

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CATHY PIERRE AND JODENS PIERRE,
on behalf of and as parents and
natural guardians of JADON
PIERRE, a minor,

Petitioners,

vs.

Case No. 17-3712N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION, a/k/a NICA,

Respondent,

and

JOY CAVALARIS, M.D.; PALM BEACH
OBSTETRICS & GYNECOLOGY, P.A.;;
AND GOOD SAMARITAN MEDICAL
CENTER, INC.,

Intervenors.

_____ /

FINAL ORDER

A final hearing was held in this matter before W. David
Watkins, a duly-appointed Administrative Law Judge (ALJ) of the
Division of Administrative Hearings (DOAH), on May 31, 2018, via
video teleconference with sites in West Palm Beach and
Tallahassee, Florida.

APPEARANCES

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For Respondent: David W. Black, Esq.
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For Intervenor Good Samaritan Medical Center, Inc.:

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STATEMENT OF THE ISSUE

Whether notice was accorded the patient, as contemplated by
section 766.316, Florida Statutes (2018).^{1/}

PRELIMINARY STATEMENT

On June 21, 2017, Petitioners, Cathy Pierre and Jodens
Pierre, on behalf of and as parents and natural guardians of
Jadon Pierre (Jaden), filed a Petition for Benefits (Petition)
pursuant to section 766.301 et seq., Florida Statutes. The

Petition stated that the action was filed under protest and in an abundance of caution.

The Petition named Joy Cavalaris, M.D. (Dr. Cavalaris), as a physician providing obstetric services at the birth of Jadon, who was born at Good Samaritan Medical Center (Good Samaritan). On June 29, 2017, DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the Petition. Dr. Cavalaris and Good Samaritan were likewise served with a copy of the Petition. On July 13, 2017, Dr. Cavalaris, and Palm Beach Obstetrics and Gynecology, P.A. (Palm Beach OBGYN or Group) filed a Motion to Intervene, which was granted by Order of July 25, 2017. On July 17, 2017, Good Samaritan filed a Motion to Intervene, which was granted by Order of July 25, 2017.

On October 11, 2017, NICA filed a Motion for Partial Summary Judgment on the issue of compensability. On October 22, 2017, a Partial Summary Final Order on compensability was entered, finding that Jadon sustained a birth-related neurologic injury, which is compensable under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). Jurisdiction was retained on the issues of notice and award.

On November 8, 2017, a Notice of Hearing by Video Teleconference initially set a final hearing for this matter on March 21, 2018. On February 9, 2018, Petitioners filed a motion

for continuance of the final hearing, and an Order granting the continuance was entered on February 13, 2018.

By notice of hearing entered on February 26, 2018, a video teleconference final hearing was set for May 31, 2018. The hearing took place on May 31, 2018, and concluded on that day.

At the final hearing Petitioners called Cathy Pierre as a live witness. Petitioners' Exhibits 1 through 5 were received in evidence. Intervenor, Good Samaritan's Exhibits 1 through 14 were admitted into evidence. These exhibits included deposition testimony of Melissa Carpentier, R.N.; and Alethia Saunders. Also accepted into evidence was Good Samaritan's Exhibit 16, the deposition of Cathy Pierre. The Exhibits of Intervenor, Dr. Cavalaris and Palm Beach OBGYN, 1 through 12, were admitted into evidence. The exhibits included deposition testimony of Lori Ann Sevald, M.D., a physician with Palm Beach OBGYN. NICA did not present any witnesses or offer any exhibits.

On June 12, 2018, Good Samaritan filed a Motion to Submit Post-Hearing Evidence. Then, on June 18, 2018, Good Samaritan filed an Amended Motion to Submit Post-Hearing Evidence, and Good Samaritan's Post-Hearing Exhibits were filed on that day.

On June 20, 2018, a Transcript of the May 31, 2018, final hearing was filed. On July 11, 2018, a telephonic motion hearing was held on Intervenor, Good Samaritan's Amended Motion to Submit Post Hearing Evidence. During the telephonic hearing,

the one-page document titled "Special Deliveries Unit Tour," reflecting Cathy Pierre's attendance on January 12, 2015, was admitted into evidence without objection. In addition, the proffered testimony of Kathy Wegner, R.N., as designated in the Amended Motion to Submit Post-Trial Evidence as proffers labeled 9A, 9B, and 9C, were established as a stipulation of the parties. The Transcript of the motion hearing held on July 11, 2018, was filed with DOAH on July 20, 2018.

