

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DELIRIS BETANCOURT, as Personal )  
Representative of the Estate of )  
REY A. PAGAN, a deceased minor, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 03-2573N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
OSCEOLA REGIONAL HOSPITAL, )  
INC., )  
 )  
Intervenor. )  
\_\_\_\_\_ )

SUMMARY FINAL ORDER OF DISMISSAL

On October 16, 2003, a teleconference was held in the above-styled case to address Respondent's Motion for Summary Final Order.

APPEARANCES

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For Respondent: Wilbur E. Brewton, Esquire  
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For Intervenor Osceola Regional Hospital, Inc.:

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For Heidy Puig, M.D.:

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STATEMENT OF THE CASE

1. On July 15, 2003, Deliris Betancourt, as Personal Representative of the Estate of Rey A. Pagan (Rey), a deceased minor, filed a petition with the Division of Administrative Hearings (DOAH) to resolve whether Rey suffered an injury compensable under the Florida Birth-Related Neurological Injury Compensation Plan (Plan) and, if so, whether the hospital (Osceola Regional Hospital) at which his birth occurred, complied with the notice provisions of the Plan.

2. DOAH served Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), with a copy of the petition on July 17, 2003,<sup>1</sup> and on August 12, 2003, NICA filed a Motion for Summary Final Order, pursuant to Section 120.57(1)(h).<sup>2</sup> The predicate for NICA's motion was its assertion that, indisputably, the physician named in the petition as having provided obstetrical services at Rey's birth (Heidy Puig, M.D.) was not, at the time, a "participating physician," as

defined by law, since she had neither paid the assessment required for participation nor was she 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. On October 16, 2003, a teleconference was held to address NICA's motion. Notably, at hearing, Petitioners, Osceola Regional Hospital, and Dr. Puig agreed with NICA that, at the time of Rey's birth, Dr. Puig was not a "participating physician" in the Plan since she had neither paid the assessment required for participation nor was she exempt from payment of the assessment.

4. Given the record, it is undisputed the physician who provided obstetrical services at Rey's birth was not, at the time, a "participating physician," 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

5. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Section 766.301, et seq.

6. 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).

7. 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).

8. 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.

9. 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).

10. 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.

11. Here, it is undisputed that the physician who provided obstetrical services during the birth of the infant was not a "participating physician" 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 is granted. Sections 120.57(1)(h), 766.309(1) and (2), and 766.31(1).

12. 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 Deliris  
Betancourt, as Personal Representative of the Estate of Rey A.  
Pagan, a deceased minor, is dismissed with prejudice.

DONE AND ORDERED this 28th day of October, 2003, in  
Tallahassee, Leon County, Florida.

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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 28th day of October, 2003.

ENDNOTES

<sup>1/</sup> Consistent with Section 766.305(2), DOAH also served the  
physician (Heidy Puig, M.D.) named in the petition as having  
provided obstetrical services at the infant's birth, as well as  
the hospital (Osceola Regional Hospital) named in the petition  
as the facility at which the infant's birth occurred. The  
hospital subsequently requested and was accorded leave to  
intervene. Dr. Puig did not request leave to intervene, but did  
participate, through counsel, in the hearing held on October 16,  
2003, to address Respondent's Motion for Summary Final Order.

<sup>2/</sup> All citations are to Florida Statutes (2002) 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.