proceedings. On the same date, a hearing was noticed for October 18, 2017, to address compensation and expenses. Due to a conflict, the hearing was re-noticed for November 29, 2017. On November 17, 2017, Respondent moved to continue the hearing. The same was granted on November 21, 2017.

On November 21, 2017, the parties filed a Joint Stipulation and Joint Petition for Partial Compensation of Claim. On December 1, 2017, the undersigned issued a Final Order Approving Stipulation for Entry of Award. As the parties had been unable to agree upon an amount of reasonable expenses incurred by Petitioner in connection with the filing of the instant claim, a final hearing was scheduled for March 2, 2018. The final hearing proceeded, as scheduled.

At hearing, Petitioner presented the testimony of Clancy Bounds, Esquire; Ronald Gilbert, Esquire; and Jonathan Gilbert, Esquire. Petitioner's Exhibits 1 through 3 were admitted. NICA presented the testimony of Bob Henry, Esquire.

The hearing Transcript was filed at DOAH on March 28, 2018. On April 2, 2018, the parties timely filed Proposed Final Orders, which have been considered in preparing this Final Order.

FINDINGS OF FACT

Petition

1. On or about September 30, 2014, Petitioner was referred to Colling, Gilbert, Wright & Carter, LLC, regarding potential representation of a birth trauma claim.

2. On or about October 22, 2014, Petitioner's counsel executed contracts for representation of Courtney Lindsey and Kamari Jackson. Specifically, Ronald Gilbert, Esquire, and Jonathan Gilbert, Esquire, represented Petitioner.

3. Ronald Gilbert was admitted to the Florida Bar in 1983 and has been engaged in the practice of law thereafter. He has litigated complex medical malpractice cases for many years (on behalf of defendants and plaintiffs) and has represented clients regarding birth trauma and NICA claims since the mid-1980s.

4. Jonathan Gilbert was admitted to the Florida Bar in 2009, and has represented similar clients throughout the span of his legal career. Ronald and Jonathan Gilbert are skilled medical malpractice attorneys who are successful in their legal and geographic communities.

5. As Petitioner retained said counsel on a contingency fee basis (for the purpose of a potential medical malpractice

claim), counsel did not maintain contemporaneous time records. Petitioner's counsel, however, permissibly reconstructed the time based on their file and office systems, and created a fee report.^{3/}

6. On November 26, 2014, Petitioner's counsel began the process of requesting medical records and lien information. Thereafter, from December 2014 through February 2015, Petitioner's counsel reviewed the medical records and lien information received. In April 2015, Petitioner's counsel conducted several telephone calls with Petitioner and drafted the NICA petition.

7. The Petition was filed on April 29, 2018. Petitioner's counsels' fee report itemizes a total of 22.48 hours for work performed by counsel and a paralegal from the date of referral to April 29, 2018 (hereinafter referred to as petition work or tasks). Specifically, the fee report documents 6.67 hours for Ronald Gilbert, 9.25 hours for Jonathan Gilbert, and 6.56 hours for the paralegal.

8. Petitioner's expert, Clancy Bounds, Esquire, was admitted to the Florida Bar in 1993. His practice, which is located in Orlando, Florida, is limited to medical malpractice litigation. Mr. Bounds has litigated NICA claims at DOAH and is familiar with the statutory requirements. Mr. Bounds testified that pre-petition tasks would include meeting with the client, obtaining records, expert review, chart review on the issue of

notice, and a determination of whether the physician(s) was a NICA participant. Mr. Bounds opined that the tasks performed in connection with investigating a medical malpractice case and those of filing a NICA Petition cannot be separated. Mr. Bounds conceded, however, that it would take little time to determine whether a physician is a NICA participating physician and that the forms for filing a petition at DOAH are readily available on the DOAH website.

9. NICA's expert, Robert Henry, was admitted to the Florida Bar in 1982. Mr. Henry primarily handles medical malpractice litigation; however, he has also represented medical providers involved in NICA proceedings. Mr. Henry has also performed other administrative work, including representing physicians before the Department of Health. Mr. Henry opined that, in this case, reasonable and necessary pre-petition work in connection with the NICA claim would include meeting with and interviewing the client, obtaining necessary information from the client to complete the petition, obtaining all medical records, and drafting the petition. Mr. Henry opined that the aforementioned tasks should consume 10 hours.