Thereafter, on July 27, 2018, all parties, with the exception of NICA, filed Proposed Final Orders.

FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses, other evidence presented at the final hearing, and on the entire record of this proceeding, the following Findings of Fact are made:

1. Petitioners, Cathy Pierre and Jodens Pierre, are the parents and natural guardians of Jadon Pierre.
2. Jadon was born at Good Samaritan, a licensed Florida hospital, in West Palm Beach, Florida, on January 26, 2015.
3. The physician providing obstetric services at the time of birth was Joy Cavalaris, M.D.
4. The circumstances of the labor, delivery, and birth of the minor child are reflected in the medical records of Good Samaritan submitted with the Petition.

5. Jadon suffered from oxygen deprivation during the course of labor and delivery, and in the immediate post-delivery resuscitative period, as determined pursuant to the undersigned's October 27, 2017, Partial Summary Final Order.

6. Jadon is substantially and permanently mentally and physically impaired, as determined pursuant to the undersigned's October 27, 2017, Partial Summary Final Order.

7. Intervenors, Good Samaritan, Palm Beach OBGYN, and Joy Cavalaris, M.D., are NICA participants.

Good Samaritan's Compliance with NICA Notice Requirements

8. Cathy Pierre presented on three occasions to Good Samaritan in 2015. Her first visit to Good Samaritan was on January 12, 2015, at 6:00 p.m., to attend a Special Deliveries Unit Tour. A sign-in sheet maintained by Kathy Wegner, R.N., Good Samaritan lactation nurse, indicates that the tour began at 6:00 p.m. The first name of expectant moms on the sign-in sheet is Cathy Pierre. Included on the sign-in sheet is Cathy Pierre's due date (January 18, 2015), her email address, and her physician. At the motion hearing held on July 11, 2018, the parties stipulated that Cathy Pierre attended no other prenatal tour other than the one conducted on January 12, 2015.

9. The parties also stipulated that Cathy Pierre did not pre-register for her delivery at the January 12, 2015, prenatal tour. Although guests on the tour are provided with the option

of filling out pre-registration forms to be submitted to Ms. Wegner, no such forms were submitted by Cathy Pierre. At 6:00 p.m., the admitting department at Good Samaritan is closed, and Cathy Pierre would not have been able to register via computer during the January 12, 2015, tour.

10. Although Cathy Pierre testified that she presented to Good Samaritan for a tour and pre-registration in December 2014, the Special Deliveries Unit Tour sign-in sheet conclusively establishes that Cathy Pierre presented for her tour on January 12, 2015.

11. Cathy Pierre presented no evidence that she pre-registered at the time of her tour. The evidence, and the stipulations of the parties, conclusively establish that Cathy Pierre did not pre-register for her delivery at the time of her tour on January 12, 2015. As expressly stipulated to by the parties:

A. Cathy Pierre attended the prenatal tour on Monday, January 12, 2015 at 6 PM. This is the only prenatal tour attended by Cathy Pierre.

B. Cathy Pierre did not "pre-register" for her delivery at the January 12, 2015 prenatal tour. Guests on the tour are provided with the option of filling out pre-registration forms to be submitted to Ms. Wegner, and no such forms were submitted by Cathy Pierre.

C. At 6 PM, the admitting department is closed and Cathy Pierre would not have been able to register via computer.

12. The greater weight of the evidence established that no provider-obstetrical patient relationship was established on January 12, 2015. Although Ms. Pierre toured the Good Samaritan facilities on January 12, 2015, the evidence of record, and the stipulation of the parties established that she did not pre-register for her delivery at that time, keeping open the possibility that she would choose a different hospital for her delivery.

13. Cathy Pierre next presented to Good Samaritan on January 19, 2015. Ms. Pierre testified that the reason for the visit to Good Samaritan on January 19, 2015, was for a check-up. Although an ultrasound was performed on that date, Ms. Pierre states that she does not recall the same. Ms. Pierre registered as a patient at Good Samaritan for the first time during this visit. She was determined not to be in active labor at that time, but was provided with a form titled "Labor Instructions for Observation Admission" containing criteria for determining when she should return to the hospital.

