

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARLANE RUIZ AND RICARDO)
RODRIGUEZ, on behalf of and as)
parents and natural guardians)
of NATHAN RUIZ-RODRIGUEZ, a)
minor,)
)
Petitioners,)
)
vs.) Case No. 10-10251N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
OSCEOLA REGIONAL HOSPITAL,)
INC., d/b/a OSCEOLA REGIONAL)
MEDICAL CENTER,)
)
Intervenor.)
_____)

SUMMARY FINAL ORDER

This cause came on for consideration upon Respondent's Motion for Summary Final Order served January 20, 2011.

STATEMENT OF THE CASE

1. On November 17, 2010, Petitioners Marlane Ruiz and Ricardo Rodriguez, on behalf of and as parents and natural guardians of Nathan Ruiz-Rodriguez (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 Nathan's birth on February 16, 2008, at Osceola Regional Medical Center. The Petition named Dr. Jose Ismael Gierbolini as the physician providing obstetric services who was present at the birth.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on November 19, 2010. Dr. Gierbolini and Osceola Regional Medical Center were each served on November 23, 2010. Only Orlando Regional Hospital, Inc., d/b/a Orlando Regional Medical Center, has moved to intervene, and its motion filed January 12, 2011, was granted by the Order entered herein on January 25, 2011.

3. On January 20, 2011, NICA served a Motion for Summary Final Order, the predicate for which was the proposition that Nathan was the result of a single gestation and at birth weighed only 1,960 grams, which is less than the 2,500 grams required by statute as the threshold for NICA claim/eligibility.

4. The supporting documentation for NICA's position and Motion for Summary Final Order, which was attached to the Motion, is a certificate of authenticity, signed by a representative (Diana David) of the appointed designee (HealthPort Technology, Inc.) responsible for release of medical records of Osceola Regional Medical Center, attesting to the

truth and accuracy of a patient record, titled "Delivery Summary for Marianne Ruiz," showing: "Baby A" delivered at 8:09 EST on 2/16/08, male, live born, birth weight: 1,960 grams; no. of babies in womb: 1.

5. The Motion for Summary Final Order was not served on Intervenor Osceola Regional Hospital, Inc., d/b/a Osceola Regional Medical Center, probably because at the time of service and filing (January 20, 2011), intervention had not yet been granted. Also, the certificate of service on the Motion for Summary Final Order was ambiguous, so on January 25, 2011, the same date as the intervention order, the undersigned caused the Motion for Summary Final Order to be sent by U.S. Mail to Petitioners and to Intervenor. No timely response in opposition to the Motion for Summary Final Order was filed by either Petitioners or Intervenor as provided-for in Florida Administrative Code Rules 28-106.103 and 28-106.204, so on February 8, 2011, an Order to Show Cause was entered, which provided:

On January 20, 2011, Respondent served a Motion for Summary Final Order. The certificate of service thereon was ambiguous, so on January 25, 2011, the undersigned sent the Motion for Summary Final Order by U.S. Mail to Petitioners and Intervenor.

To date, neither Petitioners nor Intervenor has 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 February 21, 2011, Petitioners and Intervenor shall show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

6. No timely response to the February 8, 2011, Order to Show Cause has been filed.

7. Given the record, there is no dispute of material fact. Specifically, there is no dispute regarding Nathan's live birth on February 16, 2008, that he was the result of a single gestation, and that he weighed only 1,960 grams at birth.

CONCLUSIONS OF LAW

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

9. 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.

10. 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(4), Fla. Stat.

11. 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.

12. 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.

13. 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).

14. Here, indisputably, Nathan's birth weight was 1,960 grams. Consequently, given the provisions of section 766.302(2), Nathan 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).

15. 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 Marlane Ruiz and Ricardo Rodriguez, on behalf of and as parents and natural guardians of Nathan Ruiz-Rodriguez, a minor, is dismissed with prejudice.

DONE AND ORDERED this 2nd day of March, 2011, in Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of March, 2011.

COPIES FURNISHED:
(Via Certified Mail)

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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.