

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JULIA MROZ AND STEPHEN BUNNELL, )  
individually and on behalf of )  
and as parents and natural )  
guardians of AIDEN ALVER MROZ )  
BUNNELL, a minor, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 05-1508N  
 )  
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 June 13, 2005, and the Order to Show Cause, entered June 28, 2005.

STATEMENT OF THE CASE

1. On April 25, 2005, Julia Mroz and Stephen Bunnell, individually and on behalf of and as parents and natural guardians of Aiden Alver Mroz Bunnell (Aiden), 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). Pertinent to the pending motion, the petition averred that Aiden was born March

16, 2003, at Memorial Hospital Jacksonville, and that his birth weight was 1,437 grams.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on April 26, 2005, and on June 13, 2005, NICA filed a Motion for Summary Final Order, pursuant to Section 120.57(1)(h), Florida Statutes. The predicate for NICA's motion was, inter alia, its agreement that, as alleged in the petition, Aiden's birth weight was 1,437 grams, less than the minimum weight of 2,500 grams for a single gestation or 2,000 grams for a multiple gestation required for coverage under the Plan.<sup>1</sup> See §§ 766.302(2), 766.309(1), and 766.31(1), Fla. Stat.

3. Petitioners did not respond to NICA's Motion for Summary Final Order. Consequently, an Order to Show Cause was entered on June 28, 2005, which provided, as follows:

On June 13, 2005, Respondent served a Motion for Summary Final Order. To date, Petitioners have not responded to the motion. Fla. Admin. Code R. 28-106.204(4). Nevertheless, giving due regard to Petitioners' interests, 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.

Petitioners did not respond to the Order to Show Cause.

4. Given the record, Aiden's birth weight was, indisputably, 1,437 grams. Consequently, for reasons appearing more fully in the Conclusions of Law, NICA's Motion for Summary Final Order is well-founded.

CONCLUSIONS OF LAW

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

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. § 766.303(1), Fla. Stat.

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. §§ 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.

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. § 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.

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.

§ 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.

10. 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.

11. Here, indisputably, Aiden's birth weight was 1,437 grams. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Aiden does not qualify for coverage under the Plan. See also Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 2d 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).

12. 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 Julia Mroz and Stephen Bunnell, individually and on behalf of and as parents and natural guardians of Aiden Alver Mroz Bunnell, a minor, is dismissed with prejudice.

DONE AND ORDERED this 5th day of August, 2005, 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 5th day of August, 2005.

ENDNOTE

1/ Attached to NICA's motion was an affidavit of Katherine Alexander, R.N., the Custodian of Records for NICA, who averred that:

3. In the instant case, pursuant to Section 766.305(3), Florida Statutes, the Petitioner submitted the appropriate medical records to NICA from Memorial Hospital Jacksonville. I certify that attached hereto is a true and correct copy of the pertinent medical records as submitted to NICA by the Petitioner.

4. Additionally, NICA separately requested hospital records from Memorial Hospital Jacksonville to verify the threshold requirements had not been met.

5. The medical records attached hereto as Exhibits A, B, C, D, E and F indicate the infant's birth weight was 1437 grams.

6. Section 766.302(2), Florida Statutes (2003), defines a birth-related neurological injury, in pertinent part, as:

. . . injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation . . . .

Notably, there were no medical records attached to the affidavit filed with DOAH. Nevertheless, given the pleadings, it is undisputed that Aiden's birth weight was less than that required for coverage under the Plan.

COPIES FURNISHED

(Via 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.