

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TODD J. JAMES AND CHRISTINA L.)	
JAMES, individually, and as)	
parents and next friends of)	
EVAN J. JAMES, a minor,)	
)	
Petitioners,)	
)	
vs.)	Case No. 02-4262N
)	
FLORIDA BIRTH-RELATED)	
NEUROLOGICAL INJURY)	
COMPENSATION ASSOCIATION,)	
)	
Respondent,)	
)	
and)	
)	
ORLANDO REGIONAL HEALTHCARE)	
SYSTEM, INC.,)	
)	
Intervenor.)	
)	

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on to be heard on Respondent's Motion for Summary Final Order, filed March 3, 2003.

STATEMENT OF THE CASE

1. On October 30, 2002, Todd J. James and Christina L. James, individually, and as parents and next friends of Evan J. James (Evan), 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).

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on November 1, 2002,¹ and on February 17, 2003, NICA filed its response to the claim. In such response, NICA 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 the compensability of this claim." Thereafter, Orlando Regional Healthcare System, Inc., was accorded leave to intervene, and a hearing was scheduled for July 14, 2003, to resolve whether the claim was compensable and whether the notice provisions of the Plan were satisfied.

3. In the interim, on March 3, 2003, NICA served a Motion for Summary Final Order, pursuant to Section 120.57(1)(h), Florida Statutes. The predicate for NICA's motion was its perception that, indisputably, while Evan's neurologic presentation reveals evidence of a significant delay in motor and language milestones, the cause of such impairment is, more likely than not, prenatal (developmental) in origin, having occurred prior to the onset of labor, and was not caused by oxygen deprivation or mechanical injury during labor, delivery, or resuscitation. Consequently, NICA concludes, Evan does not qualify for coverage under the Plan. See Sections 766.302(2),

766.309(1), and 766.31(1), Florida Statutes. Attached to NICA's motion was an affidavit of Michael Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, who, based on his review of Evan's medical records and his evaluation of Evan on December 18, 2002, concluded that:

While Evan is significantly behind in terms of his motor and language milestones, his neurologic presentation is consistent with developmentally based prenatally acquired neurologic involvement. Evan was born with Apgar scores of 3, 6, and 7 at 1, 5, and 10 minutes, and had a cord pH of 7.24. Despite CT scan evidence of diffuse cerebral adema on February 10, 2001 (day 1 of life), a follow up MRI on July 24, 2001 revealed only immature myelinization and extraventricular hydrocephalus

Consequently, Dr. Duchowny concluded that:

. . . As such, it is my opinion that Evan does not suffer from a permanent and substantial mental and physical impairment due to oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period as required by Section 766.302(2), Florida Statutes, for a claim to qualify for compensation under Sections 766.301 through 766.316, Florida Statutes.

4. Neither Petitioners nor Intervenor responded to NICA's Motion for Summary Final Order. Consequently, an Order to Show Cause was entered on March 18, 2003, which provided, as follows:

On March 3, 2003, Respondent filed a Motion for Summary Final Order. To date, neither Petitioners nor Intervenor have responded to the motion. Rule 28-106.204(4), Florida Administrative Code. Accordingly, it is

ORDERED that within 10 days of the date of this Order, Petitioners and Intervenor show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

5. On March 25, 2003, Intervenor filed its response to the Order to Show Cause, and requested that the administrative law judge "withhold ruling on the Motion for Summary Final Order until Intervenor has an opportunity to conduct discovery, and present evidence on its behalf." By Order of March 27, 2003, Intervenor's motion was granted, as follows:

. . . Intervener's Motion to Delay . . .
Ruling on Motion for Summary Final Order is granted until May 30, 2003. In the interim, all parties are authorized to undertake discovery and, if they propose to do so, shall file their response to Respondent's Motion for Summary Final Order not later than May 30, 2003. Thereafter, the undersigned will address Respondent's Motion.

6. On May 23, 2003, Intervenor filed what it titled Intervenor's Notice of No Response, wherein it stated:

COMES NOW Intervener, Orlando Regional Healthcare System, Inc., by and through its undersigned attorneys and hereby advises the court that it will not file a response to Respondent's Motion for Summary Final Order.

Thereafter, on May 27, 2003, Petitioners filed their response to the Motion for Summary Final Order, as follows:

Petitioners filed the original NICA Petition in this case, being unsure of whether NICA would apply. Now Petitioners file this response to notify the court that Petitioners

do not intend to file affidavits or other evidence in opposition to the opinions of Dr. Duchowny previously filed with the court. Petitioners decline to take a position at this time as to whether his report is accurate

7. Given the record, it is indisputable that Evan's neurologic impairment is, more likely than not, prenatal (developmental) in origin, having occurred prior to the onset of labor, and not associated with oxygen deprivation or mechanical injury during labor, delivery, or resuscitation. Consequently, NICA's Motion for Summary Final Order is well founded. Sections 120.57(1)(h) and 766.309, Florida Statutes.

CONCLUSIONS OF LAW

8. 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.

9. 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.

10. 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. 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.

11. 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, 766.309, and 766.31, Florida Statutes.

12. 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.

13. 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.

14. Here, indisputably, Evan's neurologic impairment was not associated with oxygen deprivation or mechanical injury occurring during the course of labor, delivery, or resuscitation. Consequently, given the provisions of Section 766.302(2), Florida Statutes, he does not qualify for coverage under the Plan. See also Humana of Florida, Inc. v. McKaughan, 658 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 Compensation Association v. McKaughn, 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." 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 Statement of the Case and Conclusions of Law,
it is

ORDERED that the claim for compensation filed by Todd J.
James and Christina L. James, individually, and as parents and
next friends of Evan J. James, a minor, be and the same is
dismissed with prejudice.

DONE AND ORDERED this 3rd day of June, 2003, in
Tallahassee, Leon County, Florida.


WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of June, 2003.

ENDNOTE

1/ Consistent with Section 766.305(2), Florida Statutes, DOAH
also served the physician (Juan E. Reinoso, M.D.) named in the
petition as having provided obstetrical services at the infant's
birth, as well as the hospital (Orlando Regional Healthcare
Systems, Inc.) named in the petition at which the infant's birth
occurred. As noted supra, the hospital sought, and was granted
leave to intervene; however, to date, the physician has not
requested leave to intervene or otherwise sought leave to
participate in these proceedings.

COPIES FURNISHED:
(By certified mail)

Scott McMillen, Esquire
McMillen, Reinhart & Voght, P.A.
111 North Orange Avenue, Suite 1450
Orlando, Florida 32801

Kenney Shipley, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
1435 Piedmont Drive, East, Suite 101
Post Office Box 14567
Tallahassee, Florida 32312

Larry J. Townsend, Esquire
Mateer & Harbert, P.A.
225 East Robinson Street, Suite 600
Post Office Box 2854
Orlando, Florida 32802-2854

Juan E. Reinoso, M.D.
610 Oak Commons Boulevard
Kissimmee, Florida 34741

South Seminole Hospital
555 West State Road 434
Longwood, Florida 32752

Ms. Charlene Willoughby
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275

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.