

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ANGEL WALKER AND JAMES PRATE,	)	
SR., on behalf of and as	)	
parents and natural guardians	)	
of JAMES PRATE, JR., a minor,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 10-0966N
	)	
FLORIDA BIRTH-RELATED	)	
NEUROLOGICAL INJURY	)	
COMPENSATION ASSOCIATION,	)	
	)	
Respondent.	)	
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SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's Motion for Summary Final Order served August 18, 2010.

STATEMENT OF THE ISSUE

1. On February 23, 2010, Petitioners Angel Walker and James Prate, Sr., on behalf of and as parents and natural guardians of James Prate, Jr. (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 James Prate, Jr.'s birth on July 14, 2007, at Shands Hospital at the University of Florida.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on February 25, 2010.

3. Jill Roscoe, M.D., was named in the Petition as the physician providing obstetric services at the birth. Dr. Jill Roscoe Delker was served with a copy of the claim on July 9, 2010.

4. Shands Hospital at the University of Florida was named in the Petition as the place (hospital) of birth/injury. The Petition was sent by certified mail from DOAH to Shands Hospital at the University of Florida, 1600 Southwest Archer Road, Gainesville, Florida 32610, on February 2, 2010 and on June 22, 2010.

5. No person or hospital has moved to intervene herein.

6. After several extensions in which to file the Response required by Section 766.305(4), Florida Statutes, NICA served, on August 18, 2010, a Motion for Summary Final Order, which was filed with DOAH the same day. That Motion for Summary Final Order is accepted as NICA's Response, required by statute, as well as for consideration here as a motion.

7. NICA's Motion for Summary Final Order is supported by Exhibits A and B, copies of the medical records of Angel Walker (mother) and James Allen Prate, Jr., a/k/a Baby Boy Walker (child), respectively. Each set of medical records (Exhibits A

and B) are accompanied by "Certificates of Authenticity" executed under oath by Rebecca Baker, the person responsible for maintaining and controlling said records on behalf of Shands at University of Florida. In their entirety, these "Certificates of Authenticity" meet the standards for affidavits in support of a motion for summary judgment as established by Florida Rules of Civil Procedure 1.510. (See, particularly, the Committee Notes and Authors' Comment).

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

9. The supporting medical records documenting NICA's position show, at Bates page number 000000024 of Exhibit A (Shands Hospital Operative Report for Angel Walker) that caesarean section surgery was performed on the mother on July 14, 2007, resulting in the birth of a single male infant weighing 2,463 grams. At Bates page number 000000003 of Exhibit B (Shands Hospital Coding Summary for "Walker, Boy/Angel") is a birth date of July 14, 2007, and a descriptive diagnosis of a "single liveborn" child. At Bates page number 000000005 of the same exhibit, a Shands Hospital Discharge Summary for "Walker, Boy/Angel," with mother "Angel Walker," and a birth date of July 14, 2007, reflects the birth weight as 2,463 grams. A

similar notation, complete with the same names identifier of "Walker Boy/Angel," and same July 14, 2007 birth date appears at Bates page number 000000009 of the Shands Neonatology Delivery Note dated July 14, 2007, and again reflects a birth weight of 2,463 grams. Finally, part of Exhibit B, at Bates page number 000000043, is Shands' Newborn Identification of a male child weighing 2,463 grams born to mother Angel Walker, and showing "Designated Significant Other" to be "James Prate" on July 14, 2007.

10. Petitioners did not file a timely response in opposition to NICA's Motion for Summary Final Order as provided for in Florida Administrative Code Rules 28-106.103 and 28-106.204, so on September 2, 2010, an Order to Show Cause provided:

On August 18, 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). Nevertheless, and notwithstanding that they have been accorded the opportunity to do so, it is

ORDERED that by September 21, 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 September 2, 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 James Prate, Jr.'s live birth on July 14, 2007, that he was the result of a single gestation, and that he weighed only 2,463 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, James Prate, Jr.'s birth weight was 2,463 grams. Consequently, given the provisions of Section 766.302(2), Florida Statutes, James Prate, Jr., 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 Comp. Ass'n 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 the claim for compensation filed by Angel Walker and James Prate, Sr., on behalf of and as parents and natural guardians of James Prate, Jr., a minor, is dismissed with prejudice.



DONE AND ORDERED this 27th day of September, 2010, in  
Tallahassee, Leon County, Florida.

*Ella Jane P. Davis*

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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 27th day of September, 2010.

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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.