

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMBER LANE AND ALONZO KELLEY, on
behalf of and as parents and
natural guardians of DESTINI
KELLEY, a minor,

Petitioners,

vs.

Case No. 13-1100N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

ST. JOSEPH'S WOMEN'S HOSPITAL,

Intervenor.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon a Third Renewed Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on May 4, 2015.

STATEMENT OF THE CASE

On March 22, 2013, Petitioners, Amber Lane and Alonzo Kelley, on behalf of and as parents of Destini Kelley (Destini), a minor, filed a Petition Under Protest Pursuant to Florida Statutes Section 766.301 et seq. with the Division of

Administrative Hearings (DOAH) for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The case was assigned to Administrative Law Judge Susan B. Kirkland. On April 18, 2013, Petitioners filed a Motion for Leave to Amend NICA Petition, which was granted by Order dated May 29, 2013. The Amended Petition (Petition) named Teresa L. Conrad, M.D., as the physician who provided obstetric services for the birth of Destini on March 26, 2008, at St. Joseph's Hospital for Women located in Tampa, Florida.

DOAH served NICA with a copy of the Petition on March 27, 2013. DOAH received a return receipt from the United States Postal Service on May 13, 2013, showing that St. Joseph's Hospital for Women had been served with a copy of the Petition. DOAH received a return receipt from the United States Postal Service on July 26, 2013, showing that Dr. Conrad was served with a copy of the Petition.

On May 14, 2013, St. Joseph's Women's Hospital filed a Motion to Intervene, which was granted by Order dated May 29, 2013. As of the date of the Summary Final Order of Dismissal, Teresa L. Conrad, M.D., has not petitioned to intervene in this proceeding.

On August 27, 2013, NICA filed a Motion for Summary Final Order, requesting that a summary final order be entered finding

that the claim was not compensable asserting that Destini did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. On September 16, 2013, an Order to Show Cause was entered directing Intervenor to show in writing by September 27, 2013, why NICA's Motion for Summary Final Order should not be granted. On September 27, 2013, Intervenor filed a Response to Order to Show Cause stating that Intervenor had not been provided with certain medical records necessary for Intervenor to evaluate this claim. After conducting a telephonic hearing on the Motion for Summary Final Order and Order to Show Cause, Judge Kirkland entered an Order Extending Time to Respond to Motion for Summary Final Order on October 22, 2013, granting an extension of time until November 4, 2013, for Intervenor to file a response to NICA's Motion for Summary Final Order. The docket does not reflect that a response was filed.

On February 10, 2014, NICA filed a Renewed Motion for Summary Final Order. A Motion to Withdraw as Counsel for Petitioners was granted by Order dated April 3, 2014, allowing Petitioners' counsel to withdraw from representation of Petitioners. Intervenor filed a Response to NICA's Renewed Motion for Summary Final Order on March 27, 2014, in opposition to NICA's renewed motion. Intervenor asserted that NICA's maternal-fetal expert, Dr. Willis, had not been provided with

certain medical records and that Destini had not yet been evaluated by a pediatric neurologist. On June 6, 2014, and subsequent to a telephonic hearing on the Motion, an Order Denying Renewed Motion for Summary Final Order was entered, noting that no appearance had been made by new counsel for Petitioners, and that Petitioners had not responded to the Renewed Motion. On June 6, 2014, a Notice of Hearing by Video Teleconferencing was issued scheduling the final hearing for September 9, 2014. On August 18, 2014, NICA filed a Motion for Extension of Time and to Reschedule Final Hearing on the grounds that Petitioners had not responded to discovery propounded by Respondent, that additional discovery propounded upon Petitioners by Respondent had not been returned in the mail, and that an examination with a pediatric neurologist had been scheduled for October 21, 2014.

On August 21, 2014, a Notice of Case Reassignment was entered reassigning the case to the undersigned, due to Judge Kirkland's impending retirement. On September 2, 2014, an Order Granting Continuance was entered.

On September 3, 2014, a Notice of Appearance was filed by Nicole Sivils, Esquire, of The Florida Law Group on behalf of Petitioners. On October 3, 2014, NICA filed a Second Renewed Motion for Summary Final Order. On October 15, 2014, Intervenor filed its Response to NICA's Second Renewed Motion for Summary

Final Order, asserting that Petitioners had not fully responded to its discovery requests, had not admitted all Requests for Admissions without qualification or restriction, and that the examination by the pediatric neurologist had not yet taken place. On October 20, 2014, NICA's Second Renewed Motion for Summary Final Order was denied.

Also on October 20, 2014, Petitioners filed a Notice of Serving Petitioner's Response to Intervenor St. Joseph's Women's Hospital's Request for Admissions. Intervenor interprets Petitioners' responses to be an admission that Destini sustained a birth related neurological injury.

On December 2, 2014, the parties filed a Status report indicating that all parties requested an additional 90 days to complete discovery and to report back as to the status of the case and whether a hearing would be necessary. On February 5, 2015, the parties filed another Joint Status Report requesting until May 15, 2015, to complete discovery and to report back to the undersigned. On March 18, 2015, John McKnight, also of The Florida Law Group, entered a Notice of Appearance. On March 18, 2015, Petitioners' new counsel filed a Motion to Withdraw which was granted by Order dated March 25, 2015. Petitioners have been representing themselves since that time.

NICA filed the instant Third Renewed Motion for Summary Final Order on May 4, 2015. On May 15, 2015, Respondent filed a

Status Report. Counsel for Respondent informed that he was advised by Petitioner Lane that she did not want NICA benefits and did not want her daughter further evaluated. This declaration to Respondent's counsel was not confirmed by any pleading filed by Petitioners but is consistent with the Petition for Benefits, as amended, which clearly stated that the "parents are NOT CLAIMANTS." In any event, the scheduled evaluation of Destini by a pediatric neurologist did not take place.