10. Considering all the evidence, the undersigned finds that Petitioner presented sufficient evidence to establish that 10.75 hours were reasonably expended by Petitioner's counsel in the petition phase of the litigation.

NICA Determination of Compensability

11. Following the filing of the Petition, on June 3, 2015, PCMC was permitted to intervene and PCMC's motion to permit discovery was granted. On July 24, 2015, PCMC served discovery upon Petitioner. Petitioner served her responses to the propounded discovery on August 24, 2015. On September 22, 2015, Petitioner propounded discovery to PCMC.

12. On September 23, 2015, Respondent filed its Response to Petition for Determination of Compensability. In summary, said response asserted that Kamari Jackson had suffered a birth-related neurological injury, as defined in section 766.302(2), and, therefore, the claim was compensable under the Plan.

13. From April 29, 2015, to September 23, 2015, Petitioner's fee report itemizes approximately 42.1 hours for work performed by counsel and a paralegal. Specifically, the fee report documents 17.95 hours for Ronald Gilbert; 11.3 hours for Jonathan Gilbert; and 12.85 hours for the paralegal. Mr. Bounds, Ronald and Jonathan Gilbert testified, globally, that the time documented on the fee report was reasonable. Mr. Bounds testified that the majority of the fees Petitioner's counsel would be entitled to under NICA "kind of end" on September 24, 2015, with the receipt of the determination of compensability.

14. Mr. Henry similarly opined that Petitioner's counsel would be entitled to reasonable fees up through the time NICA's

response was received on September 24, 2015, and some additional time regarding work, if any, on the Joint Stipulation and Joint Petition for Partial Compensation of Claim. Mr. Henry opined that it was reasonable and necessary for Petitioner's counsel to attribute four to five hours for work related to responding to post-Petition discovery.

15. Having reviewed all of the evidence, the undersigned finds that, from the date of filing the Petition to the receipt of NICA's response on September 24, 2015, Petitioner presented sufficient evidence to establish that 18.65 hours were reasonably expended by Petitioner's counsel in connection with the filing of the NICA claim.

DOAH Determination of Compensability

16. Except as expressly discussed below, following Respondent's response to the Petition acknowledging the claim as compensable, Petitioner's counsels' efforts were devoted to considering or avoiding the exclusive remedy provisions of the Plan or are otherwise not work performed in connection with the filing of the claim.

17. Following NICA's response on September 24, 2015, the undersigned finds that Petitioner presented sufficient evidence to establish that 3.75 hours were reasonably expended by Petitioner's counsel in connection with the acceptance of NICA benefits and drafting the Joint Stipulation and Joint Petition for Partial Compensation of Claim. Accordingly, the undersigned

finds that Petitioner's counsel reasonably expended 33.15 hours in representation in connection with the filing of the NICA claim.

Reasonable Fee Rate

18. Mr. Bounds testified that, giving due consideration to factors set forth in section 766.31(1)(c), Florida Statutes, the "fee customarily charged in the locality for similar legal services" was \$125.00 per hour for paralegals, \$400.00 per hour for Jonathan Gilbert, and \$815.00 per hour for Ronald Gilbert. While Mr. Bounds provided supporting testimony concerning the balance of the statutory factors in support of his opinion, he did not testify that the rates were due to be increased or decreased on the basis of any specific factor.

19. Ronald and Jonathan Gilbert similarly testified that the suggested rates were reasonable when considering each of the statutory factors set forth in section 766.31(1)(c). Ronald Gilbert testified that his proposed rate of \$815.00 per hour, as a senior partner, is the rate that he utilizes in complex litigation, including medical malpractice and tobacco litigation. Ronald Gilbert further testified that said rates "have been accepted in the tobacco cases that we've handled." He conceded, however, that tobacco litigation is not an administrative proceeding and that the firm handles such matters on a contingency fee basis.

