

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARLESA BRAZIL, on behalf of)
and as natural guardian of)
ANAJAH SCOTT, a minor,)
)
Petitioner,)
)
vs.) Case No. 06-0945N
)
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 May 2, 2006, and the Order to Show Cause, entered May 15, 2006.

STATEMENT OF THE CASE

1. On March 17, 2006, Marlesa Brazil, on behalf of, and as parent and natural guardian of Anajah Scott (Anajah), 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 Anajah was born September 30, 2005, at Memorial Hospital Jacksonville, with a birth weight of 2,318 grams. However, the petition did not

address whether Anajah was the product of a single gestation or a multiple gestation.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on March 20, 2006, and on May 2, 2006, NICA filed a Motion for Summary Final Order, pursuant to Section 120.57(1)(h), Florida Statutes. The predicate for NICA's motion was its assertion that, indisputably, Anajah was the product of a single gestation, and her birth weight of 2,318 grams was less than the minimum weight of 2,500 grams required for coverage under the Plan. See §§ 766.302(2), 766.309(1), and 766.31(1), Fla. Stat. Attached to NICA's motion was an affidavit of Katherine Alexander, Custodian of Records for NICA, which provided:

1. I am Katherine Alexander, Custodian of Records for the Florida Birth-Related Neurological Injury Compensation Association ("NICA"), for records submitted to NICA pursuant to Section 766.305(3), Florida Statutes.

2. One of my official duties as Custodian of Records submitted pursuant to Section 766.305(3), Florida Statutes, is to review the records in order to assist NICA in its determination regarding the compensability of a claim filed pursuant to Sections 766.301-766.316, Florida Statutes. I have personal knowledge of the information attested to herein.

3. In the instant case the Petitioner submitted the medical records from Memorial Hospital Jacksonville to NICA as required by Section 766.305(3), Florida Statutes. As

record custodian for NICA, I certify that attached thereto is a true and correct copy of the Labor and Delivery Summary which was included in the medical records as submitted to NICA by the Petitioner.

4. The Labor and Delivery Summary attached hereto as Exhibit A indicates that the minor child's weight at birth was 2318 grams, and was delivered from a single gestation (i.e. Birth Order 1 of 1).

Indeed, as averred, the Labor and Delivery Summary attached to Ms. Alexander's affidavit revealed that Anajah was the product of a single gestation, with a birth weight of 2,318 grams.

3. Petitioner did not respond to NICA's Motion for Summary Final Order. Consequently, an Order to Show Cause was entered on May 15, 2006, which provided, as follows:

On May 2, 2006, Respondent served a Motion for Summary Final Order. To date, Petitioner has not responded to the motion. Fla. Admin. Code. R. 28-106.204(4). Accordingly, it is

ORDERED that on or before May 25, 2006, Petitioner show good cause in writing, if any she can, why the relief requested by Respondent should not be granted.

Petitioner did not respond to the Order to Show Cause.

4. Given the record, Anajah was, indisputably, the product of a single gestation, with a birth weight of 2,318 grams.

Therefore, NICA's Motion for Summary Final Order is well-founded.¹ §§ 120.57(1)(h), 766.302(2), and 766.309, Fla. Stat.

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(4), 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(7), 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, Anajah was the product of a single gestation, with a birth weight of 2,318 grams. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Anajah 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 Respondent's Motion for Summary Final Order is granted, and the petition for compensation filed by Marlesa Brazil, on behalf of, and as parent and natural guardian of Anajah Scott, a minor, is dismissed with prejudice.

DONE AND ORDERED this 31st day of May, 2006, 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 May, 2006.

ENDNOTE

1/ Where, as here, the "moving party presents evidence to support the claimed non-existence of a material issue, he . . . [is] entitled to a summary judgment unless the opposing party comes forward with some evidence which will change the result; that is, evidence to generate an issue of material fact." Turner Produce Company, Inc. v. Lake Shore Growers Cooperative Association, 217 So. 2d 856, 861 (Fla. 4th DCA 1969). Accord, Roberts v. Stokley, 388 So. 2d 1267 (Fla. 2d DCA 1980); Perry v. Langstaff, 383 So. 2d 1104 (Fla. 5th DCA 1980).

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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.