

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARMEN ZUMPONE AND FRANK)
ZUMPONE, on behalf of and as)
parents and natural guardians)
of NICOLETTA ZUMPONE, a minor,)
)
Petitioners,)
)
vs.) Case No. 11-3286N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
BRIJMOHAN SINGH, M.D., LILY)
WHETSINE, M.D., AND PEDIATRIX)
MEDICAL GROUP OF FLORIDA, INC.,)
)
Intervenors.)
_____)

SUMMARY FINAL ORDER

This cause came on for consideration upon Respondent Florida Birth-Related Neurological Injury Compensation Association's (NICA's) Motion for Summary Final Order served and filed November 2, 2011.

STATEMENT OF THE CASE

1. On June 27, 2011, Carmen Zumpone and Frank Zumpone, on behalf of and as parents and natural guardians of Nicoletta Zumpone, filed with the Division of Administrative Hearings

(DOAH), a "Petition for Benefits Under Protest Pursuant to Florida Statute Section 766.301 et seq.," for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (NICA Plan) for injuries allegedly associated with Nicoletta Zumpone's birth on January 7, 2010.^{1/}

2. The petition alleged that Nicoletta Zumpone was born at Boca Raton Community Hospital^{2/} and that Joy Boscove, CNM, was a "participating physician" delivering obstetrical services at Nicoletta's birth. The petition made no allegations with regard to the notice required of obstetricians and hospitals which participate in NICA, and did not provide information with regard to whether or not a circuit court civil action already had been filed concerning the same or other persons or entities associated with Nicoletta's birth.^{3/}

3. Pertinent to the pending motion are the following allegations of the petition:

* * *

1. . . . Petitioners take the position that the injuries to the minor are not compensable under NICA. Petitioners are also filing this Petition to preserve the statute of limitations under NICA.

* * *

5. It is alleged that Nicoletta Zumpone suffered injuries which include, but may not be limited to a brachial plexus injury.

* * *

It is alleged that Nicoletta Zumpone suffered injuries which include, but may not be limited to, a brachial plexus/Erb's Palsy injury as a result of a difficult birth. (emphasis added).

4. DOAH served NICA with a copy of the claim on June 30, 2011; served Boca Raton Community Hospital on July 5, 2011; and served Joy A. Boscove, ARNP, on August 17, 2011. DOAH's case file contains signed certified mail receipts from each of these persons or entities.

5. Upon appropriate petition/motion and order, Brijmohan Singh, M.D.; Lily Whetstine, M.D.; and Pediatrix Medical Group of Florida, Inc.; have been granted Intervenor status. These Intervenors are neonatologists whom Petitioners have sued in circuit court. They allege that the circuit court action is in connection with Nicoletta's "immediate postdelivery resuscitation period in the hospital."^{4/} No other person or entity has moved to intervene.

6. On October 24, 2011, after a single extension of time in which to file its response as contemplated by section 766.305(4), Florida Statutes, NICA filed its Notice of Non-Compensability and Request for Evidentiary Hearing, and on November 1, 2011, filed an Amended Notice of Non-Compensability and Request for Evidentiary Hearing. The filings are consistent with each other.

7. On November 2, 2011, Respondent NICA served and filed a Motion for Summary Final Order, the thrust of which is that Nicoletta Zumpone did not suffer a birth-related neurological injury as defined by statute because she does not have a permanent and substantial physical impairment or a permanent and substantial mental impairment.

8. On November 4, 2011, Petitioners filed a Notice of Joinder with Respondent's Motion for Summary Final Order.

9. Intervenors did not file a response to the Motion for Summary Final Order within the time allotted by rule.^{5/}

10. Accordingly, on November 16, 2011, an Order to Show Cause was entered, which provided, in pertinent part:

On November 2, 2011, Respondent served a Motion for Summary Final Order. Petitioners filed a Notice of Joinder therein on November 4, 2011. Intervenors have not responded to the Motion within the time allotted by rule. 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 November 30, 2011, Intervenors shall show good cause in writing, if any they can, why the relief requested by Respondent should not be granted.

11. No responses in opposition to NICA's Motion for Summary Final Order have been filed.

12. NICA retained Donald Willis, M.D., a board-certified obstetrician with special competence in maternal-fetal medicine

to examine the child's medical records and Michael Duchowny, M.D., a pediatric neurologist, to examine the records and the child. NICA's Motion for Summary Final Order concedes that:

* * *

. . . NICA had the medical records evaluated by Dr. Donald Willis, M.D., who did opine that the delivery was complicated by a shoulder dystocia and resulted in a depressed newborn, and that oxygen deprivation occurred during delivery and the immediate post-delivery period

. . . Upon examination of the child and the pertinent medical records, Dr. Duchowny opined that Nicoletta Zumpone does not have a permanent and substantial mental impairment, nor does she have a permanent and substantial physical impairment.

13. Attached to the Motion for Summary Final Order was the affidavit of Michael S. Duchowny, M.D., a pediatric neurologist, who opined within a reasonable degree of medical probability that:

* * *

3. The Florida Birth-Related Neurological Injury Compensation Association retained me as its expert in pediatric neurology in the above-styled matter to examine the minor child, NICOLETTA ZUMPONE, and review the medical records from both NICOLETTA ZUMPONE and her mother, CARMEN ZUMPONE. The purpose of my review of the medical records and evaluation of NICOLETTA ZUMPONE was to determine whether she suffers from an injury which rendered her permanently and substantially mentally and physically impaired, and whether such injury is consistent with an injury caused by oxygen

deprivation or mechanical injury occurring during the course of labor, delivery, or the immediate post-delivery period in the hospital.