20. Mr. Henry conceded that determining a reasonable hourly rate in this matter is difficult, as he is unaware of any attorneys who represent petitioners in NICA proceedings at DOAH on an hourly basis. Mr. Henry, whose practice is almost entirely devoted to medical malpractice defense, opined that he would charge \$200.00 per hour, which is a rate higher than any of his current clients reimburse him for his time. Mr. Henry acknowledged, however, that he is "in a firm that is geared towards doing low rate work."

21. In addition, Mr. Henry reviewed some "pretty old cases" wherein the reasonable fee was determined to be in the "less than 200 to 300 range."^{4/} While Mr. Henry opined that it was reasonable for Petitioner's counsel to request a higher fee than he charges, he opined that neither \$815.00 nor \$400.00 per hour is reasonable for NICA proceedings at DOAH. Mr. Henry considered each of the statutory factors set forth in section 766.31(1)(c) in reaching his ultimate opinion that reasonable rates would be \$300.00 per hour for a senior attorney, \$200.00 for a junior attorney, and \$120.00 for paralegal work. Ultimately, Mr. Henry opined that a "blended kind of rate" of \$250.00 per hour would be reasonable. The undersigned construes Mr. Henry's opinion as initially focusing on the fee customarily charged in the locality for similar legal services, without need for amendment due to the balance of the statutory factors.

22. Here, given the nature of the expertise and the legal skills required, for what may be appropriately described as a moderately complex case, in the absence of any specific evidence on hourly NICA plaintiff's attorneys, the undersigned finds that the hourly rate for medical malpractice attorneys provides a more useful point of comparison than the fees associated with other complex litigation, such as tobacco litigation.

23. The undersigned further finds, upon consideration of the facts of this case, that the fee customarily charged in the locality for similar legal services is \$350.00 an hour. See § 766.31(1)(c)2., Fla. Stat. Upon consideration of the facts of this case, and the remaining criteria established in section 766.31(1)(c), there is no apparent basis or reason to adjust this figure.

Expenses

24. Petitioner's counsel incurred certain expenses for which they seek recovery. Such costs total \$29,408.88. Of those costs, NICA does not object to the following expenses: \$9.00 for the birth certificate; \$15.00 for the DOAH filing fee; \$130.00 for January 2, 2015, medical records from Wolfson Medical; \$349.00 for January 20, 2015, through May 10, 2015, medical records from Healthport; and \$73.24 for June 24, 2015, medical records from Star Med.

25. Mr. Bounds opined that \$4,466.91 of these costs were reasonable and necessary for the prosecution of this claim from

the time of representation through receipt of NICA's response finding the claim compensable, on or about September 24, 2015. Specifically, Mr. Bounds itemized the following: \$76.24 in outside vendor charges; \$590.75 in obtaining medical records; \$59.80 in express delivery charges; \$264.25 in photocopying charges; \$69.76 in postage; \$40.00 in travel expenses; \$9.00 to obtain the birth certificate; \$49.00 in scanning charges; \$1,836.25 for medical expert review by Legal Nurse Consulting Group of Centra; and \$1,000.00 for medical expert review by Berto Lopez, M.D.

26. From the totality of the evidence, it appears that, on April 10, 2015, medical records were provided to Berto Lopez, M.D., for his expert review. Petitioner presented sufficient evidence to establish that Petitioner's counsel consulted with Dr. Lopez in 2017; however, failed to present sufficient evidence that Dr. Lopez was consulted prior to September 24, 2015. For all that appears, Dr. Lopez's expertise was solicited in regards to the pursuit of a medical negligence claim against various healthcare providers. Accordingly, said costs associated with his fee are disallowed.

27. The undersigned finds that Petitioner presented sufficient evidence to establish that the \$1,836.25 in costs associated with the medical expert review by Legal Nurse Consulting Group of Centra were properly incurred in connection with the filing of the NICA claim. The undersigned further

finds, however, that said costs are attributable to consulting, but non-testifying experts, and, therefore, are disallowed.

28. The undersigned finds that the balance of those costs itemized by Mr. Bounds, and the DOAH filing fee, to be recoverable as reasonable expenses incurred in connection with the filing of the NICA claim. Together with costs stipulated by NICA, the undersigned finds that Petitioner is entitled to a total of \$1,158.80.

