2019 WL 4047630
District Court of Appeal of Florida, Third District.

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, et al., Appellants,
v.
Luis Arturo JIMENEZ, et al., Appellees.

No. 3D18-1814
|
Opinion filed August 28, 2019

Synopsis

Background: Florida Birth-Related Neurological Injury Compensation Association (NICA) and hospital appealed ALJ's final order granting parents' motion for voluntary dismissal of petition for benefits under Florida Birth-Related Neurological Injury Compensation Plan with prejudice.

[Holding:] The District Court of Appeal held that statute permitting bifurcation of administrative proceedings to consider compensability under Plan before determining award amount allowed parents to voluntarily dismiss claim with prejudice before award amount was determined.

Affirmed.

Salter, J., specially concurred and filed opinion.

West Headnotes (2)

[1] Appeal and Error
Statutory or legislative law

In interpreting the statutes comprising the Florida Birth-Related Neurological Injury Compensation Plan, the District Court of Appeal's standard of review is de novo. Fla. Stat. Ann. § 766.301 et seq.

[2] Health
Injury compensation funds

Statute permitting bifurcation of Florida Birth-Related Neurological Injury Compensation Association (NICA) administrative proceedings to consider compensability/eligibility before determining an award amount allowed parents to voluntarily dismiss administrative claim for benefits under Florida Birth-Related Neurological Injury Compensation Plan with prejudice before ALJ made determination of amount of compensation; parents had decided to reject any administrative award and to file civil action. Fla. Stat. Ann. §§ 766.303(2), 766.309(4), 766.316.

An Appeal from the State of Florida, Division of Administrative Hearings. Lower Tribunal No. 16-3531N

Attorneys and Law Firms

Frank, Weinberg & Black, P.L., and David W. Black (Plantation); Brewton Plante, P.A., Wilbur E. Brewton and Kelly B. Plante (Tallahassee); Falk, Waas, Hernandez & Solomon, P.A., Scott E. Solomon, Coral Gables and Paige I. Saperstein, for appellants.

Diez-Arguelles & Tejedor, P.A., and Maria D. Tejedor (Orlando); Fox & Loquasto, LLC, Wendy S. Loquasto and Susan W. Fox (Tallahassee), for appellees.

Before SALTER, FERNANDEZ and LINDSEY, JJ.

Opinion

PER CURIAM.

*1 Florida Birth-Related Neurological Injury Compensation Association ("NICA") appeals an Administrative Law Judge's ("ALJ's") final order granting the appellees' motion for voluntary dismissal of their statutory claim with prejudice. Finding no departure from the terms of the Florida Birth-Related Neurological Injury Compensation Plan, sections 766.301-.316, Florida Statutes (2018) (the "Plan"), [1] we affirm the final order.

Facts and Proceedings Below

The appellees ("Parents") are the parents of a minor child (the "Child") who sustained a birth-related neurological injury.

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NICA is the statutory entity created by the Plan to (a) collect assessments from the licensed physicians and hospitals practicing obstetrics or delivering obstetrical services, and (b) pay administratively-allowed claims, all as described in the Plan. [2]

The Child was born on April 8, 2014, prematurely, and thereafter was diagnosed with cerebral palsy. In 2016, the Parents filed a "Petition Under Protest" pursuant to the Plan, expressly disclosing their contentions that the Plan is unconstitutional and that they claim a right to file a lawsuit in court without pursuing the statutory, exclusive administrative route established by the Legislature.

A year later, the ALJ issued a partial summary final order determining that the Child had sustained a qualifying birth-related neurological injury under the Plan, and that the Parents' claim was thus compensable by NICA. That order retained jurisdiction for further determinations regarding (a) the Hospital's and physician's compliance with the Plan's notice requirement in 766.316, and (b) the amounts and terms of an award under 766.31.

In 2018, the ALJ issued a summary final order determining that the statutory notice requirements were excused under 766.316 due to the Child's emergency medical condition at the time of treatment. That order gave the parties 30 days to agree, subject to approval by the ALJ, on the amount and payment of an administrative award, including the Parents' reasonable expenses and statutory attorney's fees incurred and owing.

In the absence of such an agreement, the ALJ indicated that a hearing would be scheduled and "an award made consistent with section 766.31." In response, the Parents advised NICA and the ALJ that they "have affirmatively elected to not accept any compensation or award from the [Plan] and instead elected to pursue a civil action pursuant to section 766.303." That statute includes an exception to the otherwise-applicable exclusive remedy provided by the Plan:

> [A] civil action shall not be foreclosed where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property, provided that such suit is filed prior to and in lieu of payment of an award under ss. 766.301–766.316. Such suit shall be filed before the award of the [Division of Administrative Hearings of the Department of Management Services] becomes conclusive and binding as provided for in s. 766.311.

***2** § 766.303(2), Fla. Stat.

The Parents' response further stated that they "have unequivocally expressed their intent to not accept any future award under the Plan." After filing that response, the Parents filed a notice of voluntary dismissal of the petition with prejudice, confirming again that they were not accepting any compensation or award from the Plan.

