

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SYLVIE SIMON, individually and  
on behalf of ELIJAH S. SMITH, a  
minor,

Petitioner,

vs.

Case No. 13-2709N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

ORLANDO HEALTH, INC., d/b/a  
WINNIE PALMER HOSPITAL FOR WOMEN  
& BABIES, AMANPREET S. BHULLER,  
M.D., AND CHERISE CHAMBERS,  
M.D.,

Intervenors.

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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 May 1, 2014, and a Renewed Motion for Summary Final Order filed by NICA on May 27, 2014.

STATEMENT OF THE CASE

On July 18, 2013, Petitioner, Sylvie Simon, individually and on behalf of Elijah S. Smith (Elijah), 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 Cherise Chambers, M.D., and Amanpreet Bhuller, M.D., as the physicians providing obstetrical services at the birth of Elijah on May 27, 2011, at Orlando Health, Inc., d/b/a Winnie Palmer Hospital for Women & Babies located in Orlando, Florida.

DOAH served NICA with a copy of the Petition on July 22, 2013. DOAH served a copy of the Petition on Winnie Palmer Hospital for Women & Babies on July 23, 2013.

On August 12, 2013, Orlando Health, Inc., d/b/a Winnie Palmer Hospital for Women & Babies, Dr. Bhuller, and Dr. Chambers filed a Petition to Intervene, which was granted by Order dated September 3, 2013.

On May 1, 2014, NICA filed a Motion for Summary Final Order, asserting that Elijah did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. On May 27, 2014, NICA filed a Renewed Motion for Summary Final Order, representing that Petitioner and Intervenors had agreed to an order being entered granting the Renewed Motion for Summary Final Order.

FINDINGS OF FACT

1. Elijah S. Smith was born on May 27, 2011, at Orlando Health, Inc., d/b/a Winnie Palmer Hospital for Women & Babies in Orlando, Florida. Elijah weighed 3,266 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Elijah, to determine whether an injury occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital due to oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post delivery period. Dr. Willis described his findings as follows:

In summary, labor was complicated by an abnormal FHR pattern and a prolonged second stage of labor. Cesarean section delivery was required. The baby was depressed with low Apgar scores at one and five minutes. Bag and mask ventilation was required for over 5 minutes. Seizure activity developed at about 36 hours after birth. EEG and MRI were consistent with brain injury.

The cord pH was just above 7.0. However, no base excess was recorded and there was no clear identification as to the blood being arterial or venous. Overall, the clinical findings are consistent a [sic] birth related oxygen deprivation and brain injury. The cord blood pH of 7.1 does not alter this opinion.

There was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery, and continuing into the immediate post delivery period. The

oxygen deprivation resulted in brain injury. I am unable to comment about the severity of the brain injury.

3. NICA retained Raymond J. Fernandez, M.D., a pediatric neurologist, to examine Elijah and to review his medical records. Dr. Fernandez examined Elijah on April 8, 2014, and gave the following opinion:

There is evidence in the medical record for hypoxic ischemic perinatal brain injury, but no evidence at this time for substantial motor or mental impairment. Elijah's motor examination is normal. There is evidence of speech delay, but he is improving and I expect this trend to continue. Learning difficulty in the future is a possibility that is indeterminate at this time.

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 Dr. Willis and Dr. Fernandez that there was an obstetrical event that resulted in loss of oxygen to the brain. Their opinions are credited. There are no contrary expert opinions filed that are contrary to Dr. Fernandez's opinion that there is no evidence for a substantial motor or mental impairment. Dr. Fernandez's opinion is 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 Elijah did sustain an injury to the brain caused by oxygen deprivation occurring in the course of labor, delivery, and resuscitation in the immediate post-delivery period in a hospital. The evidence does not establish that the brain injury resulted in permanent and substantial mental and physical impairments. Therefore, Elijah 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 Sylvie Simon, individually and on behalf of Elijah S. Smith, is dismissed with prejudice.

DONE AND ORDERED this 30th day of May, 2014, in Tallahassee,  
Leon County, Florida.

*Susan Belyeu Kirklund*

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SUSAN BELYEU KIRKLAND  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of May, 2014.

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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).