CONCLUSIONS OF LAW

29. DOAH has jurisdiction of the parties to, and the subject matter of, this cause. § 766.301, et seq., Fla. Stat (2017) and hereafter.

30. The 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.

31. 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 DOAH.

§§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. NICA, 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.

32. Pursuant to section 766.309, the ALJ shall make the following determinations based upon all 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 postdelivery 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 postdelivery period in a hospital.

(c) How much compensation, if any, is awardable pursuant to s. 766.31.

(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.

33. Pursuant to section 766.31(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 ALJ shall make an award providing compensation. Under the NICA statute, the financial benefits include expenses for care and treatment, periodic or lump sum payments to the parents or guardians, and a death benefit. §§ 766.305(4), 766.31(1)(a) and (b), Fla. Stat. The funds for these financial benefits are obtained from assessments on physicians and hospitals. § 766.314, Fla. Stat. The NICA assessments constitute a tax, and, therefore, NICA is administering public funds. Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 633 So. 2d 1103, 1105 (Fla. 3d DCA 1994) (citing Coy v. Florida Birth-Related Neurological Injury Compensation Plan, 595 So. 2d 943, 945 (Fla. 1992), cert denied, 113 S. Ct. 194, 121 L. Ed. 2d 137 (1992)).

34. In addition to the benefits described above, section 766.31(1)(c), also directs the ALJ to make an award for "[r]easonable expenses incurred in connection with the filing of a claim under ss. 766.301-766.316, including reasonable attorney's fees." In determining an award for attorney's fees, the ALJ is required to 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.

§ 766.31(1)(c), Fla. Stat.

35. Determining a reasonable hourly rate and the number of hours that should be expended by the attorney in providing services is an appropriate starting point for the computation of a reasonable fee in NICA proceedings. Carreras, 633 So. 2d at 1107.

36. Under the hour-setting portion of the lodestar computation, the Carreras court discussed the importance of distinguishing between "hours actually worked" versus "hours reasonably expended." Quoting In re Estate of Platt, 586 So. 2d 328, 333-34 (Fla. 1991), the Carreras court noted that the objective is for the ALJ:

[T]o determine the number of hours reasonably expended in providing the services. '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 this 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.

37. The NICA program “contemplates routine claim processing where eligibility determinations should ordinarily be straightforward.” Id. at 1106. “The major hurdle in a NICA petition is the determination of eligibility, and litigation over eligibility should be the exception rather than the rule.” Id. at 1107. “The process of qualifying an infant for an award does not require a showing of fault and should ordinarily be accomplished without adversary litigation.” Id. at 1109.

38. In construing the phrase “incurred in connection with the filing of a claim,” the Carreras court found that the NICA statute contemplates “a reasonable allowance for the time necessary to investigate the NICA claim and prepare the NICA petition.” Id. Implicitly, the Carreras court did not rule out compensation for attorney’s fees for conducting “substantive work” beyond the acts of initial investigation and filing the petition. Id. at 1110-1111. However, “[p]lainly, the exploration of the possibility of opting out of NICA through the “bad faith” exception or otherwise is not, as the statute requires, work performed “in connection with the filing of a claim.” Id. at 1109-1110.

39. Section 766.31 does not address prevailing parties, but rather links liability for reasonable expenses, including reasonable attorney’s fees, upon the ALJ’s determination that: 1) an infant has sustained a birth-related neurological injury; and 2) that obstetrical services were delivered by a

participating physician at the birth. See Lampert v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 206 So. 3d 845, 847 (Fla. 1st DCA 2016); § 766.31(1), Fla. Stat. The determination of whether, if raised by the claimant or other party, the notice requirements in section 766.316 are satisfied, is not germane to the award of reasonable expenses and attorney's fees. Thus, time incurred by exploring civil remedies or opportunities to opt out of the Plan through lack of notice requirements in section 766.316 is not compensable. Id. at 1109-1110; See also Braniff v. Galen of Fla., Inc., 669 So. 2d 1051, 1053 (Fla. 1st DCA 1995) ("The presence or absence of notice will neither advance nor defeat the claim of an eligible NICA claimant who has decided to invoke the NICA remedy"); O'Leary v. Fla. Birth-Related Neurological Injury Comp. Plan, 757 So. 2d 624, 627 (Fla. 5th DCA 2000) ("We recognize that lack of notice does not affect a claimant's ability to obtain compensation from the Plan."); Univ. of Miami v. Ruiz, 164 So. 3d 758, 765 (Fla. 3d DCA 2015) (noting that a claimant may accept NICA benefits to the exclusion of any and all civil remedies against any entities directly involved in the delivery or eschew the NICA benefits and take his or her chances in a civil suit against the party or parties who have waived NICA immunity by failing to comply with the NICA Notice Provision).

