

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LARRY AND CAROL JUTRAS on)
behalf of and as parents and)
natural guardians of JOHN MARK)
JUTRAS, a minor,)
)
)
 Petitioners,)
)
)
vs.) Case No. 04-4471N
)
)
 FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
)
 Respondent.)
)
_____)

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on to be heard on the parties' Joint Motion for Summary Final Order, filed April 15, 2005.

STATEMENT OF THE CASE

1. On December 16, 2004, Larry and Carol Jutras, as the parents and natural guardians of John Mark Jutras (John), 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 December 16, 2004,¹ and on February 23, 2005, following denial

of Respondent's Motion for Summary Final Order on the issue, a hearing was scheduled for April 26, 2005, to resolve whether obstetrical services were provided by a "participating physician" at John's birth, as required for coverage under the Plan. § 766.309, Fla. Stat. Thereafter, on April 15, 2005, the parties filed a Joint Motion for Summary Final Order pursuant to Section 120.57(1)(h), Florida Statutes. The predicate for the parties' motion was their agreement that, indisputably, the physician (William T. Scott, M.D.), who provided obstetrical services at John's birth, was not a "participating physician," as defined by the Plan, since he had neither paid the assessment required for participation nor was he exempt from payment of the assessment. § 766.302(7), Fla. Stat. See also § 766.314(4)(b) and (c), Fla. Stat. Attached to the motion was an affidavit of the Custodian of Records for NICA, as well as documentation from the Florida Department of Health, Division of Medical Quality Assurance, which demonstrated that, at the time of John's birth, Doctor Scott had not paid the assessment required for participation, and that he was not exempt from payment of the assessment.

3. Given the record, it is undisputed that the physician who provided obstetrical services during John's birth, was not a "participating physician," as that term is used in the Plan. Consequently, the parties' Joint Motion for Summary Final Order

is, for reasons appearing more fully in the Conclusions of Law, well-founded.

CONCLUSIONS OF LAW

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

5. 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.

6. 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.

7. 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, 766.307, 766.309, and 766.31, Fla. Stat.

8. 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.

9. Pertinent to this case, "participating physician" is defined by Section 766.302(7), Florida Statutes, 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.

10. Here, indisputably, the physician who provided obstetrical services during John's birth was not a "participating physician," as that term is defined by Section 766.302(7), Florida Statutes, and as that term is used in Sections 766.301 through 766.316, Florida Statutes. Consequently, John does not qualify for coverage under the Plan.

11. 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." § 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 Statement of the Case and Conclusions of Law, it is

ORDERED that the parties' Joint Motion for Summary Final Order is granted, and the petition for compensation filed by Larry and Carol Jutras, as the parents and natural guardians of John Mark Jutras (John), a minor, is dismissed with prejudice.

DONE AND ORDERED this 22nd day of April, 2005, 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 22nd day of April, 2005.

ENDNOTE

1/ Consistent with Section 766.305(2), Florida Statutes, DOAH also served the physician (William T. Scott, M.D.) named in the petition as having provided obstetrical services at John's birth, as well as the hospital (Arnold Palmer Hospital for Children and Women) named in the petition as the facility at

which John's birth occurred. To date, neither the physician nor the hospital has requested leave to intervene or otherwise sought leave to participate in these proceedings.

COPIES FURNISHED:

(By certified mail)

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

Mark V. Morsch, Esquire
Mark V. Morsch and Associates, P.A.
2425 Lee Road
Winter Park, Florida 32789

Tana D. Storey, Esquire
Roetzel & Andress, LLP
225 South Adams Street, Suite 250
Tallahassee, Florida 32301

William T. Scott, M.D.
24 West Sturtevant Street
Orlando, Florida 32806

Orlando Regional Healthcare System, Inc.
d/b/a Arnold Palmer Hospital for
Children and Women
52 West Miller Street
Orlando, Florida 32806

Charlene Willoughby, Director
Consumer Services Unit - Enforcement
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.