

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SHANNON THOMSEN AND SHAY )  
THOMSEN, individually, and as )  
parents and natural guardians )  
of TYBEE THOMSEN, a minor, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 09-6055N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's  
Second Motion for Summary Final Order served June 21, 2010.

STATEMENT OF THE CASE

1. On November 4, 2009, Petitioners Shannon Thomsen and  
Shay Thomsen, individually and as parents and natural guardians  
of Tybee Thomsen (the child), filed a Petition (claim) with the  
Division of Administrative Hearings (DOAH) for compensation  
under the Florida Birth-Related Neurological Injury Compensation  
Plan (Plan), for injuries allegedly associated with Tybee's  
birth on August 11, 2007, at Shands at the University of Florida  
(hospital).

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on or about November 5, 2009.

3. Douglas Richards, M.D., and Women's Medical Center at Shands were each served on November 9, 2009. Neither has intervened herein.

4. On December 18, 2010, NICA served a Motion for Summary Final Order, which was denied, without prejudice, by an Order entered January 5, 2010.<sup>1</sup>

5. Subsequently, on February 10, 2010, NICA filed a Written Clarification that its Motion for Summary Final Order would stand as its timely Response as required by Section 766.305(4), Florida Statutes.

6. Thereafter, the parties provided convenient hearing dates and an agreement as to venue, and a final hearing on compensability was scheduled for August 2, 2010.

7. NICA's Second Motion for Summary Final Order was filed on June 21, 2010, and is supported by a "Stipulation Regarding Authenticity of Medical Records," signed by all counsel of record, to the effect that the portion of medical records attached thereto for Petitioner Shannon Thomsen (mother) and Tybee Thomsen (child),

(a) were prepared and kept in the ordinary course of the health care providers' business reflected therein, (b) were

prepared at or near the date of the actual event or transaction reflected in the respective records by, or from information transmitted by, a person with knowledge, (c) are true and accurate copies of the originals, (d) are genuine and authentic, (e) otherwise generally meet the foundation requirements of being business records as required pursuant to § 90.803(6), Florida Statutes, without the necessity of any further testimonial foundation or qualification at trial.

8. The predicate for the Second Motion for Summary Final Order is that Tybee was a single gestation and at birth weighed less than the 2,500 grams required by statute as the threshold for NICA claim/eligibility.

9. The new supporting and agreed documentation for NICA's position shows that the Shands Hospital Newborn Identification document<sup>2</sup> and the Shands Hospital Neonatology Delivery Note both identify Tybee's birth weight as 980 grams, and the Shands Hospital Newborn Database document entry also shows Tybee to have been born of Shannon Thomsen's single gestation pregnancy of 25 weeks.

10. Petitioners did not file a response in opposition to NICA's Second Motion for Summary Final Order as provided-for in Florida Administrative Code Rules 28-106.103 and 28-106.204, so on July 8, 2010, an Order to Show Cause provided:

On June 21, 2010, Respondent served its Second Motion for Summary Final Order. To date, Petitioners have not responded to the motion. See Fla. Admin. Code. R. 28-106.103

and 28-106.204(4). Due to the stipulation regarding medical records, it is unlikely that any opposition to the Second Motion for Summary Final Order remains. However, in an abundance of caution and notwithstanding that Petitioners have been accorded the opportunity to do so, it is

ORDERED that by July 20, 2010, Petitioners shall show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

11. No timely response to the July 8, 2010, Order to Show Cause has been filed.

12. Given the record, there is no dispute of material fact. Specifically, there is no dispute regarding Tybee's live birth on August 11, 2007, that she was the result of a single gestation, and that she weighed only 980 grams at birth.

#### CONCLUSIONS OF LAW

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

14. 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.

15. 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.

16. 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.

17. 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. 766.302(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.

18. 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. (Emphasis added).

19. Here, indisputably, Tybee's birth weight was 980 grams. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Tybee 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).

20. Where, as here, the Administrative Law Judge determines that "the injury alleged is not a birth-related neurological injury . . . she . . . 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: (1) The final hearing now scheduled for August 2, 2010, is hereby cancelled; and (2) The claim for compensation filed by Shannon Thomsen and Shay Thomsen, individually and as parents and natural guardians of Tybee Thomsen, a minor, is dismissed with prejudice.

DONE AND ORDERED this 22nd day of July, 2010, in Tallahassee, Leon County, Florida.



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ELLA JANE P. DAVIS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of July, 2010.

ENDNOTES

1/ The premises for this Motion was that the child, Tybee, was born live at less than the statutory minimum weight for a single gestation (see Section 766.302(2)), but the supporting medical documentation for the Motion was not authenticated and therefore there was no record support for NICA's factual allegations. See Bifulco v. State Farm Mutual Automobile Insurance Co., 693 So. 2d 707 (Fla. 4th DCA 1997).



2/ The "weight" space of the Hospital Newborn Identification Form specifies "980" but not "grams." However, given the other documentation and the pleadings, there is no dispute that Tybee's birth weight was recorded in grams.

COPIES FURNISHED:

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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.