

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES AND HEATHER HENDRIX, ON )  
BEHALF OF, AND AS PARENTS AND )  
NATURAL GUARDIANS OF, ADDISON )  
HENDRIX, A MINOR, )  
 )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 09-6836N  
 )  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
NORTH OKALOOSA MEDICAL CENTER, )  
 )  
Intervenor. )  
\_\_\_\_\_ )

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent Florida Birth-Related Neurological Injury Compensation Association's (NICA's) Motion for Summary Final Order, filed February 16, 2010.

STATEMENT OF THE CASE

1. On December 17, 2010, Heather Hendrix (mother) and James Hendrix (father) on behalf of, and as parents and natural guardians of Addison Hendrix (Addison), a minor whose date of birth is alleged as April 26, 2007, filed a Petition (claim)

with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

2. DOAH served NICA with a copy of the claim on December 22, 2009. Other potential intervenors were served as reflected in DOAH's case file and docket.

3. By an Order entered January 12, 2010, North Okaloosa Medical Center's Petition for Leave to Intervene, filed December 30, 2009, was granted, and North Okaloosa Medical Center was recognized as a Respondent-Intervenor.

4. On February 16, 2010, NICA filed a Motion for Summary Final Order, pursuant to Section 120.57(1)(h), Florida Statutes.<sup>1</sup>

The predicate for NICA's Motion was its assertion that, indisputably, the infant, Addison Hendrix, named in the Petition as having sustained a compensable birth-related neurological injury, did not meet the statutory weight requisite for a compensable injury, inasmuch as Addison did not weigh at least 2,500 grams for a live birth from a single gestation or 2,000 grams for a live birth from a multiple gestation.

5. Attached to the Motion was the February 10, 2010, affidavit of Jan Raulerson, RHIT, Custodian of Records, Director, Health Information Management, North Okaloosa Medical Center, attesting that ". . . the attached health information on Addison Hendrix . . . date of birth 04/26/2007, . . . are true

and exact copies of the original [sic] which were prepared by personnel of the hospital in the ordinary course of hospital business totaling approximately 124 pages."<sup>2</sup>

6. In fact, the only attachment to the Motion for Summary Final Order was a single page, bearing the logo for North Okaloosa Medical Center and titled "North Okaloosa Medical Center Newborn Nursery Admission and Discharge Examination." That document shows the mother's (Heather Hendrix's) name, an admission weight of "3 lbs. 1 oz; 1.410 kg.," a birth time of "4/26/07 @ 0920" and a sticker reading, "HENDRIX BABY GIRL."

7. The Motion for Summary Final Order further asserted that the claim did not meet the statutory weight requirements of the Plan and therefore is not a compensable claim.

8. No party timely responded to NICA's Motion for Summary Final Order. See Fla. Admin. Code R. 28-106.103 and 28-106.204(4).

9. Consequently, an Order to Show Cause was entered March 4, 2010, which provided:

On February 16, 2010, Respondent served a Motion for Summary Final Order. To date, Petitioners and Intervenor have not responded to the motion, as permitted by Florida Administrative Code Rules 28-106.103 and 28-106.204(4).

The Motion for Summary Final Order, with attachments, sets forth that at birth, the infant, Addison Hendrix weighed 1.410 Kg (or 1.410 kilograms), the same being the

equivalent of 1,410 grams. Section 766.302(2), Florida Statutes, provides a threshold requirement of 2,500 grams for a single gestation, and the granting of the Motion for Summary Final Order would be dispositive of this case against Petitioners.

Therefore, notwithstanding that Petitioners and Intervenor have already been accorded the opportunity to respond to the Motion for Summary Final Order, it is

ORDERED that by March 19, 2010, Petitioners and Intervenor show good cause in writing, if they can, why the relief requested by Respondent should not be granted.

10. No party has responded to the Order to Show Cause. Accordingly, there has been no challenge concerning the sufficiency of the Motion's supporting affidavit, the accuracy of the single page exhibit to the affidavit, or the single page exhibit's relevance to Addison, the infant in whose name the instant claim was filed. Therefore, any potential issues of authenticity or relevance of the exhibit attached to the Motion are deemed waived, and the undersigned noting that the birth certificate attached by Petitioners to the Petition herein also shows a birth weight for Addison of 3 lbs. 1 oz. at 0920 on April 26, 2007, it is determined that there is no, and can be no, legitimate dispute that the child, Addison, in whose name this Petition/Claim was filed, did, in fact, weigh, at birth,

less than the number of grams specified by statute for either a single or multiple birth. See § 766.302(2), Fla. Stat.

11. Given the record, there is no dispute of material fact. Specifically, there is no dispute that Addison Hendrix, the infant named in the Petition, did not meet the threshold statutory weight requirement for either a single or multiple gestation. Accordingly, NICA's Motion for Summary Final Order is, for reasons appearing more fully in the Conclusions of Law, well-founded.<sup>3</sup>

#### CONCLUSIONS OF LAW

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

13. 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.

14. 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.

15. 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 766.031, Fla. Stat.

16. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), to mean:

Injury to the brain of 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, deliver, 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)

17. Here, indisputably, Addison's birth weight was 1,410 grams. Consequently, given the provision of Section 766.302(2), Florida Statutes, Addison does not qualify for coverage under the Plan. See also Humana of Fla., 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, Fla. Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).

18. 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 Neurological Injury Compensation Association's Motion for Summary Final Order is granted, and the claim for compensation filed by Heather Hendrix and

James Hendrix on behalf of, and as parents and natural guardians of, Addison Hendrix, a minor, is dismissed with prejudice.

DONE AND ORDERED this 2nd day of April, 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 2nd day of April, 2010.

ENDNOTES

1/ Section 120.57(1)(h), Florida Statutes (2009), 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/ Lenhal Realty, Inc. v. TransAmerica Commercial Finance Corp., 615 So. 2d 207, 209 (Fla. 4th DCA 1993) ("[A]n affidavit in support of a motion for summary judgment is defective if it fails to be made on personal knowledge, set forth facts that would be admissible in evidence, and affirmatively show that the affiant is competent to testify as to the matters stated in the affidavit.").

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 Co., Inc. v. Lake Shore Growers Coop. Ass'n, 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.