

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DESIREE WILLIAMS AND ROBERT)
WILLIAMS, individually and as)
parents and next friends of)
LYLYAUHNIE WILLIAMS, a minor,)
)
Petitioners,)
)
vs.) Case No. 12-0848N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
PALMS WEST HOSPITAL LIMITED)
PARTNERSHIP, d/b/a PALMS WEST)
HOSPITAL, AND STEVEN PLISKOW,)
M.D.,)
)
Intervenors.)
_____)

PARTIAL SUMMARY FINAL ORDER

This cause came on for consideration upon the Renewed Motion for Summary Final Order, filed on March 18, 2013, by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA).

STATEMENT OF THE CASE

On March 5, 2012, Petitioners, Desiree Williams and Robert Williams, individually and as parents and next friends of Lylyauhnie Williams (Lylyauhnie), a minor, filed a Petition for

Determination of NICA Coverage (Petition) with the Division of Administrative Hearings (DOAH) for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Steven Pliskow, M.D., as the physician who provided obstetric services at the birth of Lylyahunie on January 3, 2012, at Palms West Hospital in Palm Beach County, Florida.

DOAH served NICA with a copy of the Petition on March 8, 2012. DOAH served Dr. Pliskow with a copy of the Petition on March 9, 2012. On March 15, 2012, DOAH received a return receipt from the United States Postal Service showing that Palms West Hospital had been served with a copy of the Petition.

On July 6, 2012, Petitioners filed an Amended Petition for Determination as to Applicability of Florida Birth-Related Neurological Injury Compensation Plan (Amended Petition), alleging that Lylyahunie did not suffer a birth-related neurological injury because Ms. Williams was not in labor.

On July 11, 2012, DOAH served NICA with a copy of the Amended Petition. DOAH served Palms West Hospital and Dr. Pliskow with copies of the Amended Petition on July 12, 2012.

On July 12, 2012, Palm West Hospital filed a petition for leave to intervene, which was granted by Order dated July 25,

2012. On July 25, 2012, Dr. Pliskow filed an amended petition to intervene, which was granted by Order dated August 7, 2012.

On October 15, 2012, NICA filed a Motion for Summary Final Order alleging that the claim was compensable. The motion was denied by Order dated December 21, 2012, on the basis that there was a disputed issue of fact of whether Ms. Williams was in labor.

On December 10, 2012, Petitioners filed Petitioners' First Amended Petition for Determination as to Applicability of Florida Birth-Related Neurological Injury Compensation Plan.

On March 18, 2013, NICA filed a Renewed Motion for Summary Final Order, stating that Petitioners and Respondent agreed that Ms. Williams was in labor.

As of the date of the Summary Final Order on Compensability, Petitioners and Intervenors have not filed a response to Respondent's Renewed Motion for Summary Final Order.

FINDINGS OF FACT

1. Lylyahunie Williams was born on January 3, 2011, at Palms West Hospital in Palm Beach County, Florida. Lylyahunie weighed 2,600 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), an obstetrician specializing in maternal-fetal medicine, was requested by NICA to review the medical records for Lylyahunie and her mother. In

an affidavit dated September 13, 2012, Dr. Willis summarized his findings as follows:

[F]etal distress occurred during labor, as documented by prolonged fetal bradycardia prior to birth. The baby did not have a heart beat at birth and required resuscitation. The baby remained flaccid after resuscitation. The initial blood gas showed severe acidosis with a pH of 6.97. EEG was abnormal, reported as showing no evidence of identifiable cerebral activity. The newborn hospital course was complicated with multi-system failure, consistent with birth hypoxia.

There was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery and continuing into the immediate post delivery period. The oxygen deprivation resulted in brain injury. I am not able to comment about the extent of the injury.

3. NICA retained Michael S. Duchowny, M.D., as its expert in pediatric neurology who evaluated the medical records and examined Lylyahunie on August 22, 2012. In an affidavit dated September 25, 2012, Dr. Duchowny opined:

It is my opinion that Lylyahunie Williams neurological examination reveals findings consistent with global neurodevelopmental delay. She is severely spastic in all four limbs with double herniplegia and significant non-fixed contractures. The reflexes are overactive and there are numerous pathological reflexes. She also evidences a facial diplegia and pseudobulbar palsy with absent gag response. Her overall level of function suggests little progress the newborn. Lylyahunie also manifests microcephaly and a cortical visual impairment. I therefore believe that she

has substantial mental and physical impairments which are permanent.

As such, it is my opinion that a review of the medical records indicates Lylyauhnie Williams delivery by cesarean section was on an emergent basis and was complicated by a tight nuchal cord. Her first arterial blood gas levels demonstrated a pH of 6.97 and a bas [sic] excess of -21.3. She was immediately placed in brain cooling protocol with significant hypothermia at St. Mary's Hospital following transfer on the 1st day of life. The records suggest that Lylyauhnie's neurological impairments were acquired intrapartum and I therefore believe that she should be considered for compensation under the NICA statute.

4. The opinions of Dr. Willis and Dr. Duchowny are credited. Based on their opinions and the representation from Respondent that Petitioners no longer take the position that the claim is not compensable, Lylyuahnie sustained an injury to her brain during labor due to oxygen deprivation, which resulted in permanent and substantial mental and physical impairments.

CONCLUSIONS OF LAW

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

6. 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.

7. 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.

8. In determining the issue of compensability, 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.

9. 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.

10. The evidence, which is no longer refuted, established that Lylyauhnie sustained a birth-related neurological injury and is eligible for benefits under the Plan.

11. Petitioners are entitled to proceed upon the issue of notice, and jurisdiction should be reserved to make such a determination.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED:

1. Respondent's Motion for Summary Final Order is granted, and Petitioners' claim is found and determined to be compensable.

2. Jurisdiction is reserved to determine the issue of an award pursuant to section 766.31.

3. Jurisdiction is reserved to determine whether the notice requirements of section 766.316 were satisfied.

DONE AND ORDERED this 19th day of April, 2013, in Tallahassee, Leon County, Florida.

Susan Belyeu Kirklund

SUSAN BELYEU KIRKLAND
Administrative Law Judge
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Filed with the Clerk of the
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this 19th day of April, 2013.

COPIES FURNISHED:

(Via Certified Mail)

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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).