

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DIANA LYNN BENNER, on behalf of
and as parent and natural
guardian of MADISON CARLENE
BENNER, a minor,

Petitioner,

vs.

Case No. 13-1634N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

MEASE COUNTRYSIDE HOSPITAL,

Intervenor.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on March 20, 2014.

STATEMENT OF THE CASE

On May 1, 2013, Petitioner, Diana Lynn Benner, on behalf of and as parent and natural guardian of Madison Carlene Benner (Madison), 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 Anjana D. Patel, M.D., as the physician providing obstetric services at the birth of Madison at Mease Countryside Hospital in Safety Harbor, Florida.

DOAH served NICA with a copy of the Petition on May 6, 2013. DOAH served a copy of the Petition on Mease Countryside Hospital on May 8, 2013. On July 17, 2013, DOAH served a copy of the Petition on Dr. Patel.

On May 28, 2013, Mease Countryside Hospital filed a Motion to Intervene, which was granted by Order dated June 11, 2013. As of the date of this Summary Final Order of Dismissal, Dr. Patel has not petitioned to intervene.

On March 20, 2014, NICA filed a Motion for Summary Final Order, asserting that Petitioner's claim was barred by section 766.304, Florida Statutes, because Petitioner had settled a lawsuit against Dr. Patel for injuries to Madison which occurred during labor and delivery. The motion was heard by telephonic conference call on March 28, 2014.

FINDINGS OF FACT

1. Madison Carlene Benner was born on May 2, 2008, at Mease Countryside Hospital in Safety Harbor, Florida.

2. On November 21, 2008, a complaint for medical malpractice was filed by Diana Lynn Benner, individually, and as parent and natural guardian of Madison Benner, a minor. The complaint alleged that Tampa Bay Women's Healthcare Alliance, LLP, d/b/a Tampa Bay Women's Care (Defendant), acting by and through an agent or employee, delivered Madison. The complaint further alleged that Defendant's agent or employee applied excessive lateral traction "to the fetal head during the dystocia causing and/or substantially contributing to the brachial plexus injury and/or aggravating a pre-existing condition."

3. Subsequent to the filing of the medical malpractice action a Guardian Ad Litem was appointed.

4. Shortly thereafter, a settlement agreement was entered into between Diana Benner, individually, and as parent and natural guardian of Madison Benner, a minor, and Anjana D. Patel, M.D.; Tampa Bay Women's Healthcare Alliance, LLP, d/b/a Tampa Bay Women's Care; Tampa Bay Women's Healthcare Alliance, LLP, d/b/a Women's Care Florida; and First Professionals Insurance Company, Inc.

5. The Settlement Agreement and Release states as recitals the following:

Recitals

- a. Diana Benner was a patient of Defendants. Madison Benner, the minor, was injured by Defendants during her delivery on May 2, 2008

in Pinellas County, Florida. Claimants allege that the minor's physical and personal injuries arose out of certain alleged negligent acts or omissions by Defendants and have made a claim seeking monetary damages on account of those injuries. The Release extends to all damages which could have been alleged in the Notice of Intent to Initiate Litigation against the Defendants. The Release does not extend to any other person or entity not identified herein.

b. FPIC is the Defendants' liability insurer and, as such, would be obligated to pay any claim made or judgment obtained against Defendants which is covered by its policy with Defendants.

c. The parties desire to enter into this Settlement Agreement in order to provide for certain payments in full settlement and discharge of all claims which have, or might be made, by reason of the incident described in Recital A above, upon the terms and conditions set forth below.

6. In exchange for the complete release and forever discharge given to the Defendants and insurer, Diana Benner, individually, and as parent and natural guardian of Madison, received \$250,000, \$80,000 of which was annuitized.

7. The settlement further states:

1.0 Release and Discharge

1.1 In consideration of the payments set forth in Section 2 Claimants hereby completely release, and forever discharge, Defendants and Insurer from any and all past, present or future claims, demands, obligations, actions, causes of action, wrongful death claims, rights, damages, costs, losses of services, expenses and compensation of any nature whatsoever,

whether based on a tort, contract, or other theory of recovery, which the Claimants may have, or which may hereafter accrue or otherwise be acquired, on account of, or may in any way grow out of, the incident described in Recital A above, including, without limitation, any and all known or unknown claims for bodily or personal injuries to Claimants or any future wrongful death claim to Claimants' representatives or heirs, which have resulted or may result from the alleged acts or omissions of the Defendants.

8. On February 12, 2009, Ms. Benner filed a Motion to Approve Settlement. A two-page letter from the Guardian Ad Litem in support of the settlement was also filed.

