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MEMORANDUM

To: Kenney Shipley, Executive Director
Florida Birth-Related Neurological Injury Compensation Association

From: Wilbur E. Brewton, General Counsel
Florida Birth-Related Neurological Injury Compensation Association

Date: May 18, 2006

Re: Whether a circuit court proceeding must be abated pending a determination of compensability under the Florida Birth-Related Neurological injury Compensation Plan.

QUESTION

Whether a circuit court must abate a civil action upon motion by any party to the proceeding for a determination by an administrative law judge as to the compensability of the claim by the Florida Birth-Related Neurological Injury Compensation Plan.

ANSWER

Yes, absent subsequent judicial, legislative or administrative determination to the contrary, a circuit court is required by law to abate the action and relinquish jurisdiction to the administrative law judge for determination of whether a claim is compensable by the Plan. §§ 766.301 and 766.304, Fla. Stat. Failure to abate is a "depart[ure] from the essential requirements of law." University of Miami v. M.A., 793 So. 999, 1000 (Fla. 3d DCA 2001).

DISCLAIMER: *This legal opinion was prepared for the benefit of NICA and is not intended to be relied on by third parties. The purpose of providing this memorandum on the website is to provide general information. This memorandum is not intended to*

provide legal advice and you may not rely on this memorandum. You should consult your attorney, who may conduct independent legal research on this issue.

ANALYSIS

In 1988, the Florida Legislature created the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan"). The Legislature's intent in creating the Plan was to provide a system of limited compensation for certain birth-related neurological injuries on a no-fault basis to insulate obstetricians from malpractice claims in civil court stemming from such birth-related neurological injuries and thus, stabilize and reduce malpractice premiums for the providers of obstetrical services, by taking such claims out of the civil court system. See §§ 766.301 and 766.302(7), Fla. Stat. In Fluet v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 788 So. 2d 1010, 1011 (Fla. 2d DCA 2001), the Court specifically stated:

> This [NICA] statutory plan provides an exclusive no-fault benefit in lieu of the claimant's traditional common law tort rights. *See* § 766.303(1), (2); *Florida Birth-Related Neurological Injury Compensation Ass'n v. McKaughan*, 668 So. 2d 974, 977 (Fla. 1996). This legislature created this plan to protect physicians from the skyrocketing malpractice insurance premiums paid by obstetricians and to assure that Floridians would have an adequate supply of these essential health services. [citations omitted] Although the benefit paid under the plan is more restricted than the remedies provided by tort law, the plan does not require the claimant to prove malpractice and provides a streamlined administrative hearing to resolve the claim. *See McKaughan*, 688 So. 2d at 977. [Emphasis supplied.]

The intent of the Plan is to provide a "streamlined administrative" process to resolve the claims as an alternative to civil actions. As such, the Administrative Law Judge (ALJ) is provided jurisdiction to determine whether a claim is compensable under the Plan.

At one point a jurisdictional issue arose as to whether a civil action could proceed with the circuit court determining compensability under NICA or whether such determination vested exclusively with the ALJ. The Supreme Court addressed this issue in Florida Birth-Related Neurological Injury Compensation Ass'n v. McKaughan, 668 So. 2d 974 (Fla. 1996), in which the Court answered the following question of great public importance:

> Does an administrative hearing officer have the exclusive jurisdiction to determine whether an injury suffered by a new-born infant does or does not constitute a "Birth-Related Neurological Injury" within the meaning of the Florida Birth-Related Neurological Injury Compensation Plan, Sections 766.301-.316, Florida Statutes (1993), so that a circuit court in a medical malpractice action specifically alleging an injury outside the coverage of the plan must automatically abate that action when the Plan's immunity is raised as an affirmative defense pending a determination by the hearing officer as to the exact nature of the infant's injury?
>
> The Court answered this question in the affirmative. The Court held that:
>
> . . . the NICA plan does not vest exclusive jurisdiction in an administrative hearing officer to determine the nature of an injury suffered by a new-born infant when a medical malpractice action is filed and a defendant health care provider raises the exclusive remedy of the NICA plan as an affirmative defense.

Subsequently, the Florida Legislature specifically overruled the Supreme Court's holding in McKaughan by passing amendments to Sections 766.301 and 766.304, Florida Statutes. In 1998, Chapter 98-113, Laws of Florida, amended Section 766.301(d), Florida Statutes, to read:

> The costs of birth-related neurological injury claims are particularly high and warrant the establishment of a limited system of compensation irrespective of fault. The issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding. [Underline indicates amendment.]

