

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

KENYA SUTTON, individually and )  
as parent of ASHANTI STEPHENS, )  
a minor, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 12-1713N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
BAYFRONT MEDICAL CENTER, INC., )  
AND RICHARD C. BROWN, M.D., )  
 )  
Intervenors. )  
\_\_\_\_\_ )

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's Unopposed Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on May 7, 2013.

STATEMENT OF THE CASE

On May 31, 2012, Petitioner, Kenya Sutton, individually and as parent of Ashanti Stephens (Ashanti), a minor, filed a Petition for Determination of Compensability Pursuant to Florida Statute Section 766.301-766.316 (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 Richard C. Brown, M.D., as the physician providing obstetric services at the birth of Ashanti at Bayfront Medical Center in St. Petersburg, Florida.

DOAH served NICA with a copy of the Petition on June 1, 2012. DOAH served Bayfront Medical Center on June 4, 2012. On June 14, 2012, Bayfront Medical Center and Dr. Brown filed a petition to intervene, which was granted by Order dated June 27, 2012.

NICA filed an Unopposed Motion for Summary Final Order, asserting that Ashanti did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. NICA represented in the motion that Petitioner and Intervenors have no objection to the granting of the motion.

#### FINDINGS OF FACT

1. Ashanti Stephens was born on December 27, 2010, at Bayfront Medical Center in St. Petersburg, Florida. Ashanti weighed 3,570 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Ashanti. In an affidavit dated May 1, 2013, Dr. Willis 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."

3. Raymond J. Fernandez, M.D., a pediatric neurologist, was retained by NICA to perform an independent medical examination of Ashanti. He did so on September 18, 2012. In an affidavit dated May 3, 2013, Dr. Fernandez opined the following within a reasonable degree of medical probability:

Ashanti's left upper extremity weakness is due to mechanical injury of the left brachial plexus and cervical nerve roots during delivery, but there is no evidence of mental or physical impairment due to brain or spinal cord injury due to oxygen deprivation or mechanical injury.

4. A review of the file does not show any contrary opinions to those of Dr. Willis and Dr. Fernandez, and Petitioner and Intervenors have no objection to the issuance of a summary final order finding that the injury is not compensable under Plan. The opinions of Dr. Willis and Dr. Fernandez that Ashanti did not suffer a neurological injury due to oxygen deprivation or mechanical injury during labor, delivery, or the immediate post-delivery period are credited.

#### 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. 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.

9. 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.

10. 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.

11. The evidence, which is not refuted, established that Ashanti 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 post-delivery period in a hospital. Therefore, Ashanti 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 filed by Kenya Sutton, individually and as parent of Ashanti Stephens, is dismissed with prejudice.

DONE AND ORDERED this 17th day of May, 2013, 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  
Division of Administrative Hearings  
this 17th day of May, 2013.

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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).