

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SAMUEL BROUGHTON and ANGELA )  
BROUGHTON, as parents and natural )  
guardians of EMMANUEL BROUGHTON, )  
a deceased minor, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 00-4811N  
 )  
FLORIDA BIRTH-RELATED NEUROLOGICAL )  
INJURY COMPENSATION ASSOCIATION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a final hearing in the above-styled case on March 14, 2001, by video teleconference, with sites in Pensacola and Tallahassee, Florida.

APPEARANCES

For Petitioner: Samuel W. Bearman, Esquire  
1015 North 12th Avenue  
Pensacola, Florida 32501

For Respondent: James Bruce Culpepper, Esquire  
Akerman, Senterfitt & Eidson, P.A.  
301 South Bronough Street, Suite 200  
Post Office Box 10555  
Tallahassee, Florida 32302-2555

STATEMENT OF THE ISSUE

At issue in this proceeding is whether Emmanuel Broughton, a deceased minor, weighed at least 2,500 grams at birth.

PRELIMINARY STATEMENT

On December 1, 2000, Samuel Broughton and Angela Broughton, as parents and natural guardians of Emmanuel Broughton, a deceased minor, filed a claim with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on December 5, 2000. NICA reviewed the claim, and on December 19, 2000, gave notice that it had "determined that such claim is not a 'birth related neurological injury' within the meaning of Section 766.302(2), Florida Statutes (1993), inasmuch as the infant . . . did not weigh at least 2,500 grams at birth," and requested that "an order [be entered] setting a hearing in this cause on the issue of the compensability of this claim." Such a hearing was held on March 14, 2001.

At hearing, the parties stipulated to the facts set forth in paragraphs one and two of the Findings of Fact. Petitioners called no witnesses; however, Petitioners' Exhibit 1 (the medical records, Tabs 6-10, filed with DOAH on December 5, 2000) was received into evidence. Respondent called no witnesses and offered no exhibits.

The transcript of the hearing was filed April 9, 2001, and the parties were accorded ten days from that date to file

proposed final orders. The parties elected to file such proposals and they have been duly considered.

#### FINDINGS OF FACT

1. Samuel Broughton and Angela Broughton, are the parents and natural guardians of Emmanuel Broughton (Emmanuel), a deceased minor. Emmanuel was born a live infant on March 19, 1997, at Sacred Heart Hospital, a hospital located in Pensacola, Florida, and he died March 21, 1997.

2. Emmanuel's weight at birth was 1,395 grams.<sup>1</sup>

#### CONCLUSIONS OF LAW

3. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Section 766.301, et seq., Florida Statutes.

4. The Florida Birth-Related Neurological Injury Compensation Plan (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. Section 766.303(1), Florida Statutes.

5. The injured "infant, his personal representative, parents, dependents, and next of kin," may seek compensation under the Plan by filing a claim for compensation with the Division of Administrative Hearings within five years of the infant's birth. Sections 766.302(3), 766.303(2), 766.305(1), and

766.313, Florida Statutes. The Florida Birth-Related Neurological Injury Compensation Association (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." Section 766.305(3), Florida Statutes.

6. 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 administrative law judge to whom the claim has been assigned. Section 766.305(6), Florida Statutes. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned administrative law judge in accordance with the provisions of Chapter 120, Florida Statutes. Sections 766.304, 766.307, 766.309, and 766.31, Florida Statutes.

7. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, to mean:

. . . injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which renders the infant permanently and

substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

8. As the claimants, the burden rested on Petitioners to demonstrate entitlement to compensation. Section 766.309, Florida Statutes. See also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977), ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.") Here, Petitioners failed to sustain that burden.

9. As heretofore noted in the Findings of Fact, the parties stipulated and the proof otherwise demonstrated that Emmanuel's birth weight was 1,395 grams. At such weight, Emmanuel was below the 2,500 gram minimum established by Section 766.302(2), Florida Statutes. Consequently, Emmanuel's injury was not shown to be a "birth-related neurological injury" as defined by law, and the subject claim is not compensable under the Plan.<sup>2</sup> Sections 766.302(2) and 766.309(1), Florida Statutes.

10. Where, as here, the administrative law judge determines that " . . . the injury alleged is not a birth-related neurological injury . . . he [is required to] enter an order [to such effect] and . . . cause a copy of such order to be sent immediately to the parties by registered or certified mail." Section 766.309(2), Florida Statutes. Such an order constitutes

final agency action subject to appellate court review. Section 766.311(1), Florida Statutes.

CONCLUSION

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

ORDERED that the petition for compensation filed by Samuel Broughton and Angela Broughton, as parents and natural guardians of Emmanuel Broughton, a deceased minor, be and the same is hereby denied with prejudice.

DONE AND ORDERED this 20th day of April, 2001, in Tallahassee, Leon County, Florida.

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WILLIAM J. KENDRICK  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of April, 2001.

ENDNOTE

1/ Emmanuel was one of twin boys delivered March 19, 1997, to Mrs. Broughton. Emmanuel (identified as Twin A in the medical records) weighed 1,395 grams at birth and Samuel O'Neil Broughton, III (identified as Twin B in the medical records) weighed 1,365 grams at birth.

2/ In reaching such conclusion, Petitioners' argument that in the case of multiple births the combined weight of the infants, as opposed to the individual weight of the injured infant, should be considered when resolving whether the minimum requirement of 2,500 grams has been met has not been overlooked. Such argument is, however, contrary to the plain and unambiguous language chosen by the legislature to define "birth-related neurological injury," and must be rejected. State v. Egan, 287 So. 2d 1,4 (Fla. 1973) ("Where the legislative intent as evidenced by a statute is plain and unambiguous, then there is no necessity for any construction or interpretation of the statute, and the courts need only give effect to the plain meaning of its terms.")

COPIES FURNISHED:  
(By certified mail)

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Sections 120.68 and 766.311, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 120.68(2), Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992). The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.