

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICIA ELIN-LIPPS AND JEFFREY )  
LIPPS, AS PARENTS AND NATURAL )  
GUARDIANS OF ALEXANDER LIPPS, A )  
MINOR, )  
 )  
 )  
 Petitioners, )  
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 )  
 vs. ) Case No. 07-0538N  
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 )  
 FLORIDA BIRTH-RELATED )  
 NEUROLOGICAL INJURY )  
 COMPENSATION ASSOCIATION, )  
 )  
 )  
 Respondent. )  
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SUMMARY FINAL ORDER OF DISMISSAL

This cause came on to be heard on Respondent's Motion for Summary Final Order, filed July 23, 2007.

STATEMENT OF THE CASE

1. On January 31, 2007, Patricia Elin-Lipps and Jeffrey Lipps, as parents and natural guardians of Alexander Lipps (Alexander), a minor, filed a petition with the Division of Administrative Hearings (DOAH) to resolve whether Alexander qualified for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on February 1, 2007, and on July 2, 2007, following a number of

extensions of time within which to do so, NICA gave notice that it was of the view that Alexander did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, because his birth weight did not meet the statutory minimum for coverage under the Plan, and requested "the weight threshold issue be determined prior to the any other issues of compensability."

3. Thereafter, on July 23, 2007, 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, Alexander was the product of a single gestation, and his birth weight of 2,460 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 a Joint Stipulation of Facts, wherein the parties stipulated "that, at birth, the infant, Alexander Lipps, weighed 2,460 grams and was delivered from a single gestation." The parties' stipulation is accepted.

4. Given the record, Alexander was, indisputably, the product of a single gestation, with a birth weight of 2,460 grams. Therefore, NICA's Motion for Summary Final Order is well-founded. §§ 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), 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.

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, Alexander was the product of a single gestation, with a birth weight of 2,460 grams. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Alexander 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 Patricia Elin-Lipps and Jeffrey Lipps, as parents and natural guardians of Alexander Lipps, a minor, is dismissed with prejudice.

DONE AND ORDERED this 31st day of July, 2007, 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 31st day of July, 2007.

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.