40. Against this legal backdrop, the undersigned concludes that Petitioner's counsel reasonably expended 33.15 hours in representation in connection with the filing of the NICA claim.

41. In considering the fee customarily charged in the locality for similar legal services, for lodestar purposes, "the relevant inquiry is to determine the prevailing rate, or range of rates, where the fee basis is hourly billing from time worked." See In re Platt, 586 So. 2d at 334. Once the hourly customary fee is determined, then one considers the other applicable statutory factors in order to arrive at the approved reasonable hourly rate for the case. Carreras, 633 So. 2d at 1108.

42. Pursuant to Carreras, the ALJ is directed to enter a finding which correlates to "real world hourly rates" in NICA cases (to the extent such information is available) and to other hourly legal work similar in nature, such as workers' compensation or medical malpractice, to serve as a useful basis for comparison. Thereafter, the ALJ is directed to apply the other relevant statutory factors to come up with the approved hourly rate for the case. Id. at 1108. The Carerras court further expounded:

In so doing, "the trial court is not bound to accept the hourly rate asserted by counsel who performed the service. The court in this instance determines the appropriate rate for the services performed." In re Platt, 586 So. 2d at 334. Furthermore, expert opinion is not binding

on the trier of fact, Baruch v. Giblin, 122 Fla. 59, 64, 164 So. 831, 833 (1935), Miller v. First American Bank & Trust, 607 So. 2d 483, 485-86 (Fla. 4th DCA 1992), and "the opinion of an expert witness does not constitute proof that the facts necessary to support the conclusion exist." Mercy Hospital, Inc. v. Johnson, 431 So. 2d 687, 688 (Fla. 3d DCA) (citation omitted), review denied, 441 So. 2d 632 (1983).

43. The undersigned concludes that the fee customarily charged in Petitioner's counsels' locality for similar legal services is \$350.00 an hour. Upon consideration of the facts of this case, and the remaining criteria established by section 766.31(1)(c), there is no basis or reason to adjust the figure. Specifically, there were no significant time limitations shown to have been imposed by the claimant or the circumstances in this particular case. The nature and length of the professional relationship with the client was a neutral consideration. The experience, reputation, and ability of the lawyers performing the services for Petitioner have been considered in establishing the reasonable hours and reasonable hourly rate and do not afford any additional basis to adjust the figure. While Petitioner's counsel appropriately exhausted novel issues regarding their client's capacity and notice, these issues are separate and apart from the issue of compensability. Finally, given the nature of the claim, which was accepted by Respondent, the potential risk of non-recovery (i.e., a determination that

the claim was not compensable) was not sufficient to warrant any adjustments.

44. Pertinent to an award of reasonable expenses, the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, effective January 1, 2016, provides, in pertinent part, as follows:

Purpose and Application. These guidelines are advisory only. The taxation of costs in any particular proceeding is within the broad discretion of the trial court. The trial court should exercise that discretion in a manner that is consistent with the policy of reducing the overall costs of litigation and of keeping such costs as low as justice will permit. . . .

Burden of Proof. Under these guidelines, it is the burden of the moving party to show that all requested costs were reasonably necessary either to defend or prosecute the case at the time the action precipitating the cost was taken.

I. Litigation Costs That Should Be Taxed.

A. Depositions.

1. The original and one copy of the deposition and court reporter's per diem for all depositions.

2. The original and/or one copy of the electronic deposition and the cost of the services of a technician for electronic depositions used at trial.

3. Telephone toll and electronic conferencing charges for the conduct of telephone and electronic depositions.

B. Documents and Exhibits

1. The costs of copies of documents filed (in lieu of "actually cited") with the court, which are reasonably necessary to assist the court in reaching a conclusion.