NICA and the Hospital moved to strike the Parents' notice of voluntary dismissal with prejudice, contending that any election of remedies must be made in circuit court, and that 766.31(1) obligates the ALJ to determine the amount of an award in the case of an eligible claimant.

The ALJ then entered a final order of dismissal with prejudice acknowledging the Parents' statutory right to pursue a civil suit on the grounds set forth in 766.303(2) at any time before the determination of an award under 766.31. [3] NICA and the Hospital have appealed that final administrative order.

Standard of Review

[1] In interpreting the statutes comprising the Plan, the Court's standard of review is de novo. Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 948 So. 2d 705, 709-10 (Fla. 2007).

Analysis

NICA and the Hospital contend that the language of 766.31(1) is mandatory: the use of the term "shall" signifies the Legislature's unambiguous intention that the ALJ, though given the power to bifurcate the proceeding under 766.309(4), must "make an award providing compensation" including the enumerated categories of expense, including "reasonable attorney's fees, which shall be subject to the approval and award of the administrative law judge."

766.309(1) also states that the ALJ "shall make the following determinations," including (in 766.309(1)(c)) "[h]ow much compensation, if any, is awardable pursuant to s. 766.31."

In response, the Parents raise two issues. First, they challenge NICA's standing to appeal the dismissal,

> because it is not adversely affected by the order since the parents expressly waived any right to NICA benefits in order to pursue the available civil remedy, and no NICA benefits will ever be paid to them for [the Child].

[2] Second, the Parents interpret 766.309(4), permitting bifurcation of NICA administrative proceedings to consider compensability/eligibility before determining an award amount, "if any," to allow claimants to dismiss their petitions before the second phase proceeds. Relying on Anderson v. Helen Ellis Memorial Hospital Foundation, Inc., 66 So. 3d 1095 (Fla. 2d DCA 2011), the Parents maintain that for reasons of futility, efficiency, and economy, they should not be forced to go through a compensation determination that they have already decided to reject.

***3** Finding the Parents' second argument, Anderson, and the ALJ's analysis to be consistent with the terms of the Plan, we affirm the final order of dismissal with prejudice. [4]

SALTER, J. (specially concurring).
I concur that we must affirm the Administrative Law Judge's ("ALJ's") final order granting the appellees' motion for voluntary dismissal of their statutory claim with prejudice. This special concurrence identifies a concern regarding the administration of the Florida Birth-Related Neurological Injury Compensation Plan, sections 766.301-.316, Florida Statutes (2018) (the "Plan"), [5] and the election of remedies available to claimants under the Plan.

Election Before Award

NICA and the Hospital contend that the language of 766.31(1) is mandatory: the use of the term "shall" signifies the Legislature's unambiguous intention that the ALJ, though given the power to bifurcate the proceeding under 766.309(4), must "make an award providing compensation" including the enumerated categories of expense, including "reasonable attorney's fees, which shall be subject to the approval and award of the administrative law judge."

766.309(1) also states that the ALJ "**shall** make the following determinations," including (in 766.309(1)(c)) "[h]ow much compensation, if any, is awardable pursuant to s. 766.31." [6] In Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Division of Administrative Hearings, 948 So. 2d 705, 711 (Fla. 2007), the Florida Supreme Court detailed the procedure for the administrative resolution of claims under the Plan. The ALJ is to determine whether the claim is a birth-related neurological injury, then determine whether the injury was caused by a participating medical provider as defined in 766.302, and "[f]inally, if the first and second requirements are met, the ALJ **must determine** the amount of the award without any regard for fault." Id.

NICA and the Hospital argue persuasively that the statutory reference to bifurcation and an award "if any" refer to the possibility that the ALJ might render a finding in the initial phase (in a different case than this) of "not compensable" or of ineligibility based on lack of the required notice.

In the present case, the ALJ found that under a "plain reading of the statute" the Parents could make their election before the second phase of the bifurcated proceeding, and were entitled to voluntarily dismiss the administrative petition "prior to an ALJ **determining** an award under section 766.31." My concern is with the consequences of such a determination.

Exclusivity and Information

The mandatory language within the Plan can be read to require the ALJ and parties to compute the administrative compensation provided by the Plan if the compensability and notice requirements have been met. 766.303(2) allows the claimants to make an election to pursue a civil action in which they will be required to prove "clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property, provided that such suit is filed prior to and in lieu of **payment** of an award under [the Plan]." That provision does not specify that such an election should bar the computation or **determination** of an award.

***4** The mandatory language of 766.31(1) uses yet another term, directing that the ALJ **shall make an award** if the

predicate requirements have been met (as here). But "making an award," is not synonymous with "paying an award." And to parents faced with the special needs of a child with birth-related injuries (and typically, lifelong costs and expenses), their election to proceed with a lawsuit versus acceptance of the administrative award involves a dramatic and high-stakes gamble.

