

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANGEL LEWIS and JERRY LEWIS, as)
parents and natural guardians)
of HUNTER LEWIS, a minor,)
)
Petitioners,)
)
vs.) Case No. 02-2147N
)
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 hearing
in the above-styled case on November 20, 2003, in Tallahassee,
Florida.

APPEARANCES

For Petitioners: Ken Davis, Esquire
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and

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For Respondent: Ronald A. Labasky, Esquire
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STATEMENT OF THE ISSUE

Whether Hunter Lewis, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On May 22, 2002, Angel Lewis and Jerry Lewis, individually and as parents and natural guardians of Hunter Lewis (Hunter), a minor, filed a petition (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 May 23, 2002. NICA reviewed the claim and, following a number of agreed time extensions, on February 3, 2003, 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 case on the issue of . . . compensability." Following a number of continuances, such a hearing was ultimately held on November 20, 2003.

At hearing, the parties stipulated to the factual matters contained in paragraphs 1 and 2 of the Findings of Fact, and

Petitioners' Exhibit 1 (the medical records filed with DOAH on May 22, 2002), Exhibit 2 (the Verified Medical Opinion of Richard J. Inwood, M.D.), and Exhibit 3 (the deposition of Donald C. Willis, M.D.), and Respondent's Exhibit 1 (the deposition of Paul R. Carney, M.D.), were received into evidence. No witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed December 3, 2003, and the parties were accorded 10 days from that date to file proposed orders. Neither party elected to file such a proposal.

FINDINGS OF FACT

Fundamental findings

1. Petitioners, Angel Lewis and Jerry Lewis, are the parents and natural guardians of Hunter Lewis, a minor. Hunter was born a live infant on June 2, 2000, at Tallahassee Memorial Hospital, a hospital located in Tallahassee, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Hunter's birth was Arthur S. Clements, M.D., who, at all times material hereto, was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.¹

Coverage under the Plan

3. Pertinent to this case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as an "injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired." § 766.302(2), Fla. Stat. See also §§ 766.309 and 766.31, Fla. Stat.

The cause and timing, as well as the significance of Hunter's neurologic impairment

4. To address the cause and timing of Hunter's neurologic impairment, as well as its significance, Petitioners offered selected medical records relating to Hunter's birth and subsequent development (Petitioners' Exhibit 1); the Verified Medical Opinion of Richard J. Inwood, M.D., a neonatologist (Petitioners' Exhibit 2); and the deposition of Donald C. Willis, M.D., an obstetrician (Petitioners' Exhibit 3). In turn, Respondent offered the deposition of Paul R. Carney, M.D., a pediatric neurologist (Respondent's Exhibit 1).

5. As for the significance of Hunter's impairments, it was Dr. Carney's opinion, based on the results of his neurologic evaluation of November 21, 2002, that Hunter's assessment "indicates substantial cognitive and language impairment," but

"very mild long tract neurological findings." Dr. Carney described Hunter's developmental delay as static, as opposed to progressive, and he ventured no opinion as to the cause or timing of Hunter's impairments. As for Dr. Inwood, he was of the opinion that:

. . . Hunter Lewis [] was delivered by induced labor prior to 38 weeks and had immature lungs. Because of the immaturity of the lungs he suffered hypoxic insult and, to a reasonable degree of medical probability, sustained significant neurological injury. This injury would not have occurred had his delivery been delayed until he had demonstrated lung maturity. His problems are not congenital and did not occur during labor or delivery, but rather after delivery

Notably, Dr. Inwood did not further address Hunter's neurologic injury or, stated otherwise, did not speak to whether in his opinion, Hunter suffered both cognitive and motor impairment and, if so, the significance of each. As for Dr. Willis, he was of the opinion that the medical records revealed no evidence of oxygen deprivation or other trauma associated with labor, delivery, or resuscitation immediately following Hunter's birth. Significantly, the medical records are consistent with the opinions of Doctors Inwood and Willis that the cause and timing of Hunter's impairment was not associated with labor, delivery, or resuscitation, and with the opinion of Dr. Carney that, while

Hunter may demonstrate substantial cognitive delay, his motor impairment is mild.

6. Given the record, it must be concluded that the proof demonstrated, more likely than not, that Hunter's impairments were not occasioned by an injury to the brain caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital, and that he is not permanently and substantially physically impaired.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 766.301, et seq, Fla. Stat.

8. 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. § 766.303(1), Fla. Stat.

9. 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. §§ 766.302(3), 766.303(2), 766.305(1), and 766.313, Fla. Stat. 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."

§ 766.305(3), Fla. Stat.

10. 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. § 766.305(6), Fla. Stat. 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. §§ 766.304, 766.309, and 766.31, Fla. Stat.

11. 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.

§ 766.309(1), Fla. Stat. 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."

§ 766.31(1), Fla. Stat.

12. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), 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 postdelivery 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.

13. As the claimants, the burden rested on Petitioners, as the proponent of the issue, to demonstrate that Hunter suffered a "birth-related neurological injury." § 766.309(1)(a), Fla. Stat. See also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1997)("[T]he burden

of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.").

14. Here, the proof failed to support the conclusion that, more likely than not, Hunter's neurologic impairments resulted from an "injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation." Moreover, the proof failed to demonstrate that Hunter was "permanently and substantially mentally and physically impaired." Consequently, the record developed in this case failed to demonstrate that Hunter suffered a "birth-related neurological injury," within the meaning of Section 766.302(2), and the claim is not compensable. §§ 766.302(2), 766.309(1), and 766.31(1), Fla. Stat. See also Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1997)(The Plan is written in the conjunctive and can only be interpreted to require both substantial mental and substantial physical impairment.); Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 5th DCA 1995)("[B]ecause the Plan . . . is a statutory substitute for common law rights and liabilities, it should be strictly construed to include only those subjects clearly embraced within its terms."), approved, Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).

15. 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." § 766.309(2), Fla. Stat. Such an order constitutes final agency action subject to appellate court review. § 766.311(1), Fla. Stat.

CONCLUSION

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

ORDERED that the claim for compensation filed by Angel Lewis and Jerry Lewis, individually and as parents and natural guardians of Hunter Lewis, a minor, is dismissed with prejudice.

DONE AND ORDERED this 17th day of December, 2003, in Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of December, 2003.

ENDNOTE

1/ All citations are to Florida Statutes (1999), unless otherwise indicated.

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 the original of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 766.311, 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.