

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DANIEL IVANOVIC AND LORI )  
IVANOVIC, ON BEHALF OF AND AS )  
PARENTS AND NATURAL GUARDIANS )  
OF WESLEY IVANOVIC, A MINOR, )  
)  
Petitioners, )  
)  
vs. ) Case No. 06-2513N  
)  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
)  
Respondent, )  
)  
and )  
)  
DAVID A. MARCANTAL, M.D., )  
CELEBRATION OBSTETRICS AND )  
GYNECOLOGY ASSOCIATES, P.A., )  
and ADVENTIST HEALTH )  
SYSTEM/SUNBELT, INC., d/b/a )  
FLORIDA HOSPITAL CELEBRATION )  
HEALTH, )  
)  
Intervenors. )  

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FINAL ORDER

With the parties' agreement, this case was resolved on an agreed record.

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On July 17, 2006, Daniel Ivanovic and Lori Ivanovic, on behalf of and as parents and natural guardians of Wesley Ivanovic (Wesley), 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 July 18, 2006, and on April 10, 2007, following a number of extensions of time within which to do so, NICA responded to the claim, and gave notice that it was of the view that Wesley 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 the issue. In the interim, David A. Marcantal, M.D., Celebration Obstetrics and Gynecology Associates, P.A., and Adventist Health System/Sunbelt, Inc., d/b/a Florida Hospital Celebration Health, were accorded leave to intervene.

Pursuant to notice, dated May 2, 2007, a hearing was scheduled for August 20, 2007, to resolve whether the claim was compensable. However, on August 9, 2007, the parties filed an Agreed Motion to Submit Cause Upon an Agreed Record of Counsel, in lieu of a hearing. The parties' motion was granted by Order

of August 15, 2007, and the hearing scheduled for August 20, 2007, was canceled.

The parties filed their Agreed Record of Counsel on August 14, 2007, and Supplemental Stipulation of Counsel on August 20, 2007, and were accorded until August 27, 2007, to file proposed orders. No proposed orders were filed.

#### FINDINGS OF FACT

##### Stipulated facts

1. Daniel Ivanovic and Lori Ivanovic are the parents and natural guardians of Wesley Ivanovic, a minor. Wesley was born a live infant on July 12, 2004, at Adventist Health System/Sunbelt, Inc., d/b/a Florida Hospital Celebration Health, Celebration, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services during Wesley's birth was David A. Marcantel, M.D., who, at the time, was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

3. Lori Ivanovic was provided notice as required by Section 766.316, Florida Statutes.

4. The Agreed Record demonstrates that Wesley did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes.

Coverage under the Plan

5. Pertinent to the case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as an "injury to the brain or spinal cord . . . 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." § 766.302(2), Fla. Stat.

6. Here, the parties' stipulation that Wesley did not suffer a "birth-related neurological injury," as defined by the Plan, is consistent with the record, which demonstrates that Wesley's impairments are most likely developmentally based, as opposed to birth-related. Consequently, the record fails to support the conclusion that Wesley suffered a "birth-related neurological injury," as required for coverage under the Plan.

CONCLUSIONS OF LAW

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

8. 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.

9. 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), and 766.305(1), 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.

10. 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.

11. 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 postdelivery 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 postdelivery 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.

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

13. Here, the proof failed to support the conclusion that, more likely than not, Wesley's neurologic impairments were the result of an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Wesley was not shown to qualify for coverage under the Plan. See also §§ 766.309(1) and 766.31(1), Fla. Stat.; 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 constructed 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).

14. Where, as here, the administrative law judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . she or 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

ORDERED the claim for compensation filed by Daniel Ivanovic and Lori Ivanovic, on behalf of and as parents and natural guardians of Wesley Ivanovic, a minor, is dismissed with prejudice.

DONE AND ORDERED this 29th day of August, 2007, in Tallahassee, Leon County, Florida.

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WILLIAM J. KENDRICK  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of August, 2007.



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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.