

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TONDRA WHITED, on behalf of and
as parent and natural guardian
of ZACARI PORTER, a minor,

Petitioner,

vs.

Case No. 13-1653N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

WINSTON BLISS, M.D., SUNLIFE
OB/GYN SERVICES OF FORT
LAUDERDALE, AND PLANTATION
GENERAL HOSPITAL LIMITED
PARTNERSHIP, d/b/a PLANTATION
GENERAL HOSPITAL,

Intervenors.

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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 September 11, 2013.

STATEMENT OF THE CASE

On May 3, 2013, Petitioner, Tondra Whited, on behalf of and as parent and natural guardian of Zacari Portor (Zacari), 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 Dr. Shirley Campbell-Mogg and Dr. Winston O. Bliss as the physicians providing obstetric services at the birth of Zacari at Plantation General Hospital located in Plantation, Florida.

DOAH served NICA with a copy of the Petition on May 9, 2013. On May 29, 2013, Dr. Bliss and Sunlife OB/GYN Services of Fort Lauderdale filed a Motion to Intervene, which was granted by Order dated June 11, 2013. On June 11, 2013, Plantation General Hospital Limited Partnership, d/b/a Plantation General Hospital filed Plantation General Hospital's Motion for Leave to Intervene Pursuant to Florida Administrative Code Rule 28-106.205, which was granted by Order dated June 25, 2013. DOAH served a copy of the Petition on Dr. Campbell-Mogg on July 12, 2013. As of the date of this Summary Final Order of Dismissal, Dr. Campbell-Mogg has not petitioned to intervene in this proceeding.

On September 11, 2013, NICA filed a Motion for Summary Final Order, asserting that Zacari did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes.

As of the date of this Summary Final Order of Dismissal neither Petitioner nor Intervenors have filed a response to the Motion for Summary Final Order.

FINDINGS OF FACT

1. Zacari was born on April 2, 2011, at Plantation General Hospital located in Plantation, Florida. Zacari weighed eight pounds two ounces at birth.

2. NICA retained Donald Willis, M.D., as its medical expert specializing in maternal-fetal medicine. In an affidavit dated September 6, 2013, Dr. Willis opined as follows:

It is my opinion that labor was indicated at 39 weeks with no fetal distress during labor. Spontaneous vaginal birth resulted in a healthy baby with Apgar scores of 9/9. The newborn hospital course was uneventful.

As such, it is my 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.

Further, in that there was no oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediately post-delivery period in the Hospital, then accordingly, there was no causal event which would have rendered Zacari Porter permanently and substantially mentally and physically impaired as a result of same.

3. NICA retained Michael S. Duchowny, M.D., as its medical expert in pediatric neurology. Dr. Duchowny examined Zacari on

July 17, 2013, and reviewed his medical records. In an affidavit dated September 4, 2013, Dr. Duchowny opined as follows:

It is my opinion that, in summary, Zacari's neurological examination is significant only for expressive language delay. In contrast, he has well-developed motor abilities, both gross and fine motor skills and has no focal or lateralizing findings.

I had an opportunity to review medical records that were sent on June 27, 2013. The records document a relatively uncomplicated perinatal and postnatal course without evidence of either mechanical injury or oxygen deprivation to the brain or spinal cord.

The record review together with today's neurological exam reveals developmentally appropriate motor function and only a mild expressive language delay which suggest that Zacari does not have either a substantial mental or physical impairment. I therefore believe that Zacari should not be considered for inclusion within the NICA program.

As such, it is my opinion that Zacari is not permanently and substantially mentally impaired nor is he 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 Zacari Porter.

4. A review of the file does not show any opinion contrary to the opinions of Dr. Willis and Dr. Duchowny that Zacari does not have a substantial and permanent mental and physical impairment due to lack of oxygen or mechanical trauma during

labor, delivery, or the immediate post-delivery period are 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. 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.

9. 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.

10. 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.

11. The evidence, which is not refuted, established that Zacari Porter is not permanently and substantially mentally impaired nor is he 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, Zacari 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 Tondra Whited, on behalf of and as parent and natural guardian of Zacari Porter, is dismissed with prejudice.

DONE AND ORDERED this 17th day of October, 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 17th day of October, 2013.

COPIES FURNISHED:
(Via certified mail)

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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).