

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LASHAUNDA KATRICE MASON AND)
ALONZO COCHEASE MASON, on)
behalf of and as parents and)
natural guardians of ZAIVION)
JOEL MASON, a minor,)
)
Petitioners,)
)
vs.) Case No. 10-1138N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

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 September 29, 2010.

STATEMENT OF THE CASE

1. On March 5, 2010, Lashaunda Katrice Mason (mother) and Alonzo Cochease Mason (father) on behalf of and as parents and natural guardians of Zaivion Joel Mason, a minor, whose date of birth is alleged as March 6, 2005, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). Dr. George Buchanan and Shands at University of

Florida were named in the Petition as associated with Zaivion's birth.

2. DOAH served NICA with a copy of the claim on March 9, 2010; served University of Florida Shands Hospital on March 11, 2010; and served George Buchanan, M.D., on June 15, 2010.

3. No person or entity has moved to intervene.

4. On September 29, 2010, 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, the physician, George Buchanan, M.D., named in the Petition as having provided obstetrical services at Zaivion's birth, was not a "participating physician," as defined by law, inasmuch as he was not a participating physician at the time of the injury to the minor child, because he had not paid the required assessment for participation in the Plan, nor was he exempt from payment of the assessment. § 766.302(7), Fla. Stat. See also § 766.314(4)(c), Fla. Stat. Attached to the motion was an affidavit of NICA's Custodian of Records, attesting that George Buchanan, M.D., had not paid the required assessment for participation in the Plan at the time of the injury. The affidavit further attested that NICA's policy is to annually document exemptions pursuant to Section 766.314(4)(c), Florida Statutes, and that the "NICA Cares" physician payment history report attached to the affidavit shows that in 2005, the year of

Zaivion's birth, Dr. Buchanan paid the Two Hundred and Fifty Dollars (\$250.00) assessment required by Section 766.314(4)(b)1., Florida Statutes, for non-participating, non-exempt licensed physicians.

5. Petitioners did not timely respond to NICA's Motion for Summary Final Order. Consequently, an Order to Show Cause was entered on October 13, 2010, which provided:

On September 29, 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 they have been accorded the opportunity to do so, it is

ORDERED that by October 25, 2010, Petitioners shall show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

6. On October 25, 2010, Petitioners filed a "Response to this Court's October 13, 2010 to Show Cause and a Request for Extension of Time to File a Response to Respondent's Motion for Summary Final Order." The thrust of this Response was that Petitioners needed time to examine additional medical records.

7. On October 27, 2010, an Order was entered which provided, in pertinent part, "Petitioners are granted to and until November 30, 2010, in which to respond to the Motion for Summary Final Order or to move for additional time for discovery in aid of a response."

8. On November 30, 2010, Petitioners filed a Response, stating, in pertinent part, "The additional hospital records have been reviewed and Petitioner reluctantly concurs that no NICA doctor assisted Dr. Buchanan."

9. Given the record, there is no dispute of material fact. Specifically, there is no dispute that the only physician named in the Petition as providing obstetrical services during Zaivion's birth was not a "participating physician," as that term is defined by Section 766.302(7), Florida Statutes. Accordingly, NICA's Motion for Summary Final Order is, for reasons appearing more fully in the Conclusions of Law, well-founded.¹

CONCLUSIONS OF LAW

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

11. 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.

12. 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. NICA, 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.

13. 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.

14. 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 postdelivery 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 postdelivery 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.

15. Pertinent to this case, "participating physician" is defined in Section 766.302(7), Florida Statutes, to mean:

. . . a physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full-time or part-time and who had paid or was exempted from payment at the time of the injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred. . . .

16. Here, indisputably, the only physician, named/shown to have provided obstetrical services during Jaivion's birth, was not a "participating physician," as that term is defined in

Section 766.302(7), Florida Statutes, and as that term is used in Sections 766.301 through 766.316, Florida Statutes.

Consequently, Zaivion (and derivatively, his parents) does not qualify for coverage under the Plan.

17. Where, as here, the administrative law judge determines that ". . . obstetrical services were not delivered by a participating physician at the birth, 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 Statement of the Case and Conclusions of Law, it is

ORDERED that Respondent Neurological Injury Compensation Association's Motion for Summary Final Order is granted, and the petition for compensation filed by Lashaunda Katrice Mason and Alonzo Cochease Mason on behalf of, and as parents and natural guardians of Zaivion Joel Mason, a minor, is dismissed with prejudice.

DONE AND ORDERED this 9th day of December, 2010, in
Tallahassee, Leon County, Florida.

Ella Jane P. Davis

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 9th day of December, 2010.

ENDNOTE

^{1/} Where, 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 the result; that is, evidence to generate an issue of material fact." Turner Produce Company, Inc. v. Lake Shore Growers Cooperative Association, 217 So. 2d 856, 861 (Fla. 4th DCA 1969). Accord Roberts v. Stokley, 338 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.