14. The registration process on January 19, 2015, was conducted by Alethia Saunders, who was employed as a Patient Access Lead with the emergency room. As part of her duties and responsibilities, Ms. Saunders handled obstetrical admissions

through the emergency department when patients presented after regular business hours.

15. As part of the admission process for obstetrical patients, Alethia Saunders would present a document entitled "Notice to Obstetrical Patient" to the patients. On January 19, 2015, Alethia Saunders presented to Cathy Pierre the Notice to Obstetrical Patient Form, printed the patient's name on the form, and the form was signed by Ms. Pierre. The form states as follows:

I have been furnished information by Good Samaritan Medical Center prepared by the Florida Birth Related Neurologic Injury Compensation Association and have been advised that the hospital participates in that program. Physicians and midwives and their groups providing care at the Good Samaritan Medical Center are or may be participating in that program, wherein certain limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation. For specifics on this program I understand that I can contact:

**Florida Birth Related Neurological Injury
Compensation Association - NICA, Post Office
Box 14567, Tallahassee, Florida 32317-4567,**

**Telephone No. 850-488-8191 or Toll Free
800-398-2129.**

(emphasis in original).

The form goes on to state that "I further acknowledge that I have received a copy of the brochure prepared by NICA."

16. Alethia Saunders stated that the NICA form is completed for every obstetrical patient. Ms. Saunders testified that, as part of the registration process, every patient is presented with the folder which contains the Peace of Mind Brochure from NICA, and the patient signs the Notice to Obstetrical Patient Form and then she signs the form as a witness.

17. Cathy Pierre testified that her signature appears on the Notice to Obstetrical Patient Form dated January 19, 2015. However, Ms. Pierre testified that she could not recall reading the Notice to Obstetrical Patient Form on January 19, 2015. With respect to the NICA brochure, Cathy Pierre testified that while she recalls receiving a NICA brochure at some point, she does not recall when.

18. The preponderance of the evidence established that Cathy Pierre was provided with information by Good Samaritan on January 19, 2015, in the form of a brochure prepared by NICA, and that Ms. Pierre signed the receipt of notice to obstetrical patient on January 19, 2015.

19. On January 26, 2015, Ms. Pierre presented again to Good Samaritan and delivered Jadon at that time. While Ms. Pierre also received and signed a Notice to Obstetrical Patients form on January 26, 2015, it is the form dated and signed on January 19, 2015, that is relevant for the

determination of whether adequate notice was provided to Ms. Pierre in this case.

Notice Provided by Dr. Cavalaris and Palm Beach OBGYN:

20. Cathy Pierre first presented to Palm Beach OBGYN on June 12, 2014, for her first prenatal visit. Ms. Pierre was seen by Dr. Lori Ann Sevald, an obstetrician/gynecologist with the Group.

21. Dr. Sevald performed a physical examination on Ms. Pierre, finding her uterus to be enlarged, which she indicated is normal for a pregnant patient. She also ordered an ultrasound which revealed a live intrauterine pregnancy.

22. Dr. Sevald's routine custom and practice for each new obstetrical patient being seen at the Group's office was for the patient to receive a copy of the Group's four-page Obstetric Informed Consent form (consent form) and to review the entire document with the patient. Dr. Sevald indicated she would discuss genetic testing, routine testing, and provide the new obstetrical patient with an overview of what to expect during labor and delivery.

23. Dr. Sevald stated she had no doubt, based on her customary practice, that she would have reviewed the entire consent form with Cathy Pierre. Additionally, Dr. Sevald explained she would have provided Ms. Pierre with a NICA brochure titled "Peace of Mind for An Unexpected Problem" and

would have explained the program to Ms. Pierre. Dr. Sevald also signed the consent form as a witness to the patient's signature. The aforementioned process was referenced on page four of Dr. Sevald's History and Physical, dated June 12, 2014, which indicates "[t]he OB consent and NICA forms were reviewed, signed and copies given to the patient" and "[t]he patient was made aware that our practice participates in the Florida NICA program."

