

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STARR ELAINE LEROY AND BILLY)
SIMMONS, JR., on behalf of and)
as parents and natural)
guardians of COPELAND LEROY, a)
minor,)
)
Petitioners,)
)
vs.) Case No. 03-2384N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on to be heard on Respondent's Motion for Summary Final Order, filed July 30, 2003, and the Order to Show Cause, entered August 15, 2003.

STATEMENT OF THE CASE

1. On June 27, 2003, Starr E. Leroy and Billy G. Simmons, Jr., on behalf of, and as parents and natural guardians of, Copeland Leroy, 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 June 30, 2003,¹ and on July 30, 2003, NICA filed a Motion for Summary Final Order, pursuant to Section 120.57(1)(h).² The predicate for NICA's motion was its assertion that, indisputably, the physician named in the petition as having provided obstetrical services at birth (Ted Manos, M.D.), and the other health care providers noted in the medical records as having participated in the labor and delivery process (Steven E. Pillow, M.D.; Raveendra Limaye, M.D.; Madelynne Marie Kugler, C.N.M.; and D. Futch, C.N.M.), were not "participating physician[s]," as defined by law, since they had neither paid the assessment required for participation nor were they exempt from payment of the assessment. Section 766.302(7). Attached to the motion was an affidavit of the Custodian of Records for NICA attesting to such facts.

3. Petitioners did not respond to NICA's Motion for Summary Final Order. Consequently, an Order to Show Cause was entered on August 15, 2003, which provided, as follows:

On July 30, 2003, Respondent filed a Motion for Summary Final Order. To date, Petitioner has not 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 show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

4. Petitioners responded to NICA's Motion for Summary Final Order and the Order to Show Cause on August 27, 2003, as follows:

Petitioners have no argument to present in opposition to the Respondent's Motion for Summary Final Order.

5. Given the record, there is no genuine issue of fact regarding the status of the health care providers who provided obstetrical services during the infant's birth, and they were not, at the time, "participating physician[s]," as that term is defined by Section 766.302(7). Consequently, NICA's Motion for Summary Final Order is, for reasons appearing more fully in the Conclusions of Law, meritorious.

CONCLUSIONS OF LAW

6. 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.

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. Section 766.303(1).

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. Sections 766.302(3), 766.303(2), 766.305(1), and 766.313. 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).

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. Section 766.305(6). 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. Sections 766.304, 766.307, 766.309, and 766.31.

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.

Section 766.309(1). 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.

11. Pertinent to this case, "participating physician" is defined by Section 766.302(7), to mean:

. . . a physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full-time or part-time and who had paid or was exempt from payment at the time of injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred.

12. Here, it is undisputed that the physician alleged to have provided obstetrical services during the birth of the infant, and the other health care provides noted in the medical

records as having participating in the labor and delivery process, were not "participating physician[s]" as that term is defined by Section 766.302(7), and as that term is used in Sections 766.301 through 766.316. Consequently, NICA's Motion for Summary Final Order should be granted. Sections 120.57(1)(h), 766.309(1) and (2), and 766.31(1).

13. Where, as here, the administrative law judge determines that ". . . obstetrical services were not delivered by a participating physician at the birth, 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). Such an order constitutes final agency action subject to appellate court review. Section 766.311(1).

CONCLUSION

Based on the Statement of the Case and Conclusions of Law, it is

ORDERED that the claim for compensation filed by Starr Elaine Leroy and Billy Simmons, Jr., on behalf of, and as parents and natural guardians of Copeland Leroy, a minor, be and the same is dismissed with prejudice.

DONE AND ORDERED this 4th day of September, 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 4th day of September, 2003.

ENDNOTES

1/ Consistent with Section 766.305(2), DOAH also served the physician (Ted Manos, M.D.) named in the petition as having provided obstetrical services at the infant's birth, as well as the hospital (Florida Hospital - Waterman) named in the petition as the facility at which the infant's birth occurred. To date, neither the physician nor hospital has requested leave to intervene or otherwise sought leave to participate in these proceedings.

2/ All citations are to Florida Statutes (2002) unless otherwise indicated.

COPIES FURNISHED:
(via certified mail)

Ronald S. Gilbert, Esquire
Morgan, Colling & Gilbert, P.A.
20 North Orange Avenue, Suite 1600
Post Office Box 4979
Orlando, Florida 32802-4979

Kenney Shipley, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
1435 Piedmont Drive, East, Suite 101
Post Office Box 14567
Tallahassee, Florida 32308

Ted Manos, M.D.
Florida Physicians Medical Group
1360 Waterman Way
Tavares, Florida 32778

Florida Hospital - Waterman
201 North Eustis Street
Eustis, Florida 32726

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.