

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANNTONETTE YOUNG, on behalf of)
and as parent and natural)
guardian of MAKHAI FORD, a)
minor,)
)
Petitioner,)
)
vs.) Case No. 11-1942N
)
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, served April 25, 2011, and filed April 27, 2011.

STATEMENT OF THE CASE

1. On April 15, 2011, Anntonette Young, on behalf of and as parent and natural guardian of Makhai Ford, a minor, whose date of birth is alleged as May 21, 2008, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). Jennifer M. Sanchez, D.O. and

University Community Hospital, Inc., were named in the petition as associated with Makhai's birth.

2. DOAH served NICA with a copy of the claim on April 20, 2011; served University Community Hospital, Inc., on or about April 25, 2011; and served Jennifer Sanchez, D.O., on or about May 23, 2011.

3. No person or entity has moved to intervene.

4. On April 27, 2011, 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, Jennifer Sanchez, named in the Petition as having provided obstetrical services at Makhai's birth, was not a "participating physician," as defined by law, inasmuch as Dr. Jennifer Sanchez was not a participating physician at the time of the injury to the minor child, because she had not paid the required assessment for participation in the Plan, nor was she exempt from payment of the assessment as a resident physician, assistant resident physician or intern as provided in section 766.314(4)(c). See also § 766.302(7), Fla. Stat. Attached to the motion was an affidavit of NICA's Custodian of Records, attesting that Dr. Jennifer Sanchez, had not paid the required assessment for participation in the Plan at the time of the injury and that NICA has no records with respect to Dr. Jennifer Sanchez in relation to an exempt status

for the year 2008. The affidavit further attests that NICA's policy is to annually document exemptions pursuant to section 766.314(4)(c), and that the "NICA CARES" physician payment history/report, attached to the affidavit, shows that in 2008, the year of Makhai's birth, Dr. Sanchez paid the Two hundred fifty dollars (\$250.00) assessment required by section 766.314(4)(b)1., for non-participating, non-exempt licensed physicians.

5. Petitioner did not timely respond to NICA's Motion for Summary Final Order. Consequently, an Order to Show Cause was entered on May 10, 2011, which provided:

On April 25, 2011, Respondent served a Motion for Summary Final Order. To date, Petitioner has not responded to the motion. Fla. Admin. Code R. 28-106.103 and 28-106.204(4). Nevertheless, and notwithstanding that Petitioner has been accorded the opportunity to do so, it is

ORDERED that by May 23, 2011, Petitioner shall show good cause in writing, if any she can, why the relief requested by Respondent should not be granted.

6. No timely response was filed by Petitioner to the May 10, 2011 Order to Show Cause.

7. Because service of the petition herein was not perfected upon Dr. Sanchez until May 23, 2011, the undersigned has waited 30 days from May 23, 2011, before ruling on the Motion for Summary Final Order, in order to give Dr. Sanchez

ample opportunity to intervene and be heard in this cause. She has not moved to intervene and therefore cannot be heard either as opposed to the pending motion or for any other purpose.

8. 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 Makhai Ford's birth was not a "participating physician," as that term is defined by section 766.302(7). 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

9. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 766.301-766.316, Fla. Stat.

10. 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.

11. 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.

12. 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 (ALJ) 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 ALJ in accordance with the provisions of chapter 120, Florida Statutes.

§§ 766.309 and 766.31, Fla. Stat.

13. In discharging this responsibility, the ALJ 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 post delivery period in a hospital.

§ 766.309(1), Fla. Stat. An award may be sustained only if the ALJ 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.

14. Pertinent to this case, "participating physician" is defined in section 766.302(7), 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. . . .

15. Here, indisputably, the only physician named as providing obstetrical services during the statutory period (see § 766.309(1)(b)) was not a "participating physician," as that term is defined in section 766.302(7), and as that term is used in sections 766.301 through 766.316. Consequently, Makhai (and derivatively, Makhai's parent) does not qualify for coverage under the Plan.

16. Where, as here, the ALJ 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 the Conclusions of Law, it is, ORDERED:

Respondent Neurological Injury Compensation Association's Motion for Summary Final Order is granted, and the petition for compensation filed by Anntonette Young on behalf of, and as parent and natural guardian of Makhai Ford, a minor, is dismissed with prejudice.

DONE AND ORDERED this 28th day of June, 2011, 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 28th day of June, 2011.

ENDNOTE

1/ Where, as here, the "moving party presents evidence to support the claimed non-existences 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 Co., Inc. v. Lake Shore Growers Coop. Ass'n, 217 So. 2d 856, 861 (Fla. 4th DCA 1969). Accord Roberts v. Stokley 338 So. 2d 1267 (Fla. 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 § 766.311, Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n 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.