The ALJ's conclusion, though arguably not the basis for the final order of dismissal, is incorrect: "Indeed, if [the Parents] waited until after an ALJ determined an award pursuant to section 766.31, they would be precluded from pursuing such a civil suit." It is incorrect because the computation, determination, or "making" of an award is not the same as payment of the award. It is "payment," not the occurrence of any of the other precursors to payment, that bars the prosecution of a civil suit seeking a judicial remedy rather than the exclusive administrative remedy, as specified in 766.303(2). NICA maintains that, under 766.311(1), an award by the ALJ would not be "conclusive and binding as to all questions of fact" until 30 days after issuance of the award (thus allowing time for an appeal and suspending **payment** during that period).

NICA contends the ALJ must determine or "make" an award to these Parents, but NICA has not insisted that the award be "paid" immediately. NICA does not seek to deprive the Parents of their right to sue based on the higher evidentiary and culpability standards set forth in 766.303(2), but rather to assure that the Parents know what they are walking away from, what additional standard of proof they are assuming, and the consequence of that election.

NICA also contends in its briefing here that the premature dismissal of the Parents' petition with prejudice may re-open findings conclusively determined in the exclusive administrative proceeding:

> NICA is concerned that dismissing the Petition or claim with prejudice may appear to undo the previous ruling and/or confuse the circuit court, as to the finality of the finding of compensability and notice (which shields the persons or entities involved in the birth from circuit actions in ordinary negligence under Section 766.303(2), Florida Statutes), thereby frustrating one of the purposes for which the NICA statute was enacted.

If the award is computed but not paid, no harm is discernible, in my view.[7] The Parents would then be provided a very specific summary of payments and future benefits for their disabled Child. Information for decision is a good thing.

Heightened Burden and Risk of No Recovery in a Civil Action

The administrative award is one choice, and the prospect of a civil jury verdict and judgment, less the contingent attorney's fees which might be paid from the judgment, are the other. It is essential that the Parents understand the difference between a "no-fault" remedy and one which requires proof of "bad faith," "malicious purpose," or "willful and wanton disregard of human rights, safety, or property," on the part of a medical professional or hospital, by "clear and convincing evidence." There is a possibility of a defense verdict in circuit court, and if such a verdict is rendered the administrative remedy is no longer available.

***5** These pros and cons, of course, fall squarely within the professional responsibility of the attorneys advising the Parents. I raise them only to underscore the significance of "informed consent" as defined in the preamble to Chapter 4 of the Rules of Professional Conduct and in Rule Regulating the Florida Bar 4-1.4(b). An informed decision also requires an explanation of the differences between the administratively-awardable attorney's fees specified in 766.31(1)(c) of the Plan and a "contingent fee" as specified in Rule Regulating the Florida Bar 4-1.5(f).

Conclusion

The terms currently in the Plan relating to the right of claimants to elect a judicial rather than administrative remedy in a bifurcated proceeding compel us to affirm the final administrative order of dismissal in this case. However, given the mandatory language of the Plan's terms and its repeated directive that the ALJ "shall" determine an award, NICA's and the Hospital's principled position may warrant a clarifying amendment by the Legislature.

The Legislature could, for example, clarify that the civil action described in 766.303(2) may not proceed until (a) an

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administrative award has been determined and issued (with any payments to be suspended for 30 days to permit an appeal or the circuit court election), and (b) the claimants have signed and filed in the administrative case a written election of the circuit court alternative as disclosed to them by the Plan and their counsel. [8] In my view, minor modifications along these lines would clarify the Legislative intent in the Plan and help future claimants understand the enormous consequences of the choice when presented to them.

All Citations

--- So.3d ----, 2019 WL 4047630, 44 Fla. L. Weekly D2193

Footnotes

1 The Florida Legislature enacted the Plan in 1988, in response to the rapidly increasing costs of insurance coverage for physicians practicing obstetrics as "high-risk medical specialists." The numeric statutory references in this opinion are to the Plan as in effect continuously from 2014 to the present.

2 An intervenor in the administrative case, South Miami Hospital ("Hospital"), has filed a notice of joinder in NICA's appeal and position.

3 The administrative case was bifurcated, a procedure expressly authorized by 766.309(4), such that compensability and notice were addressed before consideration of the amount of any award.

4 In a similar appeal by NICA, the Fifth District Court of Appeal affirmed, per curiam, a final administrative order dismissing a bifurcated petition under the Plan before the issuance of an award. See Fla. Birth-Related Neurological Injury Comp. Ass'n v. Johnson, No. 5D18-2551, 2019 WL 2323734 (Fla. 5th DCA May 28, 2019).

5 As in the majority opinion, the numeric statutory references in this opinion are to the Plan as in effect continuously from 2014 to the present.

6 Words in bold in this excerpt and throughout this specially concurring opinion are for emphasis rather than in the cited text.

7 The Parents argue that the determination process is a waste of scarce resources. Because damages must be proven in a subsequent circuit court case anyway, and the incremental ALJ time is modest, I find this argument unpersuasive.

8 The Clerk of this Court shall serve a copy of this opinion on the Office of Legislative Affairs, Office of State Courts Administrator, Tallahassee, to permit consideration of the concerns addressed in this special concurrence.

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