4. I evaluated NICOLETTA ZUMPONE on October 12, 2011. A true and accurate copy of my neurology evaluation dated October 15, 2011 is attached hereto as Exhibit 1. All of the statements and opinions expressed therein are true and correct based upon my review of the records, the history taken, and my opinions from the evaluation of the minor child.

5. I reviewed medical records which were sent to me on August 16, 2011. They provide detailed information regarding Nicoletta's medical problems at birth and confirm the statements articulated by Nicoletta's mother. There were no findings to suggest that Nicoletta sustained either a permanent or substantial brain injury due to either mechanical injury or oxygen deprivation. In fact, Nicoletta's present neurological examination reveals no mental or motor impairments apart from her Erb's palsy and she is essentially at age level in both domains. Her residual right upper extremity Erb's palsy results from trauma outside the central nervous system. Nicoletta has made significant progress and I suspect she will continue to improve in the future.

6. As such, it is my opinion that NICOLETTA ZUMPONE does not qualify for coverage under the criteria of the NICA Plan, based on my Report and the foregoing reasons.^[6/]
(emphasis added).

14. Given that there has been no response in opposition to the Motion for Summary Final Order, there is no dispute of material fact that, regardless of whether or not Nicoletta suffered some oxygen deprivation in the statutory period (in the

course of "labor, delivery, or resuscitation in the immediate postdelivery period"), and although she may suffer some residual problems, she does not suffer from either a substantial mental or motor impairment.^{7/}

CONCLUSIONS OF LAW

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

16. 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.

17. 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.

18. 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.

19. 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.

20. 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).

21. Here, indisputably, Nicoletta Zumpone suffers no permanent and substantial motor (physical) impairment apart from her Erb's palsy, which physical impairment does not affect either her brain or spinal cord. She also is without substantial mental or physical impairment, as she is progressing at age level in both domains. In order to be compensable under NICA, the child must be both "permanently and substantially

mentally impaired" and "permanently and substantially physically impaired." Given the provisions of section 766.302(3), Nicoletta Zumpone does not qualify for coverage under the Plan. See also Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997) (The Plan is written in the conjunctive and can only be interpreted to require both substantial mental and physical impairment.); 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).

CONCLUSION

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED:

1. NICA's Unopposed Motion for Summary Final Order is granted.
2. The Petition filed by Carmen Zumpone and Frank Zumpone, on behalf of and as parents and natural guardians of Nicolette Zumpone, is dismissed with prejudice.

DONE AND ORDERED this 20th day of December, 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 20th day of December, 2011.

ENDNOTES

1/ Petitioners alleged that the NICA Plan is unconstitutional, but that "out of an abundance of caution and due to other court rulings which have required other petitioners to pursue this avenue initially, Petitioners are filing this Petition for Benefits Under Protest."

2/ This is the "hospital" as contemplated by section 766.302(2) and (6).

3/ See sections 766.302(7) and 766.309(1)(b), defining "participating physician." See also Tarpon Springs Hospital Foundation, Inc. v. Anderson, 34 So. 3d 742 (Fla. 3d DCA 2010).

4/ See section 766.316, and All Children's Hospital, Inc. v. Department of Administrative Hearings, 29 So. 3d 992 (Fla. 2010) holding non-obstetricians are not required to give pre-delivery notice.

5/ 28-106.103 Computation of Time

In computing any period of time allowed by this chapter, by order of a presiding officer, or by any applicable statute, the

day of the act from which the period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday. When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in these rules, legal holiday means those days designated in Section 110.117, F.S. Except as provided in Rule 28-106.217, F.A.C., five days shall be added to the time limits when service has been made by regular U.S. mail. One business day shall be added when service is made by overnight courier. No additional time shall be added if service is made by hand, facsimile transmission, or electronic mail or when the period of time begins pursuant to a type of notice described in Rule 28-106.111, F.A.C.

28-106.104

(4) In cases in which the Division of Administrative Hearings has final order authority, any party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits. A party moving for summary final order later than twelve days before the final hearing waives any objection to the continuance of the final hearing.

6/ See, e.g., Vero Beach Care Ctr v. Ricks, 476 So. 2d 262, 264 (Fla. 1st DCA 1985) ("Lay testimony is legally insufficient to support a finding of causation where the medical condition involved is not readily observable."); Ackley v. Gen. Parcel Servs., 646 So. 2d 242, 245 (Fla. 1st DCA 1994) ("The determination of the cause of a non-observable medical condition, such as a psychiatric illness, is essentially a

medical question."); Wausau Ins. Co. v. Tillman, 765 So. 2d 123, 124 (Fla. 1st DCA 2000) ("Because the medical conditions which the claimant alleged had resulted from the workplace incident were not readily observable, he was obligated to present expert medical evidence establishing that causal connection.").

7/ 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

Review of a final order of an administrative law judge shall be by appeal to the District Court of Appeal pursuant to section 766.311(1), Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal. See § 766.311(1), Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992).