

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICIA WHITE AND ALBERT )  
HOUSTON, JR., on behalf of and )  
as parents and natural )  
guardians of ALBERT HOUSTON, )  
III, a minor, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 05-0186N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a final hearing in the above-styled case on January 20, 2006, by video teleconference, with sites in Tallahassee and Fort Myers, Florida.

APPEARANCES

For Petitioners: No appearance at hearing.

For Respondent: Stanley L. Martin, Esquire  
Phelps Dunbar, LLP  
100 South Ashley Drive, Suite 1900  
Tampa, Florida 33602

STATEMENT OF THE ISSUES

At issue is whether Albert Houston, III, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On January 21, 2005, Patricia White and Albert Houston, Jr., on behalf of, and as parents and natural guardians of Albert Houston, III (Albert), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on January 25, 2005, and on March 23, 2005, following an extension of time within which to do so, NICA gave notice that it was of the view that Albert did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, and requested that a hearing be scheduled to resolve whether the claim was compensable. Such a hearing was initially scheduled for August 8, 2005, re-scheduled at Petitioners' request for October 6, 2005, and again re-scheduled for January 20, 2006.

Although duly noticed, neither Petitioners nor anyone on their behalf appeared at hearing, and no evidence was offered to

support their claim. Respondent appeared through counsel, but offered no competent proof.<sup>1</sup>

#### FINDINGS OF FACT

1. As observed in the Preliminary Statement, neither Petitioners nor anyone on their behalf appeared at hearing, and no proof was offered to support their claim. Consequently, there being no proof, the record fails to demonstrate that Albert suffered a birth-related neurological injury," as defined by the Plan.

#### CONCLUSIONS OF LAW

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

3. The 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.

4. 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.

5. 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.

6. 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.

7. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes (2000), 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 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.

8. As the claimants, the burden rested on Petitioners to demonstrate that Albert suffered a "birth-related neurological injury," as defined by the Plan. § 766.309(1)(a), Fla. Stat.

See also Balino v. Department of Health and Rehabilitative

Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977)("[T]he burden or proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.") By failing to appear and offer proof, Petitioners failed to sustain that burden. Accordingly, the Petitioners' claim has not been shown to be compensable under the Plan.

9. 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 Patricia White and Albert Houston, Jr., on behalf of and as parents and natural guardians of Albert Houston, III, a minor, is dismissed with prejudice.

DONE AND ORDERED this 14th day of February, 2006, 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 14th day of February, 2006.

ENDNOTE

1/ Respondent offered the reports of Doctors Donald Willis and Michael S. Duchowny that were filed with DOAH on March 24, 2005. However, such reports are hearsay and cannot support a finding of fact. § 120.57(1)(c), Fla. Stat.

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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.