

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM AND CHERISE MOORE, on
behalf of and as parents and
natural guardians of SARAH
ELIZABETH MOORE, a minor,

Petitioners,

vs.

Case No. 13-0688N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

WOMEN'S CARE FLORIDA AND BRIAN
MCNULTY, M.D.,

Intervenors.

_____ /

SUMMARY FINAL ORDER

This cause came on for consideration upon an Unopposed Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA) on November 11, 2013.

STATEMENT OF THE CASE

On February 19, 2013, Petitioners, William Moore and Cherise Moore, on behalf of and as parents and natural guardians of Sarah Elizabeth Moore (Sarah), 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 compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Brian McNulty, M.D. as the physician providing obstetric services at the birth of Sarah at Florida Hospital Tampa Bay.

DOAH served NICA with a copy of the Petition on February 26, 2013. DOAH served Dr. McNulty and Florida Hospital Tampa Bay with copies of the Petition on February 27, 2013. On July 22, 2013, Women's Care Florida and Dr. McNulty filed Intervenor, Women's Care Florida and Brian McNulty, M.D.'s Petition and Motion to Intervene, which was granted by Order dated August 6, 2013. As of the date of this Summary Final Order, Florida Hospital Tampa Bay has not petitioned to intervene in this proceeding.

On November 11, 2013, NICA filed an Unopposed Motion for Summary Final Order, asserting that Sarah did sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. NICA represented in the motion that neither Petitioners nor Intervenor opposed the granting of the motion.

FINDINGS OF FACT

1. Sarah Elizabeth Moore was born on January 2, 2013, at Florida Hospital Tampa Bay in Tampa, Florida. She weighed 2,690 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records of Sarah. In a report dated August 8, 2013, Dr. Willis opined as follows:

In summary, the mother had abdominal trauma the day before delivery that resulted in what appears to be a fetal-maternal hemorrhage, causing severe fetal anemia. The blood count (Hct) at birth was only 16%. Fetal/newborn anemia resulted in hypoxia and acidosis, which worsened after delivery. The umbilical cord blood gas had a base excess of -9.9, which significantly worsened to a based excess of -20 within minutes after birth. Hospital course was complicated by multi-system failure, consistent with hypoxic injury. MRI identified global hypoxic ischemic encephalopathy.

The mother was apparently not in labor. The fetus did not appear to have significant hypoxia at time of birth, but developed severe hypoxia during the immediate post delivery period. The oxygen deprivation during the post-delivery period resulted in brain injury. There was no injury due to mechanical trauma.

3. On October 11, 2013, Raymond J. Fernandez, M.D., evaluated Sarah. His examination revealed that Sarah had

[s]ubstantial mental and motor impairment due to oxygen deprivation that began prior to delivery and continued during delivery and during the immediate post delivery period of resuscitation. Acidosis, due to hypoxia persisted for approximately eight to ten hours after birth. Sarah has severe microcephaly, indicative of severe brain atrophy that is predictive of permanent and substantial impairment, both motor and mental.

4. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinions of either Dr. Willis or Dr. Fernandez. The opinions of Dr. Willis and Dr. Fernandez that Sarah did suffer a neurological injury due to oxygen deprivation during the immediate post-delivery resuscitation period are credited. Additionally, Dr. Fernandez's opinion that Sarah has both a substantial mental and motor impairment is also 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 Sarah did sustain an injury to the brain caused by oxygen deprivation occurring in the course of resuscitation in the immediate postdelivery period in a hospital, which renders her substantially and permanently physically and mentally impaired. Therefore, Sarah 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 Unopposed Motion for Summary Final Order is granted, and Sarah Elizabeth Moore 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. It is further ORDERED that the parties are accorded 30 days from the date of this Order to resolve, subject to approval of the administrative law judge, the amount and manner of payment of an award to Petitioners; the reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees and costs; and the amount owing for expenses previously incurred. If not resolved within such period, the parties shall so advise the administrative law judge, and a hearing will be scheduled to resolve such issues. Once resolved, an award will be made consistent with section 766.31.

DONE AND ORDERED this 22nd day of November, 2013, 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 22nd day of November, 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).