

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

NEIL AND RENJINI KANNIKAL, on  
behalf of and as parents and  
natural guardians of NEHA, a  
minor,

Petitioners,

vs.

Case No. 12-3889N

FLORIDA BIRTH- RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon the Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on June 24, 2013.

STATEMENT OF THE CASE

On November 29, 2012, Petitioners, Neil Kannikal and Renjini Kannikal, on behalf of and as parents and natural guardians of Neha, a minor, filed a Petition for Benefits 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 Shelby Wilbourne, M.D., as the physician providing obstetric services at the birth of Neha at Broward General Medical Center located in Fort Lauderdale, Florida.

DOAH served NICA with a copy of the Petition on December 5, 2012. DOAH received a receipt from the United States Postal Service on December 7, 2012, showing that Broward General Medical Center had been served with a copy of the Petition.

Dr. Wilbourne was served a copy of the Petition by DOAH on December 6, 2012.

As of the date of this Summary Final Order of Dismissal, neither Broward General Medical Center nor Dr. Wilbourne have petitioned to intervene in this proceeding.

On June 24, 2013, NICA filed a Motion for Summary Final Order, asserting that Neha did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. Petitioners filed Petitioners' Response in Opposition to Motion for Summary Final Order on July 1, 2013.

On July 11, 2013, the Motion for Summary Final Order was heard by telephonic conference call. Petitioners had filed medical records from Neha's treating physician. The records in and of themselves did not refute Respondent's allegation that Neha did not have a birth-related neurological injury. By Order dated July 11, 2013, Petitioners were given an extension of time

in which to file a supplemental response to the Motion for Summary Final Order on or before October 1, 2013. As of the date of this Summary Final Order of Dismissal, Petitioners have not filed a supplemental response to the motion.

FINDINGS OF FACT

1. Neha was born on May 15, 2012, at Broward General Medical Center, located in Fort Lauderdale, Florida. Neha weighed six pounds nine ounces at birth.

2. NICA retained Michael S. Duchowny, M.D., as its medical expert in pediatric neurology. Dr. Duchowny examined Neha on March 20, 2013, and reviewed her medical records. In an affidavit dated April 24, 2013, Dr. Duchowny opined as follows:

Neha's neurological examination is significant only for a mild degree of hypontia coupled with very slight motor development delay. In other regards, she seems to be developing quite well and I suspect that her language development will progress on schedule. There are no focal or lateralizing findings to suggest structural brain damage.

A review of medical records reveals that Neha was born by stat cesarean section at Broward General Hospital due to fetal bradycardia. She was delivered with a full body nuchal cord and a true knot that was removed at birth. There was evidence of severe metabolic acidosis-arterial blood gases drawn 11 minutes after birth revealed a pH of 6.66, PCO<sub>2</sub> of 162, PO<sub>2</sub> of 11, and base excess of -32. These values were improved on a repeat series drawn at 12:27 PM.

Thick meconium was suctioned below the vocal cords and Neha was diagnosed with meconium aspiration syndrome. Seizures occurred several after birth and were treated with phenobarbital and phenytoin. As previously stated by the family, Neha was immediately enrolled in a general hypothermia protocol. Of significance, a brain ultrasound exam obtained on May 15 at 6:46 PM, was normal and an MRI scan of the brain obtained on May 23 (DOL #8) was also within normal limits.

Neha's examination today does not reveal either a substantial mental or motor impairment, findings are consistent with the lack of significant MRI findings. I believe that the hypothermia protocol in all likelihood was neuro-protective and more likely than not, contributed to Neha's positive outcome.

Given Neha's favorable outcome, I believe that she should not be considered for inclusion within the NICA program.

As such, it is my opinion that Neha Kannikal is not permanently and substantially mentally impaired nor is she permanently and substantially physically impaired due to oxygen deprivation or mechanical injury occurring during the course of labor, delivery or the immediate post-delivery period in the hospital during the birth of Neha Kannikal.

3. A review of the file does not show any opinion contrary to Dr. Duchowny's opinion that Neha does not have a substantial and permanent mental and physical impairment due to lack of oxygen or mechanical trauma 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 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.

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 Neha Kannikal is not permanently and substantially mentally impaired nor is she permanently and substantially physically impaired due to oxygen deprivation or mechanical injury occurring during the course of labor, delivery or the immediate post-delivery period. Therefore, Neha 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 Neil Kannikal and Renjini Kannikal, on behalf of and as parents and natural guardians of Neha, is dismissed with prejudice.

DONE AND ORDERED this 8th day of October, 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  
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this 8th day of October, 2013.

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).