

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEIGH OLINGER AND STEVEN)
OLINGER, on behalf of and as)
parents and natural guardians)
of JASON OLINGER, a minor,)
)
Petitioners,)
)
vs.) Case No. 03-0551N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
DELIA DELGADO, M.D., AND WOMAN)
TO WOMAN CENTER, P.A., and)
MORTON PLANT HOSPITAL)
ASSOCIATION, INC.,)
)
Intervenors.)
_____)

FINAL ORDER

With the parties' agreement, this case was heard on an agreed record.

STATEMENT OF THE ISSUE

At issue is whether Jason Olinger, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On February 14, 2003, Leigh Olinger and Steven Olinger, on behalf of and as parents and natural guardians of Jason Olinger (Jason), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) to resolve whether Jason suffered a "birth-related neurological injury," as defined by 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 February 19, 2003. NICA reviewed the claim and on June 2, 2003, gave notice that it was of the view that the infant "did not suffer from a 'birth-related neurological injury' within the meaning of Section 766.302(2), Fla. Stat.," and requested that a hearing be scheduled to address the issue of compensability. In the interim, Delia Delgado, M.D., Woman to Woman Center, P.A., and Morton Plant Hospital Association, Inc., were accorded leave to intervene.

By order of October 22, 2003, a hearing was scheduled for December 4 and 5, 2003, in St. Petersburg, Florida, to address the issue of compensability; however, on November 26, 2003, the parties filed a Pre-Hearing Stipulation, whereby they agreed to waive the hearing, and to submit the case for resolution on an agreed record. The parties' stipulation was approved by order of December 2, 2003.

Consistent with the parties' Pre-Hearing Stipulation, Petitioners' Exhibit 1 (the medical records filed with DOAH February 14, 2003); Respondent's Exhibit 1 (the medical report of Michael Duchowny, M.D., dated March 26, 2003), Exhibit 2 (Dr. Duchowny's affidavit dated April 7, 2003), Exhibit 3 (the deposition of Dr. Duchowny), Exhibit 4 (the deposition of Joseph Casadonte, M.D.), Exhibit 5 (the deposition of Leigh Olinger), Exhibit 6 (the deposition of Steven Olinger), Exhibit 7 (the deposition of Lee Ann Tripepi), and Exhibit 8 (the deposition of Terri Kersenbrock Graffeo); and Intervenor Morton Plant Hospital's (Hospital's) Exhibit 1 (Petitioners' answers to interrogatories served upon them by Intervenor, Delia Delgado, M.D., and Woman to Woman Center, P.A., on March 31, 2003), Exhibit 2 (Petitioners' Response to Request for Admissions served by Intervenor, Delia Delgado, M.D., and Woman to Woman Center, P.A., on March 31, 2003, as well as a copy of the Request for Admissions), and Exhibit 3 (signed acknowledgment of receipt of NICA brochure), were received into evidence.¹

The parties, at their request, were accorded 10 days from December 4, 2003, to file proposed orders. Respondent elected to file such a proposal and it has been duly considered.

FINDINGS OF FACT

Stipulated facts

1. Petitioners, Leigh Olinger and Steven Olinger, are the parents and natural guardians of Jason Olinger, a minor. Jason was born a live infant on July 27, 2001, at Morton Plant Hospital, a hospital located in Pinellas County, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Jason's birth was Delia Delgado, 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.² Dr. Delgado and Morton Plant Hospital satisfied the notice provisions of the Plan.

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 Jason's impairment

4. To address the cause and timing of Jason's impairment, as well as its significance, the parties offered selected medical records related to Jason's birth (Petitioners' Exhibit 1); the deposition of Michael Duchowny, M.D., a pediatric neurologist who examined Jason on March 26, 2003, as well as a copy of Dr. Duchowny's report and affidavit (Respondent's Exhibits 1, 2, and 3); the deposition of Joseph Casadonte, M.D., Jason's treating pediatric neurologist (Respondent's Exhibit 4); the deposition of Leigh Olinger, Jason's mother (Respondent's Exhibit 5); the deposition of Steven Olinger, Jason's father (Respondent's Exhibit 6); the deposition of Lee Ann Tripepi, Jason's occupational therapist (Respondent's Exhibit 7); the deposition of Terri Kersenbrock Graffeo, Jason's physical therapist (Respondent's Exhibit 8); and Petitioners' answers to interrogatories and request for admissions (Hospital's Exhibits 1 and 2).

5. Here, while the proof demonstrated that Jason suffers some developmental delay, it likewise demonstrated, indisputably, that Jason was not substantially mentally or physically impaired. Consequently, for reasons appearing more fully from the Conclusions of Law, the claim does not qualify for coverage under

the Plan, and it is unnecessary to address the etiology of Jason's developmental delay.

CONCLUSIONS OF LAW

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

7. 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.

8. 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.

9. 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.

10. 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.

11. 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 for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 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.

12. As the claimants, the burden rested on Petitioners, as the proponents of the issue, to demonstrate that Jason 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.").

13. Here, the proof failed to support the conclusion that, more likely than not, Jason was "permanently and substantially mentally and physically impaired." Consequently, the record developed in this case failed to demonstrate that Jason 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).

14. 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 Leigh Olinger and Steven Olinger, on behalf of and as parents and natural guardians of Jason Olinger, 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.

ENDNOTES

1/ Petitioners and Intervenors, Delia Delgado, M.D., and Woman to Woman Center, P.A., joined in the submission of Respondent's Exhibits. (Pre-Hearing Stipulation, page 5.)

2/ All citations are to Florida Statutes (2001), unless otherwise indicated.

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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.