Also, Chapter 98-113, Laws of Florida, amended Section 766.304, Florida Statutes, to read, in pertinent part:

> The administrative law judge shall hear and determine all claims filed pursuant to ss. 766.301-766.316 and shall exercise the full power and authority granted to her or him in chapter 120, as necessary, to carry out the purposes of such sections. The administrative law judge has exclusive

> jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303. . . . [Underline indicates amendment.]

Chapter 98-113, Laws of Florida (1998), specifically provides that:

> The amendments to sections 766.301 and 766.304, Florida Statutes, shall take effect July 1, 1998, and shall apply only to claims filed after that date and to that extent shall apply retroactively regardless of the date of birth. [Emphasis supplied.]

The Legislature passed the above-referenced amendments specifically to overrule the holding in McKaughan as evidenced by the staff bill analysis which states:

> The bill provides that the issue of whether a claim is covered by NICA must be determined exclusively in an administrative proceeding. Essentially, the bill would overturn the *McKaughan* decision. Additionally, the bill provides that if the administrative law judge determined that the claimant is entitled to compensation under the NICA plan, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of ss. 766.301-766.316, F.S. In no case may a civil action be brought until an administrative judge has determined that the claimant is not entitled to compensation under the NICA plan.

See Judiciary Comm., CS/SB 1070 (1998) Staff Analysis and Economic Impact Statement (April 9, 1998) (on file with the committee).

In 2000, the Fifth District Court of Appeal addressed the 1998 amendments in O'Leary v. Florida Birth-Related Neurological Injury Compensation Ass'n, et al., 757 So. 2d 624 (Fla. 5th DCA 2000). Although the main issue in O'Leary was whether the ALJ had exclusive jurisdiction to determine whether adequate NICA notice was provided, the Court addressed the ALJ's jurisdiction, in general, in light of the 1998 amendments.

The Court stated:

> Section 766.304 states that the administrative law judge shall hear all claims and shall exercise the full power and authority granted that is necessary to carry out the purposes of the section. The section further grants exclusive jurisdiction to the administrative law judge to determine whether a claim is compensable and precludes any civil action until the issue of compensability is determined. We believe that under these amendments, any issue raising the immunity of a health care provider, including the issue of whether the health provider satisfied the notice requirements of the Plan is an issue to be decided by the administrative law judge as one which relates to the question of whether the claim is compensable under the Plan.

O'Leary at 627. On the basis of O'Leary, the Third District Court of Appeal held that the denial of a motion to abate a circuit court action for a determination of compensability under NICA "departed from the essential requirements of law." University of Miami v. M.A., 793 So. 2d 999, 1000 (Fla. 3d DCA 2001); see also Weinstock, M.D. v. Houvardas, 924 So. 2d 982 (Fla. 2d DCA 2006)[1].

In 2006, the Florida Legislature enacted Chapter 2006-8, Laws of Florida, which adds subsection (d) to Section 766.309(1), Florida Statutes, and provides:

> (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 findings.

Further, in Section 2 of Chapter 2006-8, Laws of Florida, the Legislature provides that:

> It is the intent of the Legislature that the amendment to s. 766.309, Florida Statutes, contained in the act, clarifies that since July 1, 1998, the administrative law judge has had the exclusive jurisdiction to make factual

1 This case was decided prior to the enactment of Ch. 2006-8, Laws of Florida, which clarifies that the ALJ has had the exclusive jurisdiction to determine notice since 1998.

determinations as to whether the notice requirements in s. 766.316, Florida Statutes, are satisfied.

Thus, an administrative law judge has the exclusive jurisdiction to determine whether a claim is compensable under the Plan and whether the notice requirements of Section 766.316, Florida Statutes, are satisfied. A circuit court lacks jurisdiction to make these determinations.

CONCLUSION

Based on the foregoing, the administrative law judge has the exclusive jurisdiction to determine if a claim is compensable under the Plan and whether the notice requirements in s. 766.316, Florida Statutes, are satisfied. Therefore, when a circuit court is presented with a motion to abate for the purpose of seeking a determination by an ALJ of compensability under the Plan, as well as, whether the notice requirements of Section 766.316, Florida Statutes, were satisfied, a circuit court judge is required to abate the circuit court action pending the determinations by the ALJ.

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