

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARL W. CROSS and MYLENE C.)
CROSS, as parents and natural)
guardians of AARON COLBY CROSS,)
a minor,)
)
 Petitioners,)
)
vs.)
)
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
 Respondent,)
)
and)
)
)
ST. JOSEPH'S HOSPITAL, INC.,)
)
 Intervenor.)
)
_____)

Case No. 01-4878N

AMENDED FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a hearing in the above-styled case on September 4, 2002, and May 16, 2003, by teleconference.

APPEARANCES

For Petitioners: Raymond J. Greene, Esquire
9525 Blind Pass Road, No. 507
St. Petersburg Beach, Florida 33706

For Respondent: Stanley L. Martin, Esquire
Phelps Dunbar, LLP
100 South Ashley Drive, Suite 1900
Tampa, Florida 33602

For Intervenor:¹ Kirk S. Davis, Esquire
Akerman, Senterfitt & Eidson, P.A.
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STATEMENT OF THE CASE

At issue in the proceeding is whether Aaron Colby Cross, a minor, suffered an injury for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On October 9, 2001, Carl W. Cross and Mylene C. Cross, as parents and natural guardians of Aaron Colby Cross (Aaron), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (the Plan).

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA), with a copy of the claim on December 24, 2001.² NICA reviewed the claim and on February 27, 2002, 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," and requested that "an order [be entered] setting a hearing in this cause on the issue of compensability of this claim." Such a hearing was duly-noticed and held on September 4, 2002.

At hearing, Petitioners appeared through counsel, but offered no evidence. Respondent, given Petitioners' failure to offer proof, declined the opportunity to offer any evidence. The transcript of the hearing was not ordered, and the parties waived the opportunity to submit proposed final orders.

On September 6, 2002, a Final Order was entered which resolved that, by failing to offer any proof, Petitioners failed to demonstrate that Aaron suffered a "birth-related neurological injury." Consequently, the claim was dismissed.

Thereafter, on October 1, 2002, St. Joseph's Hospital, Inc. (St. Joseph's) filed a Petition to Reopen Administrative Proceeding, Set Aside Final Order, Request for Rehearing, and Motion to Intervene, and on October 3, 2002, filed a Supplemental Petition to Reopen Administrative Proceeding, Set Aside Final Order, Request for Rehearing, and Motion to Intervene. Subsequently, on January 22, 2003, a hearing was held to address the pending motions, and an Order was entered on January 28, 2003, as follows:

. . . Upon consideration of the pending petitions/motions, and consistent with the discussion had at hearing, it is

ORDERED that:

1. St. Joseph's Motion to Intervene is, without objection, granted.
2. Ruling is deferred on St. Joseph's Petition to Reopen Administrative Proceeding, Set Aside Final Order, and Request for Rehearing, as well as St. Joseph's

Supplemental Petition to Reopen Administrative Proceeding, Set Aside Final Order, and Request for Rehearing.

3. By January 31, 2003, the parties will have resolved, among themselves, whether there are any disputes that, as alleged by St. Joseph's, the hospital failed to receive notice of the filing of the claim for compensation and, if the record is reopened, whether any party intends to offer any additional proof regarding the issue of compensability.

4. At 9:30 a.m., February 4, 2003, a status conference will be held, by telephone. Respondent shall make the necessary arrangements for the conference call.

Consistent with the Order of January 28, 2003, a status conference was held on February 4, 2003. Given the agreements reached at hearing, as well as the Parties' Consent to Reopening NICA Action, filed February 3, 2003, an Order was entered on February 4, 2003, that provided, as follows:

1. St. Joseph's Petition to Reopen Administrative Proceeding and Supplemental Petition to Reopen Administrative Proceeding are granted, and the Final Order heretofore entered on September 6, 2002, is vacated. Given such ruling, it is unnecessary to address St. Joseph's Request for Rehearing or Supplemental Request for Rehearing.

2. At 9:30 a.m., February 27, 2003, a status conference will be held, by telephone. St. Joseph's counsel shall make the necessary arrangements for the conference call.

On February 27, 2003, a status conference was held, as scheduled. Consistent with the discussions had at such hearing, an Order was entered on February 28, 2003, that provided, as follows:

. . . on or before March 14, 2003, Intervenor shall advise the undersigned in writing whether it proposes to offer any evidence, apart from that offered at the hearing heretofore held on September 4, 2002, for the undersigned to consider in resolving whether the subject claim is compensable.

Thereafter, following a requested extension of time, Intervenor filed its response to the Order of February 28, 2003, and stated:

The intervenor, St. Joseph's Hospital, Inc., hereby notifies the court that it will be offering no proof at the final hearing in this matter.

Following the filing of Intervenor's response, a hearing was held on May 16, 2003. At hearing, Petitioners, Respondent, and Intervenor agreed that no further proof would be offered in this case, and that the record be closed. The transcript of that hearing was not ordered, and the parties waived the opportunity to submit proposed orders.

FINDING OF FACT

1. As observed in the preliminary statement, neither Petitioners nor any other party offered any proof. Consequently, it must be resolved that the record fails to demonstrate that

Aaron Colby Cross, a minor, suffered a "birth-related neurological injury" as alleged in the claim for benefits.

CONCLUSIONS OF LAW

2. 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.

3. The Florida Birth-Related Neurological Injury Compensation 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.

4. 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 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, 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.

5. 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.

6. In discharging this responsibility, the administrative law judge must make the following determination based upon the 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. 766.303(2).

(b) 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 midwife 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.

Section 766.309(1), Florida Statutes. An award may be sustained only if the administrative law judge concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth." Section 766.31(1), 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. See Section 766.309(1)(a), 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.")

9. Here, by failing to offer any proof, Petitioners failed to sustain their burden to demonstrate that Aaron suffered a "birth-related neurological injury." Accordingly, the subject claim has not been shown to be compensable under the Plan.

10. Where, as here, the proof fails to support the conclusion that the infant suffered a "birth-related neurological injury," the administrative law judge [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 Carl W. Cross and Mylene C. Cross, as parents and natural guardians of Aaron Colby Cross, a minor, is hereby denied with prejudice.

DONE AND ORDERED this 19th day of May, 2003, in Tallahassee,
Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of May, 2003.

ENDNOTES

1/ Mr. Davis represented Intervenor at the hearing held May 16, 2003. Intervenor was not a party at the time of the September 4, 2002, hearing.

2/ The delay in serving NICA, as well as the other persons or entities named in Section 766.305(2), Florida Statutes, was occasioned by Petitioners' failure to provide DOAH with the medical records when they filed their petition. Those records were filed December 20, 2001.

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.