

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LAUREN SMEDLEY, on behalf of )  
and as parent and natural )  
guardian of JOSHUA CLEMENT, a )  
minor, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-6008N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's Motion for Summary Final Order, filed on May 3, 2012.

STATEMENT OF THE CASE

On November 21, 2011, Lauren Smedley, on behalf of and as parent and natural guardian of Joshua Clement (Joshua), a minor, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The petition named Mark Sargent, M.D. (Dr. Sargent) and Holmes Regional Medical Center (Holmes).

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on November 23, 2011. Dr. Sargent was served a copy of the petition on November 26, 2011. DOAH sent a copy of the petition to Holmes Regional Medical Center on November 23, 2011, and received a receipt from the United States Postal Service on November 30, 2011, showing receipt by Holmes.

On May 3, 2012, Respondent filed a Motion for Summary Final Order, asserting that Joshua did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. Respondent represented in the petition that Petitioner's counsel had been furnished with a copy of the motion and had no objection to the entry of a final summary order finding that the claim is not compensable.

#### FINDINGS OF FACT

1. Joshua Clement was born on January 2, 2012, at Holmes Regional Medical Center. He weighed 4,173 grams.

2. Joshua's vaginal birth was complicated by shoulder dystocia. His Apgar scores were 5/9. Bag and mask ventilation was required for less than 30 seconds after birth. Joshua responded to the resuscitation and was taken to the nursery at the hospital. His newborn hospital care was essentially uneventful. Joshua was subsequently diagnosed with Erb's palsy.

3. Donald C. Willis, M.D. (Dr. Willis), reviewed the medical records for Joshua's delivery and opined that "[t]here was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery or the immediate post delivery period."

4. On February 8, 2012, Michael S. Duchowny, M.D. (Dr. Duchowny), evaluated Joshua. Upon examination of Joshua and the pertinent medical records, Dr. Duchowny opined that:

Joshua's neurological examination reveals findings consistent with a diagnosis of mild Erb's palsy affecting primarily the C5/6 and to a lesser degree C7 dermatomes. He has no sensory abnormalities and his motor deficits are mild and will likely improve with time. There were no findings referable to motor impairment arising from damage to the central nervous system and certainly his cognitive abilities are entirely intact.

I have reviewed records sent on January 23, 2012. The information supports the mother's history and provides no information to suggest neurologic injury to the brain or spinal cord acquired due to oxygen deprivation or mechanical injury.

I therefore do not believe that Joshua should be considered for compensation within the NICA program. He has a mild motor impairment which is the result of forces acting outside of the brain and spinal cord. Furthermore, his mental function is normal for age.

5. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinions of either Dr. Willis or Dr. Duchowny. The opinions of

Dr. Willis and Dr. Duchowny that there was no neurologic injury to the brain or spinal cord due to oxygen deprivation or mechanical injury are credited. Additionally, Dr. Duchowny's opinion that Joshua is not mentally impaired is credited.

CONCLUSIONS OF LAW

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

7. The 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.

8. 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 DOAH. §§ 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.

9. 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.

10. 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).

11. The term "birth-related neurological injury" is defined in section 766.302(2) as follows:

"Birth-related neurological injury" means 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.

12. The evidence, which is not refuted, established that Joshua did not sustain an injury to the brain or spinal cord 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 him permanently and physically impaired. Therefore, Joshua is not eligible for benefits under the Plan.

#### CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the petition for benefits filed by Lauren Smedley, on behalf of and as parent and natural guardian of Joshua Clement, is dismissed with prejudice.

DONE AND ORDERED this 10th day of May, 2012, in  
Tallahassee, Leon County, Florida.

*Susan Belyeu Kirklund*

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SUSAN BELYEU KIRKLAND  
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Filed with the Clerk of the  
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this 10th day of May, 2012.

COPIES FURNISHED:

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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).