

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHELLE AND CHRIS JOHNSTON, AS)
PARENTS AND NATURAL GUARDIANS)
OF EMMA JOHNSTON, A MINOR,)
)
Petitioners,)
)
vs.) Case No. 09-1712N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

SUMMARY FINAL ORDER

This cause came on for consideration upon Respondent Florida Birth-Related Neurological Injury Compensation Association's (NICA's) Motion for Summary Final Order, filed April 27, 2010.

STATEMENT OF THE CAUSE

1. On April 1, 2009, Petitioners, as parents and natural guardians of Emma Johnston (Emma), a minor, whose date of birth is alleged as June 6, 2007, filed a Petition for Determination of Compensability Pursuant to Florida Statute Section 766.301 et seq. (Claim) with the Division of Administrative Hearings (DOAH) for compensation 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 April 3, 2009. After several extensions of time in which to do so, NICA filed a Response to Petition for Benefits on August 26, 2009, denying compensability.

3. On September 24, 2009, a telephonic conference was held to address the status of the case, and Petitioners requested to defer a response to an August 27, 2009, Order for setting for final hearing until Petitioners had completed the depositions of Doctors Willis and Duchowny. As a result, an Order was entered September 25, 2009, granting a minimum of 60 days for responses or conference calls as an aid to either scheduling final hearing or otherwise resolving the case. On December 3, 2009, a telephonic case management conference was held, and on December 4, 2010, an Order was entered granting the parties until February 15, 2010, to respond with mutually agreeable hearing dates. This response date was extended to February 22, 2010, by an Order entered February 15, 2010, in response to an unopposed motion. On February 22, 2010, the case was noticed for final hearing on June 3, 2010.

4. On April 27, 2010, NICA filed its Motion for Summary Final Order, pursuant to Section 120.57(1)(h), Florida Statutes.¹ The predicate for NICA's motion was its assertion that, indisputably, Emma's abnormalities resulted from intrauterine-

acquired factors and that she did not suffer a birth-related neurological injury as defined in Section 766.309(1)(a), Florida Statutes.

5. Attached to NICA's motion was an unsworn report of Michael S. Duchowny, M.D. (Exhibit 1), and excerpts from what purports to be his deposition, but not any pages which concern oath or identity of the speaker. Also in the case file was the October 13, 2009, Deposition of Donald Willis, M.D., taken at the instance of the Petitioners and filed November 12, 2010.

6. Petitioners filed no timely response to the Motion for Summary Final Order. Consequently, an Order to Show Cause was entered on May 12, 2010, which provided:

On April 27, 2010, Respondent served a Motion for Summary Final Order. To date, Petitioners have not responded to the motion. Fla. Admin. Code R. 28-106.103 and 28-106.204(4). Nonetheless and notwithstanding that they have been accorded the opportunity to do so, it is

ORDERED that by May 24, 2010, Petitioners shall show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

7. Petitioners did not respond to NICA's Motion for Summary Final Order.

8. Review of the entire Division case file revealed that the copy of the deposition of Dr. Duchowny, upon which Respondent's Motion for Summary Final Order relied, was missing

the exhibits referenced in the deposition and likewise was missing Dr. Duchowny's signature. It also was without a statement of the reporter/transcriptionist that Dr. Duchowny had been afforded an opportunity to read and sign his deposition but that he had not read and signed in a reasonable period of time. See Fla. R. Civ. P. 1.310(e). Accordingly, Respondent was given an opportunity to supplement/correct Dr. Duchowny's deposition, and that was accomplished by the items filed on June 2, 2010.²

9. No subsequent response of any kind has been filed by Petitioners in the intervening 12 days.

10. The predicate for the Motion for Summary Final Order is NICA's contention that, indisputably, Emma Johnston's neurologic problems are not birth-related, and that no obstetrical event resulted in a loss of oxygen or mechanical trauma.

11. NICA relies upon the August 5, 2009, Medical Examination Report and the November 12, 2009, deposition of Michael Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, who evaluated Emma on August 5, 2009.

12. Dr. Duchowny's August 5, 2009, medical report, adopted in his November 12, 2009, deposition states:

In SUMMARY, Emma's neurological examination reveals evidence of cognitive delay together with generalized hypotonia and congenital nystagmus and an alternating esotropia. In addition, Emma demonstrates somatic

abnormalities including epicanthal folds and a high arched palate. These findings are consistent with a diagnosis of hypotonia ataxic cerebral palsy. A review of the medical records mailed on June 4, 2009 further support this diagnosis and suggests that Emma's neurological problems are the result of intrauterine-acquired factors. I therefore believe that Emma did not suffer a neurologic injury to the brain during labor or delivery that was due to oxygen deprivation or mechanical injury. I therefore do not believe that she is compensable under the NICA statute.

13. Additionally, Dr. Duchowny testified at his November 12, 2009, deposition, Page 32, lines 11-18:

Q: So you did not find any evidence of mechanical injury or insult resulting in a mechanical problem with the respiratory process?

A: That's correct.

Q: And there is nothing in your review of the records that suggested there was any such mechanical injury or mechanical insult?

A: Right.

and at page 39, lines 5-12:

Q: Can you tell us that Emma Johnston does not suffer any damage to her brain as a result of oxygen deprivation during labor, delivery and the postdelivery resuscitation period?

A: Yes, I believe so.

Q: You believe that she did not suffer any injury to her brain because of oxygen deprivation?

A: That's correct.

14. There has been no response in opposition to the Motion for Summary Final Order, and accordingly, there is no dispute on the issue of non-compensability. Consequently, for reasons appearing more fully in the Conclusions of Law, NICA's Motion for Summary Final Order is well-founded.³

CONCLUSIONS OF LAW

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

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. Here, indisputably, Emma's neurologic problems arose in utero and were not "caused by an injury to the brain or spinal cord . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation." Consequently, given the provisions of Section 766.302(2), Florida Statutes, Emma 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).

22. Where, as here, the administrative law judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . she or he shall enter an order [to such effect] and shall 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 Statement of the Case and Conclusions of Law, it is

ORDERED that Respondent Florida Birth-Related Neurological Injury Compensation Association's Motion for Summary Final Order is granted, and the Petition for Compensation filed by Emma Johnston, by and through her parents and natural guardians Michelle Johnston and Chris Johnston, be and the same is dismissed with prejudice.

DONE AND ORDERED this 15th day of June, 2010, in
Tallahassee, Leon County, Florida.

Ellajane P. Davis

ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of June, 2010.

ENDNOTES

1/ Section 120.57(1)(h), Florida Statutes (2008), provides:

(h) Any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order.

2/ See, e.g., Vero Beach Care Center v. Ricks, 476 So. 2d 262, 264 (Fla. 1st DCA 1985)("Lay testimony is legally insufficient to support a finding of causation where the medical condition involved is not readily observable."); Ackley v. General Parcel Services, 646 So. 2d 242, 245 (Fla. 1st DCA 1994)("The determination of the cause of a non-observable medical condition, such as a psychiatric illness, is essentially a medical question."); Wausau Insurance Company v. Tillman, 765 So. 2d 123, 124 (Fla. 1st DCA 2000)("Because the medical conditions which the claimant alleged had resulted from the workplace incident were not readily observable, he was obligated to present expert medical evidence establishing that causal connection.").

3/ When, 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 that result; that is, evidence to generate an issue of a material fact. It is not sufficient for an opposing party merely to assert that an issue does exist." 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.