

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

IRENE RODRIGUEZ, on behalf of  
and as parent and natural  
guardian of ELIJAH THEARD, a  
minor,

Petitioner,

vs.

Case No. 13-0184N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

BILL DUKE, M.D., AND BRENDA  
HARRIS-WATSON, M.D.,

Intervenors.

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SUMMARY FINAL ORDER ON COMPENSABILITY

This cause came on for consideration upon a Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on June 28, 2013.

STATEMENT OF THE CASE

On January 8, 2013, Petitioner, Irene Rodriguez, on behalf of and as parent and natural guardian of Elijah Theard (Elijah), 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 Billy Lee Duke, M.D.; Brenda Harris-Watson, M.D.; and Manuel Fiesta, M.D., as the physicians providing obstetric services at the birth of Elijah at Lakeland Regional Medical Center in Lakeland, Florida.

DOAH served NICA with a copy of the Petition on January 28, 2013. Dr. Fiesta was served a copy of the Petition on January 22, 2013. Lakeland Regional Medical Center, Dr. Duke, and Dr. Harris-Watson were served copies of the Petition on January 21, 2013. Dr. Harris-Watson was also served a copy of the Petition on January 22, 2013.

On March 13, 2013, Dr. Duke filed a motion to intervene, which was granted by Order dated March 20, 2013. On March 20, 2013, Dr. Harris-Watson filed a motion to intervene, which was granted by Order dated March 29, 2013.

NICA filed a Motion for Summary Final Order, asserting that Elijah sustained a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. The motion was served by Email on June 28, 2013. As of the date of this Summary Final Order on Compensability, neither Petitioner nor Intervenors have filed a response.

FINDINGS OF FACT

1. Elijah was born on May 1, 2010, at Lakeland Regional Medical Center in Lakeland, Florida. Elijah weighed 3,520 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Elijah. In an affidavit dated June 19, 2013, Dr. Willis opined the following:

In summary, there was a non-reassuring FHR pattern during labor. Cesarean delivery was done with delivery of a depressed newborn. The baby had low Apgar scores and a cord blood pH<7.0. The baby required resuscitation, including intubation and chest compressions. Hospital course was complicated by multisystem dysfunction. MRI was consistent with diffuse global hypoxic ischemic encephalopathy.

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 severity of the brain injury.

3. Raymond J. Fernandez, M.D., a pediatric neurologist specializing in pediatric neurology, was retained by NICA to examine Elijah. Dr. Fernandez examined Elijah on May 31, 2013. In an affidavit dated June 21, 2013, Dr. Fernandez opined as follows:

There is ample evidence of substantial mental and motor (physical) impairment due to oxygen deprivation during labor and delivery. Elijah Theard has severe microcephaly that is

indicative of poor brain growth and is a reliable predictor of permanent impairment.

4. A review of the file does not show any contrary opinions to those of Dr. Willis and Dr. Fernandez. The opinions of Dr. Willis and Dr. Fernandez that Elijah did suffer a neurological injury due to oxygen deprivation or mechanical injury during labor and delivery and continuing into the immediate post-delivery period are credited. Dr. Fernandez's opinion that Elijah suffered substantial and permanent mental and physical impairment due to oxygen deprivation during labor and delivery is 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. 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 Elijah did sustain an injury to the brain caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate post delivery period in a hospital. The evidence also established that the injury suffered is substantial and permanent mental and physical impairment. Intervenors have stated in their motions to intervene that they are participating physicians in the Plan. Therefore, Elijah is eligible for benefits under the Plan.

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 Elijah Theard sustained a birth-related neurological injury which is compensable under the Plan.
2. Jurisdiction is reserved to determine the issue of award pursuant to section 766.31.
3. Jurisdiction is retained to determine whether the notice requirements of section 766.316 were satisfied.

DONE AND ORDERED this 10th day of July, 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 10th day of July, 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).