

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DONALD HAWLEY AND CAMILLE)
HAWLEY, individually and as)
parents of RIVER HAWLEY,)
deceased,)
)
Petitioners,)
)
vs.) Case No. 12-0851N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
DOUGLAS WINGER, M.D., AND)
OBSTETRICS & GYNECOLOGY)
ASSOCIATES, P.A.,)
)
Intervenors.)
_____)

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's Motion for Summary Final Order, filed on April 30, 2012.

STATEMENT OF THE CASE

On March 8, 2012, Petitioners, Donald Hawley and Camille Hawley, individually and as parents of River Hawley (River), deceased, filed a Petition for Determination of Compensability (Petition) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related

Neurological Injury Compensation Plan (Plan). The Petition named Douglas Winger, M.D., as the physician who provided obstetric services at the birth of River at Florida Hospital Celebration.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the Petition on March 15, 2012, and served Florida Hospital-Celebration Health on March 16, 2012. Dr. Winger was served with a copy of the Petition in March 2012, and a return receipt was returned to DOAH on March 21, 2012.

On March 29, 2012, Dr. Winger and Obstetrics & Gynecology Associates, P.A., who is Dr. Winger's employer, filed a Motion to Intervene, stating that they are currently and were participants in the Plan at the time of the injury alleged by Petitioners. An Order Granting Petition to Intervene was entered on April 5, 2012.

On April 30, 2012, NICA filed a Motion for Summary Final Order, stating that, at the time of River's birth, Dr. Winger was not a "participating physician" as that term is defined by section 766.302(7), Florida Statutes. No response to the motion was filed by either Petitioners or Intervenors.

On May 16, 2012, an Order to Show Cause was entered requiring Petitioners and Intervenors to show cause on or before May 29, 2012, why the motion should not be granted and stating

that failure to show cause would result in the issuance of a summary final order of dismissal. No response to the Order to Show Cause has been filed.

FINDINGS OF FACT

1. The Petition named Dr. Winger as the physician providing obstetric services at River's birth on July 25, 2010.

2. Attached to the motion is an affidavit of NICA's custodian of records, Tim Daughtry, attesting to the following, which has not been refuted:

One of my official duties as Custodian of Records is to maintain NICA's official records relative to the status of physicians as participating physicians in the Florida Birth-Related Neurological Injury Compensation Plan who have timely paid the Five Thousand Dollar (\$5,000) assessment prescribed in Section 766.314(4)(c), Florida Statutes, and the status of physicians who may be exempt from payment of the Five Thousand Dollar (\$5,000) assessment pursuant to Section 766.314(4)(c), Florida Statutes. I maintain NICA's official records with respect to the payment of the Two Hundred Fifty Dollar (\$250.00) assessment required by Section 766.314(4)(b)1., Florida Statutes, by all non-participating, non-exempt physicians.

* * *

As payments of the requisite assessments are received, NICA compiles data in the "NICA CARES" database for each physician. The "NICA CARES physician payment history/report" attached hereto for Dr. Douglas Winger indicates that in the year 2010, the year in which Dr. Winger participated in the delivery of River

Hawley, as indicated in the Petition for Benefits, Dr. Winger did not pay the Five Thousand Dollar (\$5,000) assessment required for participation in the Florida Birth-Related Neurological Injury Compensation Plan.

Further, it is NICA's policy that if a physician falls within the exemption from payment of the Five Thousand Dollar (\$5,000) assessment due to their status as a resident physician, assistant resident physician or intern as provided in Section 766.314(4)(c), Florida Statutes, annual documentation as to such exempt status is required to be provided to NICA. NICA has no records with respect to Dr. Winger in relation to an exempt status for the year 2010. To the contrary, the attached "NICA CARES physician payment history/report" shows that in 2010, Dr. Winger paid the Two Hundred and Fifty Dollar (\$250) assessment required by Section 766.314(4)(b)1., Florida Statutes, for non-participating, non-exempt physicians.

3. The NICA CARES statement attached to the affidavit of Mr. Daughtry supports the representations made in the affidavit.

4. No party has offered any exhibits, affidavits or any other evidence refuting the affidavit of Mr. Daughtry, which shows that Dr. Winger was not a participating physician in the Plan at the time of River's birth. Neither Petitioners nor Intervenors have requested additional discovery time, and Petitioners have not moved for leave to amend the Petition to name any additional physician as rendering obstetrical services in connection with River's birth.

5. Dr. Winger was not a participating physician at the time of River's birth on July 25, 2010.

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 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.

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 the Division of Administrative Hearings. §§ 766.302(3), 766.303(2), and 766.305(1), 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.

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), Fla. Stat.

11. Pertinent to this case, "participating physician" is defined by 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 exempt 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.

12. Section 766.314 provides that beginning January 1, 1990, physicians who are not participating physicians in the Plan shall pay an annual assessment of \$250, unless they are excluded from the assessment as provided in section 766.314(4)(b)4. Physicians participating in the plan are assessed \$5,000 annually, unless specifically excluded. § 766.314(4)(c), Fla. Stat.

13. Dr. Winger paid an assessment of \$250 for the year 2010, therefore, he is not eligible to be a participating physician. No evidence was submitted that Dr. Winger was excluded from paying the \$5,000 assessment required for participating physicians.

14. The obstetrical services provided during River's birth were not provided by a participating physician. Thus, the death of River is not compensable under the Plan.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law, it is ORDERED that Respondent's Motion for Summary Final Order is granted, and the Petition is dismissed with prejudice.

DONE AND ORDERED this 5th day of June, 2012, 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 5th day of June, 2012.

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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).