

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NICHOLAS ROMERO, a minor, by)
and through his parents and)
natural guardians, ANDREA)
ROMERO AND LAURO ROMERO; AND)
ANDREA ROMERO AND LAURO ROMERO,)
individually,)
)
Petitioners,)
)
vs.) Case No. 05-1901N
)
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, served August 15, 2005.

STATEMENT OF THE CASE

1. On May 23, 2005, Andrea Romero and Lauro Romero, individually, and as parents and natural guardians of Nicholas Romero (Nicholas), 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). Notably, the petition averred that Nicholas was born June 2, 1999.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on May 24, 2005,¹ and on July 21, 2005, following an extension of time within which to do so, NICA served its response to the petition for benefits, and gave notice that it was of the view that Nicholas did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, and that, given the provisions of Section 766.313, Florida Statutes, the claim was time-barred. Nevertheless, since Plan immunity may be a viable defense to a civil suit, and the administrative law judge has exclusive jurisdiction to resolve whether a claim is compensable, NICA requested that a hearing be scheduled to resolve whether the claim was compensable. See §§ 766.301(1)(d), 766.303(2), and 766.304, Fla. Stat., and O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 757 So. 2d 624 (Fla. 5th DCA 2000).

3. On August 11, 2005, a hearing was scheduled for November 4, 2005, to resolve whether the claim was compensable and whether the claim was time-barred. Thereafter, on August 15, 2005, NICA served a Motion for Summary Final Order. The predicate for the motion was, inter alia, NICA's assertion that the claim was not compensable since, indisputably, Nicholas was neither substantially mentally impaired nor substantially physically impaired, and that the claim, filed more than 5 years

after Nicholas' birth, was time-barred. Attached to NICA's motion was an affidavit of Michael Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, who, based on his review of Nicholas' medical records and his evaluation of Nicholas on June 29, 2005, concluded, within a reasonable degree of medical probability, that Nicholas' "mental and motor status are close to age level," and that Nicholas "is not permanently and substantially mentally impaired nor is he permanently and substantially physically impaired."

4. On August 31, 2005, Petitioners filed their response to the Motion for Summary Final Order. Their response was as follows:

The Petitioners hereby declare that they have no opposition to the entry of a Summary Final Order in accordance with the Motion for Summary Final Order filed by the FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, dated August 15, 2005.

5. Given the record, it is undisputed that Nicholas is not substantially mentally or physically impaired, and that the claim for compensation was filed more than 5 years after Nicholas' birth. Consequently, for reasons appearing more fully in the Conclusions of Law, NICA's Motion for Summary Final Order is well-founded. § 120.57(1)(h), Fla. Stat.

CONCLUSIONS OF LAW

Jurisdiction

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

Compensability

7. In resolving whether a claim is compensable, 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.

8. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes (1999),² 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.

9. Here, indisputably, Nicholas is not permanently and substantially mentally and physically impaired. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Nicholas 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).

The time limitation for filing claims

10. Pertinent to NICA's contention that the claim is time-barred, Section 766.313, Florida Statutes, provides:

Limitation on claim.--Any claim for compensation under ss. 766.301-766.316 that is filed more than 5 years after the birth of an infant alleged to have a birth-related neurological injury shall be barred.

Indisputably, the claim for compensation was filed more than 5 years after Nicholas' birth. Consequently, the claim is time-barred and, if compensable, Petitioners would not be entitled to an award.

CONCLUSION

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

ORDERED that NICA's Motion for Summary Final Order is granted, and the claim for compensation filed by Andrea Romero and Lauro Romero, individually, and as parents and natural guardians of Nicholas Romero, a minor, is dismissed with prejudice.

DONE AND ORDERED this 31st day of August, 2005, in
Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of August, 2005.

ENDNOTES

1/ Consistent with Section 766.305(2), Florida Statutes, DOAH also served the physician (Gil Aronson, M.D.) named in the petition as having provided obstetrical services at Nicholas' birth, as well as the hospital (South Broward Hospital District, d/b/a Memorial Hospital West) named in the petition as the facility at which Nicholas' birth occurred. To date, neither the physician nor the hospital has requested leave to intervene or otherwise sought leave to participate in these proceedings.

2/ Nicholas was born June 2, 1999. Consequently, the amendments to Section 766.302(2), Florida Statutes, "[e]ffective July 1, 2001, and applicable to births occurring on or after that date," are not applicable to this case. Ch. 2001-277, § 149, Laws of Fla.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Summary Final Order of Dismissal 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.