

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ANTONIA OSCEOLA, a minor, by and  
through his parents and natural  
guardians, LEAH OSCEOLA and  
MIGUEL ALBARRAN, and LEAH  
OSCEOLA and MIGUEL ALBARRAN,  
individually,

Petitioners,

vs.

Case No. 13-2446N

FLORIDA BIRTH- RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent.

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SUMMARY FINAL ORDER OF DISMISSAL

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  
September 23, 2013.

STATEMENT OF THE CASE

On June 28, 2013, Petitioners, Leah Osceola and  
Miguel Albarran, individually and on behalf of and as parents and  
natural guardians of Antonia Osceola (Antonia), a minor, filed a  
Petition for Compensation 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 Robert C. Siudmak, M.D., and Maria C. Zedan, C.N.M., as the physician and midwife providing obstetric services at the birth of Antonia at Plantation General Hospital in Plantation, Florida.

DOAH served NICA and Plantation General Hospital with copies of the Petition on July 5, 2013. Dr. Siudmak and Ms. Zedan were served copies of the Petition on July 8, 2013. As of the date of this Summary Final Order of Dismissal, Dr. Siudmak, Ms. Zedan, and Plantation General Hospital have not petitioned to intervene.

NICA filed a Motion for Summary Final Order, asserting that Antonia did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. The motion was served by Email on September 23, 2013. As of the date of this Summary Final Order of Dismissal, Petitioners have not filed a response. However, in a Response to Order of September 13, 2013, NICA advised that Petitioners did not dispute that their claim was not compensable under the NICA Plan.

#### FINDINGS OF FACT

1. Antonia was born on March 14, 2012, at Plantation General Hospital located in Plantation, Florida. Antonia weighed 3,665 grams at birth.

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

It is my opinion that the pregnancy was complicated by poorly controlled Diabetes with a large-for-gestational age baby and resulting in dystocia at delivery. The baby was depressed at birth, but "rapidly improved." The baby suffered a brachial plexus injury from the shoulder dystocia, but there was no evidence of brain injury.

As such, it is my opinion that delivery was complicated by a shoulder dystocia with resulting brachial plexus injury. However, there was no apparent brain or spinal cord injury from loss of oxygen or mechanical trauma.

3. Michael S. Duchowny, M.D., a pediatric neurologist, was retained by NICA to examine Antonia. Dr. Duchowny examined Antonia on August 28, 2013. In an affidavit dated September 18, 2013, Dr. Duchowny opined as follows:

It is my opinion that Antonia's neurological examination reveals evidence of a complete left brachial plexus palsy involving nerve roots C5 to T1. She thus has both an Erb's and Klumpke's paralysis which is judged to be severe. There appears to be little benefit from her previous surgery as she most likely had an avulsive type injury. In contrast, Antonia's cognitive status and motor ability in her other three extremities are well preserved.

I had an opportunity to fully review the medical records that were sent on July 25, 2013. The records confirm the family's history of shoulder dystocia at birth. Antonia's Apgar scores were 0, 6 & 8 at 1, 5

and 10 minutes. Her brachial plexus palsy was recognized immediately. She was intubated in the delivery room but extubated at 10 minutes of age. Of note, an MRI of Antonia's brachial plexus performed on June 29, 2012[,] revealed pseudomeningocele formation at the C7 and T1 levels.

As such, it is my opinion that Antonia's brachial plexus palsy places her damage outside the central nervous system as it involves cervical and upper thoracic root segments. Although her injury was likely acquired as a result of mechanical forces during delivery, the location of her impairment is outside the central nervous system (brain and spinal cord). I therefore believe that Antonia should not be considered for compensation with the NICA program.

4. A review of the file does not show any contrary opinions to those of Dr. Willis and Dr. Duchowny. The opinions of Dr. Willis and Dr. Duchowny that Antonia did not suffer a brain or spinal cord injury due to oxygen deprivation or mechanical injury during labor, delivery, and resuscitation during the 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.

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 Antonia did not sustain an injury to the brain or spinal cord

caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital. Therefore, Antonia 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 Leah Osceola and Miguel Albarran, individually and as parents and natural guardians of Antonia Osceola is dismissed with prejudice.

DONE AND ORDERED this 4th day of October, 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 4th day of October, 2013.

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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).