2. The costs of copies obtained in discovery, even if the copies were not used at trial.

C. Expert Witnesses

1. A reasonable fee for deposition and/or trial testimony, and the costs of preparation of any court ordered report.

D. Witnesses

1. Costs of subpoena, witness fee, and service of witnesses for deposition and/or trial.

E. Court Reporting Costs Other than for Depositions

1. Reasonable court reporter's per diem for the reporting of evidentiary hearings, trial and post-trial hearings.

F. Reasonable Charges Incurred for Requiring Special Magistrates, Guardians Ad Litem, and Attorneys Ad Litem

* * *

III. Litigation Costs That Should Not Be Taxed as Costs.

A. The Cost of Long distance Telephone Calls with Witnesses, both Expert and Non-Expert (including conferences concerning scheduling of depositions or requesting witnesses to attend trial)

B. Any Expenses Relating to Consulting But Non-Testifying Experts

C. Cost Incurred in Connection with Any Matter Which Was Not Reasonable Calculated to lead to the Discovery of Admissible Evidence

D. Travel Time

1. Travel time of attorney(s).

2. Travel time of expert(s).

E. Travel Expenses of Attorney(s).

45. The undersigned concludes that, with the exclusion of the costs associated with non-testifying expert witness fees, the balance of those costs itemized by Respondent's expert, Mr. Bounds, and the DOAH filing fee, to be recoverable as reasonable expenses incurred in connection with the filing of the NICA claim. Together with costs stipulated by NICA, Petitioner is entitled to a total of \$1,158.80.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Petitioner is awarded \$11,602.50 in attorney's fees and \$1,158.80 in expenses.

DONE AND ORDERED this 17th day of April, 2018, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of April, 2018.

ENDNOTES

^{1/} On September 29, 2017, NICA filed an unopposed Motion for Substitution of Party. The grounds for the motion were that, on or about April 11, 2017, Courtney Lindsey was adjudicated totally incapacitated in the Circuit Court of Putnam County, Florida. On the same date, Cherry Fullwood Leonard was appointed as Ms. Lindsey's guardian. On August 17, 2017, Ms. Leonard was appointed as the guardian of Kamari Jackson. On October 2, 2017, the undersigned granted NICA's motion for substitution of party and the style of the case was amended.

^{2/} On March 11, 2016, Intervenor Mohammed Akhiyat, M.D., filed a Joinder in Putnam Community Medical Center's Motion for Partial Summary Final Order.

^{3/} Where attorneys have not kept contemporaneous time records, it is permissible for a reconstruction of time to be prepared. See Brake v. Murphy, 736 So. 2d 745, 747 (Fla. 3d DCA 1999).

^{4/} See Allgood v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case No. 08-4814N (Fla. DOAH Feb. 18, 2011) (concluding a reasonable rate of \$270.00 per hour); Oliver v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case No. 06-0318N (Fla. DOAH Dec. 19, 2008) (concluding a reasonable market rate of \$300.00 per hour); and Robles v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case No. 07-2186 (Fla. DOAH Dec. 16, 2018) (concluding a stipulated fee of \$300.00 per hour was reasonable).

COPIES FURNISHED:
(via certified mail)

Jonathan T. Gilbert, Esquire
Ronald S. Gilbert, Esquire
Colling, Gilbert, Wright & Carter, LLC
Suite 830
801 North Orange Avenue
Orlando, Florida 32801
(eServed)
(Certified Mail Number 7016 0910 0001 7980 1703)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
Suite 1
2360 Christopher Place
Tallahassee, Florida 32308
(eServed)
(Certified Mail Number 7016 0910 0001 7980 9822)

Brooke M. Gaffney, Esquire
Smith, Stout, Bigman & Brock, P.A.
Suite 900
444 Seabreeze Boulevard
Daytona Beach, Florida 32118
(eServed)
(Certified Mail Number 7016 0910 0001 7980 9839)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail Number 7016 0910 0001 7980 9846)

Justin Senior, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)
(Certified Mail Number 7016 0910 0001 7980 4407)

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).