



of Noah Klee (Noah), a minor, filed a Petition under Protest Pursuant to Florida Statute Section 766.301 et seq. (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 Stephen Snow, M.D., as the physician who provided obstetric services at the birth of Noah at Orlando Health, Inc., d/b/a Winnie Palmer Hospital (Winnie Palmer Hospital) on March 30, 2009.

DOAH served NICA and Winnie Palmer Hospital with copies of the Petition on October 15, 2012. DOAH served Dr. Snow with a copy of the Petition on December 26, 2012.

On October 18, 2012, Winnie Palmer Hospital filed a Petition for Leave to Intervene, which was granted by Order dated October 31, 2012. On December 19, 2012, the Petition for Leave to Intervene of Emma Fritz, M.D. and Tampa Bay Women's Healthcare Alliance, L.L.P., d/b/a Tampa Bay Women's Care, d/b/a Woman's Care Florida was filed and was granted by Order dated January 3, 2013.

On January 17, 2013, NICA filed a Motion for Summary Final Order, stating that there were no disputed facts on the issue of compensability and that Noah had not sustained a birth-related neurological injury and was not entitled to compensation under the Plan. No one filed a written response to the motion.

The motion was heard by telephonic conference call on February 6, 2013. The motion was denied on the basis that it was not clear to the undersigned that the affidavit of Dr. Donald Willis, which was attached to the motion, sufficiently addressed the issue of whether there had been an injury during the period of resuscitation in the immediate postdelivery period. At the motion hearing, Petitioners vigorously argued that the injury was not compensable under the Plan and that the motion should be granted.

The final hearing was scheduled for March 8, 2013, and an Order of Prehearing Instructions was entered, requiring the Intervenors to advise Petitioners and Respondent no later than February 20, 2013, of any opinions of experts that they had retained to testify at the final hearing. Petitioners were required to advise Respondent and Intervenors by March 1, 2013, of the opinions of any experts that Petitioners had retained to testify at the final hearing.

By letter filed on January 20, 2013, Winnie Palmer Hospital advised that the experts retained by Winnie Palmer Hospital opined that "Noah Klee did not sustain a 'birth-related neurological injury' as defined in Florida Statute §766.302(2)." By letter filed on February 26, 2013, Dr. Fritz and Tampa Bay Women's Care disclosed that the experts they retained were "of the opinion that Noah Klee did not sustain a birth-related

neurological injury as defined by §766.302(2) of the Florida Statutes."

In responses to requests for admissions served by Winnie Palmer Hospital, Petitioners denied that "Noah Klee sustained an injury to his brain caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital." In response to an interrogatory, Petitioners responded that the denial was based on the report of Dr. Willis.

On February 15, 2013, NICA filed a Renewed Motion for Summary Final Order. The motion was served on the other parties by email; thus, a response to the motion was due by February 22, 2013.

On February 27, 2013, Petitioner filed Petitioner's Motion to Take Deposition of Donald Willis, M.D. The motion was heard during a status conference held by telephone on February 28, 2013. At that time, counsel for Petitioners advised that she did not have an expert who could testify that Noah had sustained a birth-related neurological injury, but that she wanted to question Dr. Willis on his opinion that Petitioner was not in labor prior to the delivery of Noah. Because Petitioner did not have an expert to opine that Noah sustained a birth-related neurological injury to testify at the final hearing that was to be held in eight days, the motion to take the deposition of

Dr. Willis was denied, and an oral ruling was made granting the Motion for Summary Final Order.

FINDINGS OF FACT

1. Noah Klee was born on March 30, 2009, at Winnie Palmer Hospital in Orlando, Florida. Noah weighed 4,259 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 Noah and his mother. In an affidavit dated February 14, 2013, Dr. Willis summarized his findings as follows:

The purpose of my review of the medical records of NOAH KLEE and AMANDA KLEE was to determine whether an injury occurred in the course of labor, delivery or resuscitation in the immediate post-delivery period in the Hospital due to oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the Hospital.

\* \* \*

In summary, the pregnancy was complicated by insulin dependent diabetes with decreased fetal movement and onset of severe preeclampsia at 37 weeks gestational age. Emergency Cesarean section was done for suspected fetal distress on the FHR monitor. The patient was not in labor. The baby was depressed at birth, but Apgar score was normal by 5 minutes and the umbilical cord blood gas pH was above 7. The baby did suffer brain injury, but the above findings suggest the injury did not occur during

labor, delivery or resuscitation in the immediate post-delivery in the Hospital.

The patient was not in labor. There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during delivery or resuscitation in the immediate post-delivery in the Hospital.

As such, it is my opinion that there was no oxygen deprivation or mechanical injury during the course of labor, delivery or resuscitation in the immediate post-delivery in the Hospital.

3. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinions of Dr. Willis. The opinion of Dr. Willis that Noah did not suffer a neurological injury due to oxygen deprivation or mechanical injury during labor, delivery, or immediate postdelivery period is credited.

#### CONCLUSIONS OF LAW

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

5. 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.

6. 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.

7. 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 determines that the claim is not compensable, as it has in the instant case, any 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.

8. 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.

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 not refuted, established that Noah 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. Therefore, Noah 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 Amanda Klee and Walter Klee, on behalf of and as parents and natural guardians of Noah Klee, is dismissed with prejudice.

DONE AND ORDERED this 1st day of March, 2013, in Tallahassee, Leon County, Florida.

*Susan Belyeu Kirklund*

---

SUSAN BELYEU KIRKLAND  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of March, 2013.

COPIES FURNISHED:

(Via Certified Mail)

Kenney Shipley, Executive Director  
Florida Birth Related Neurological  
Injury Compensation Association  
2360 Christopher Place, Suite 1  
Tallahassee, Florida 32308  
(Certified Mail No. 7012 1640 0000 7864 0446)

Maria D. Tejedor, Esquire  
Diez-Arguelles and Tejedor, P.A.  
505 North Mills Avenue  
Orlando, Florida 32803  
(Certified Mail No. 7012 1640 0000 7864 0453)

Bradley Paul Blystone, Esquire  
Marshall, Dennehey, Warner,  
Coleman and Goggin  
315 East Robinson Street, Suite 550  
Orlando, Florida 32801  
(Certified Mail No. 7012 1640 0000 7864 0460)

David W. Black, Esquire  
Frank, Weinberg and Black, P.L.  
7805 Southwest 6th Court  
Plantation, Florida 33324  
(Certified Mail No. 7012 1640 0000 7864 0477)

Thomas E. Dukes, III, Esquire  
McEwan, Martinez & Dukes, P.A.  
Post Office Box 753  
Orlando, Florida 32802-0753  
(Certified Mail No. 7012 1640 0000 7864 0484)

Stephen Snow, M.D.  
525 South Magnolia Avenue  
Orlando, Florida 32801  
(Certified Mail No. 7012 1640 0000 7864 0491)

Amie Rice, Investigation Manager  
Consumer Services Unit  
Department of Health  
4052 Bald Cypress Way, Bin C-75  
Tallahassee, Florida 32399-3275  
(Certified Mail No. 7012 1640 0000 7864 0507)

Elizabeth Dudek, Secretary  
Health Quality Assurance  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308  
(Certified Mail No. 7012 1640 0000 7864 0514)

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).