On May 18, 2015, Intervenor filed its Response to NICA's Third Renewed Motion for Summary Final Order to which Respondent filed a Reply. Intervenor requested a hearing requiring Petitioners to state under oath whether they sought NICA benefits and that, if they did not want benefits, the Petition should be withdrawn by Petitioners or dismissed by the undersigned.

Several efforts were made by the undersigned's office to schedule a telephonic hearing with all parties present, but these efforts were unsuccessful due to Petitioners not responding to these efforts. Accordingly, on June 8, 2015, an Order to Show Cause was entered instructing the parties to inform the undersigned in writing no later than June 22, 2015, as to why NICA's third renewed Motion for Summary Final Order should not be granted. The Order to Show Cause informed the parties that whether Petitioners want or do not want NICA benefits, the undersigned is required to make a determination as to whether the

claim is compensable pursuant to section 766.304, Florida Statutes. The Order to Show Cause further informed that absent Petitioners' withdrawal of their Petition, the undersigned must make a determination of whether or not this claim is compensable under the NICA Plan. Intervenor and NICA filed responses to the Order to Show Cause. Petitioners did not file a response. Intervenor reasserted its position that Petitioner, Ms. Lane, should be required to state under oath whether or not she (they) wanted NICA benefits in that she apparently informed Judge Kirkland during a telephonic hearing at some point in this process that she (they) did want NICA benefits. NICA responded that whether Petitioners want or do not want NICA benefits is irrelevant, and that no evidentiary hearing is necessary and that further examination of Destini is not required to bring this claim to resolution. NICA urges that the case should be determined by NICA's pending Third Renewed Motion for Summary Final Order.

It is not uncommon for Petitioners in NICA cases to file a Petition for a determination of NICA benefits, when they are not seeking such benefits. In such instances, the Petitions are not dismissed. Rather, the AJL makes a determination of whether the injury is compensable under the NICA Plan.

FINDINGS OF FACT

1. Destini Kelly was born on March 26, 2008, at St. Joseph's Hospital for Women in Tampa, Florida. Destini weighed in excess of 2,500 grams.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Destini. In a report dated May 23, 2013, Dr. Willis described his findings in pertinent part as follows:

I have reviewed the medical records for the above individual. The mother, Amber Lane was a 20 year old G1. Pregnancy course was uneventful. She was admitted to the hospital for induction of labor due to post-dates. Genital Group B streptococcus (GBS) culture during pregnancy was positive and antibiotics were given during labor.

The fetal heart rate (FHR) monitor tracing during labor was not available for review. Delivery was by vaginal birth. Birth weight was 3,516 grams or 7 lbs 12 ozs. The newborn was not depressed. Apgar scores were 8/9. Umbilical cord blood gas was not done.

Newborn nursery admission exam was normal. The hospital course was uneventful. The baby was discharged home on two days after birth.

In summary, the baby was not depressed at birth and had a normal newborn hospital course.

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery, or the immediate post delivery period. I would not expect review of the FHR tracing during labor to change the above

conclusions, but would be happy to review the tracings if available.

Thank you for allowing me to review this case.

3. In an affidavit dated July 2, 2013, Dr. Willis reaffirmed his opinion that there was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery or the immediate post-delivery period.

4. Petitioners denied the following request for admission: "Destini Kelly did not suffer mechanical trauma to the baby's brain or spinal cord during labor, delivery or the immediate post-delivery period."

5. Petitioners admitted the following request for admission: "Destini Kelly did not suffer oxygen deprivation during labor, delivery or in the immediate post-delivery period that rendered the infant permanently and substantially mentally and physically impaired."

6. Petitioners denied the following request for admission: "Destini Kelly is not permanently and substantially physically impaired."

7. Petitioners denied the following request for admission: "Destini Kelly is not permanently and substantially mentally impaired."

8. The above quoted-responses are confusing in that Petitioners were denying a negative. These responses are not sufficient to establish that Destini did sustain a birth-related neurological injury as contemplated in section 766.309(1). Moreover, Petitioners did not respond to Respondent's Third renewed Motion for Summary Final Order or the Order to Show Cause, thereby raising no disagreement with NICA's motion.

9. A review of the file reveals that no contrary expert evidence was presented by either Petitioners or Intervenor to dispute Dr. Willis' opinion that there was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the brain during labor, delivery, or the immediate post-delivery period. His opinion was filed initially with NICA's Motion for Summary Final Order on August 27, 2013, and again with the Third Renewed Motion for Summary Final Order filed May 4, 2015. Dr. Willis' opinion is credited.

CONCLUSIONS OF LAW

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

11. 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.

12. 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.

13. NICA has determined that Petitioners do not have a claim that is compensable under the Plan and has filed a Motion for Summary Final Order, requesting that an order be entered finding that the claim is not compensable.

14. In ruling on the motion, 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. 766.302(2).

§ 766.309(1), Fla. Stat.

15. 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.

16. The evidence, which is not refuted, established that Destini did not sustain an injury to the brain caused by oxygen deprivation or mechanical injury in the course of labor, delivery or the immediate post-delivery period. Therefore, as any injury to Destini does not meet the definition of a "birth-related neurological injury" as defined by section 766.302(2), Destini 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, as amended, filed by Amber Lane and Alonzo Kelley, on behalf of and as parents and natural guardians of Destini Kelley, a minor, is dismissed with prejudice.

DONE AND ORDERED this 23rd day of July, 2015, in
Tallahassee, Leon County, Florida.



BARBARA J. STAROS
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Filed with the Clerk of the
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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).