9. On March 6, 2009, a hearing was held before Circuit Judge Amy Williams, who approved the settlement. Any claims of Madison's father were extinguished by the settlement. The Guardian Ad Litem was relieved of further responsibilities. The medical malpractice action was voluntarily dismissed on March 16, 2009.

10. At the time of Madison's birth, Dr. Patel, who was one of the parties settling with Ms. Benner, was a "participating physician" as that term is defined by section 766.302(7). There is no dispute that Dr. Patel delivered Madison, was named in the Petition as the physician providing obstetric services, and was present at the birth of Madison.

CONCLUSIONS OF LAW

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

12. 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. The Plan is a limited no-fault alternative for common law rights and liabilities. Romine v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 842 So. 2d 148, 151 (Fla. 5th DCA 2003) ("In its current form, [the Plan] provides exclusive no-fault benefits to eligible claimants in lieu of the claimants' traditional common law tort rights.")

13. Section 766.303(2) provides:

The rights and remedies granted by this plan on account of a birth-related neurological injury shall exclude all other rights and remedies of such infant, her or his personal representative, parents, dependents, and next of kin, at common law or otherwise, against any person or entity directly involved with the labor, delivery, or immediate postdelivery resuscitation during which such injury occurs, arising out of or related to a medical negligence claim with respect to such injury; except that a civil action shall not be foreclosed where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property, provided that such suit is filed prior to and in lieu

of payment of an award under ss. 766.301-766.316. Such suit shall be filed before the award of the division becomes conclusive and binding as provided in s. 766.311.

14. In 1998 the Florida legislature adopted Chapter 98-113, Laws of Florida, which in part, amended section 766.304. As amended, section 766.304 provides:

The administrative law judge shall hear and determine all claims filed pursuant to ss. 766.301-766.316 and shall exercise the full power and authority granted to her or him in chapter 120, as necessary to carry out the purposes of such sections. The administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, or if the claimant accepts an award issued under s. 766.31, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of 766.303. If it is determined that a claim filed under this act is not compensable, neither the doctrine of collateral estoppel nor res judicata shall prohibit the claimant from pursuing any and all civil remedies available under common law and statutory law. The findings of fact and conclusions of law of the administrative law judge shall not be admissible in any subsequent proceeding; however, the sworn testimony of any person and the exhibits introduced into evidence in the administrative case are admissible as impeachment in any subsequent civil action only against a party to the administrative proceeding, subject to the Rules of Evidence. An award may not be made or paid under ss. 766.301-766.316 if the claimant recovers

under a settlement or a final judgment is entered in a civil action.

15. By amending section 766.304 to include “[a]n award may not be made or paid under ss. 766.301-766.316 if the claimant recovers under settlement or a final judgment is entered,” the legislature intended to prevent claimants from maintaining an administrative action after having received a monetary recovery in a medical malpractice action involving the labor, delivery or immediate post-delivery period. “As it now stands, a claimant cannot assert a NICA claim and make a civil recovery.” Romine at 842 So. 2d 151. “Following the 1998 amendments to NICA, it is clear that a plaintiff’s acceptance of a civil settlement bars a claim for NICA benefits.” Gugelmin v. Fla. Birth-Related Neurological Injury Comp. Ass’n, 882 So. 2d 517, 520 (Fla. 4th DCA 2004).

16. The settlement agreement clearly releases Dr. Patel from all damages resulting from the birth of Madison, which could have been alleged by Ms. Benner. Thus, having settled with Dr. Patel, Ms. Benner is now precluded from pursuing a claim for benefits pursuant to sections 766.301-766.316.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Diana Benner, on

behalf of and as parent and natural guardian of Madison Carlene Benner, is dismissed with prejudice.

DONE AND ORDERED this 15th day of April, 2014, 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 15th day of April, 2014.

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 3050 0000 1250 8471)

Diana Lynn Benner
Apartment 1218
14330 58th Street North
Clearwater, Florida 33760
(Certified Mail No. 7012 3050 0000 1250 8488)

David S. Nelson, Esquire
La Cava and Jacobson, P.A.
101 East Kennedy Boulevard, Suite 2500
Tampa, Florida 33602
(Certified Mail No. 7012 3050 0000 1250 8495)

Robert J. Grace, Esquire
The Bleakley Bavol Law Firm
15170 North Florida Avenue
Tampa, Florida 33613
(Certified Mail No. 7012 3050 0000 1250 8501)

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 3050 0000 1250 8518)

Elizabeth Dudek, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(Certified Mail No. 7012 3050 0000 1250 8525)

Anjana D. Patel, M.D.
Women's Care Florida Countryside
2665 SR 580
Clearwater, Florida 33761
(Certified Mail No. 7012 3050 0000 1250 8532)

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).