24. Ms. Pierre recalls going to the office of Palm Beach OBGYN in Lake Worth as a new patient and completing some paperwork when she got to the office. When questioned about the paperwork, Ms. Pierre agreed that June 12, 2014, was likely the date she first presented to Palm Beach OBGYN. Although, Ms. Pierre could not recall reviewing the four-page Obstetric Informed Consent form, she did acknowledge that her printed (maiden) name, signature and the date, which appear on page four of the consent form, were all written by her, probably on June 12, 2014. Located between her printed maiden name and signature, the consent form states as follows:

I was furnished information prepared by the Florida Birth-Related Neurological Injury Compensation Association (NICA), pursuant to Section 766.316, Florida Statutes, and was advised that our Doctors (Samuel Lederman, MD, Gloria Hakkarainen, MD, Sylvia Siegfried, MD, Joy Cavalaris, MD, Lori Sevald, MD, Marcela Lazo, MD and Barbara Telan, CNM) are participating

physicians in that program. By participating in this program, limited compensation is available in the event that certain types of qualifying neurological injuries occurs during labor, delivery or resuscitation in the hospital. For specifics about the program, I understand that I can contact the Florida Birth-Related Neurological Injury Compensation Association (NICA), at PO Box 14567, Tallahassee, FL 32317, Tele No. 1.800.398.2129.

I further acknowledge that I have received a copy of the brochure prepared by NICA.

I acknowledge that I read this form and fully understand its contents. I was given ample opportunity to ask questions and all questions were answered to my satisfaction.

I also acknowledge that I was given a copy of this form so that my family and I can review its contents at home and ask questions in the future.

25. Ms. Pierre indicated that during one of her visits to Palm Beach OBGYN she received a copy of the NICA brochure. However, she could not recall which visit. Nevertheless, she acknowledged she could have received the brochure at the time of her first visit to the Group on June 12, 2014.

26. The greater weight of the evidence established that more likely than not, Dr. Cavalaris' office provided Ms. Pierre with a copy of the NICA brochure during her first prenatal office visit in June 2014, when the beginning of her provider-obstetrical patient relationship began.

CONCLUSIONS OF LAW

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

28. 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. § 766.301(1), Fla. Stat.

29. The injured "infant, his personal representatives, parents, dependents and next of kin" may seek compensation under the Plan by filing a claim for compensation with DOAH within five (5) years of the infant's birth. §§ 766.302(3), 766.303(2), 766.305(1), and 766.313, Fla. Stat. NICA, which administers the Plan, has "forty-five (45) days from the date of service of a complete claim . . . in which to file a response to the Petition and to submit relevant information relating to the issue of whether the injury is a birth-related neurological injury." § 766.305(3), Fla. Stat.

30. 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 ALJ to which the claim has been assigned. § 766.305(6), Fla. Stat. The ALJ has exclusive jurisdiction to

determine whether a claim filed under the Plan is compensable.
§ 766.304, Fla. Stat.

31. In discharging this responsibility, the ALJ must make the following determinations based upon the available evidence:

Whether the injury claimed is a birth-related neurological injury. If the Claimant has demonstrated, to the satisfaction of the ALJ, 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 § 766.302(2).

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 mid-wife 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.

Whether, if raised by the Claimant or other party, the factual determinations regarding the notice requirements in § 766.316 are satisfied. The ALJ has the exclusive jurisdiction to make these factual determinations.

§ 766.309(1), Fla. Stat.

32. The only issue to be determined at the final hearing was whether notice was provided by the named Intervenors, or

whether the requirement to provide notice was excused, pursuant to section 766.316, which provides:

Notice to obstetrical patients of participation in the plan.--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.

33. Section 766.309(1)(d) provides in relevant 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.

34. Petitioners contend that Intervenors did not give notice pursuant to section 766.316. In turn, Intervenors contend that they provided sufficient notice pursuant to section 766.316. As the proponents of the proposition that appropriate notice was given or that notice was not required, the burden on the issue of notice is upon the Intervenors. Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n., 880 So. 2d 1253, 1257 (Fla. 1st DCA 2004).

35. As to Intervenors Dr. Cavalaris and Palm Beach OBGYN, the greater weight of the evidence establishes that Dr. Cavalaris' office provided Ms. Pierre a copy of the NICA brochure at the time of her initial visit to her Group's practice in June 2014. The greater weight of the evidence establishes that Dr. Sevald, as a member of the Group, provided the notice required by section 766.31 on June 12, 2014, and that the notice was both timely and sufficient. Dr. Sevald followed her routine customary practice when seeing a new obstetrical patient which included giving the NICA brochure to the patient and having the patient sign the consent form, which Dr. Sevald witnessed on June 12, 2014. "Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove the conduct of the organization on a particular occasion was in

conformity with the routine practice." § 90.406, Fla. Stat.; see also Tabb, 880 So. 2d at 1259.

36. As to Good Samaritan, section 766.316 requires that "[e]ach hospital with a participating physician on its staff and each participating physician" shall provide notice.

37. On January 19, 2015, Cathy Pierre signed an acknowledgment form indicating that she received a brochure prepared by NICA from Good Samaritan. Her signature on the form raises a rebuttable presumption that the notice requirements of section 766.316 have been met. Accordingly, Good Samaritan contends that sufficient notice pursuant to Florida Statutes was given. Petitioners assert that Good Samaritan was under a duty to provide timely and sufficient notice to Ms. Pierre during her tour visit to the hospital on January 12, 2015, but failed to do so. Petitioners further argue that the notice provided on January 19, 2015, was inadequate, since it was given during a labor check, and only seven days prior to her scheduled induction.

38. In Weeks v. Florida Birth-Related Neurological Injury Compensation Association, 977 So. 2d 616, 618-619 (Fla. 5th DCA 2008), the court stated:

[T]he formation of the provider-obstetrical patient relationship is what triggers the obligation to furnish the notice. The determination of when this relationship commences is a question of fact. Once the

relationship commences, because [section 766.316] is silent on the time period within which notice must be furnished, under well-established principles of statutory construction, the law implies that notice must be given within a reasonable time." Burnsed v. Seaboard Coastline R. Co., 290 So. 2d 13, 19 (Fla. 1974); Concerned Citizens of Putnam County v. St. Johns River Water Mgmt. Dist., 622 So. 2d 520, 523 (Fla. 5th DCA 1993). The determination depends on the circumstances, but a central consideration should be whether the patient received the notice in sufficient time to make a meaningful choice of whether to select another provider prior to delivery, which is the primary purpose of the notice requirement.

39. In this case it is found that a "provider-obstetrical patient relationship" was not formed between Good Samaritan and Ms. Pierre until the labor check on January 19, 2015. Merely touring a hospital's physical plant is insufficient to establish a provider-obstetrical patient relationship. And while guests on the Special Deliveries Unit Tour are given the option of filling out pre-registration forms, Ms. Pierre chose not to do so.

40. On January 19, 2015, at which time the provider-obstetrical patient relationship was formed, Ms. Pierre was provided a copy of the NICA Peace of Mind Brochure and the Notice to Obstetrical Patient form which clearly states that Good Samaritan is a participant in the NICA Plan. Ms. Pierre's signature on the form acknowledging receipt of the NICA brochure

raises a rebuttable presumption that the notice requirements of NICA have been met. See § 766.316, Fla. Stat.

41. In addition to the presumption, the facts as found herein support the conclusion that Ms. Pierre was appropriately provided pre-delivery notice of NICA participation by Good Samaritan on the very day the provider-obstetrical patient relationship was formed. As such, Petitioner did not overcome the rebuttable presumption in favor of Good Samaritan that the NICA notice requirements were met.

42. Based upon the foregoing Findings of Fact and Conclusions of Law it is found that Intervenors provided legally sufficient notice to Ms. Pierre as required by section 766.316.

ORDER

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

1. The claim for compensation filed by Petitioners, as parents and natural guardians of Jadon Pierre, a minor, is compensable and is APPROVED.^{2/}

2. Intervenor, Good Samaritan Medical Center, Inc. complied with the statutory Notice requirements of the NICA Plan pursuant to section 766.316, Florida Statutes.

3. Intervenors, Joy Cavalaris, M.D. and Palm Beach Obstetrics and Gynecology, P.A., complied with the statutory

Notice requirements of the NICA Plan pursuant to section 766.316, Florida Statutes.

4. The parties are accorded 30 days from the date of this Order to resolve, subject to approval of the undersigned, 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 undersigned, and a hearing will be scheduled to resolve such issues. Once resolved, an award will be made consistent with section 766.31, Florida Statutes.

DONE AND ORDERED this 30th day of August, 2018, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of August, 2018.

ENDNOTES

^{1/} Statutory references herein are to the 2018 version of the Florida Statutes.

^{2/} Compensability of the claim was previously found and determined by this Court's Partial Summary Final Order of October 27, 2017.

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).