

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NATHALIE JORGE, on behalf of and
as parent and natural guardian
of YANCEL PERAZA, a minor,

Petitioner,

vs.

Case No. 13-2842N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

JORGE LONDOÑO, M.D., AND ORLANDO
HEALTH, INC., d/b/a WINNIE
PALMER HOSPITAL,

Intervenors.

_____ /

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 February 3, 2014.

STATEMENT OF THE CASE

On July 15, 2013, Petitioner, Nathalie Jorge, on behalf of and as parent and natural guardian of Yancel Peraza (Yancel), 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 compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Jorge Londoño, M.D., as the physician providing obstetric services at the birth of Yancel at Winnie Palmer Hospital in Orlando, Florida.

DOAH served NICA with a copy of the Petition on July 30, 2013. DOAH served a copy of the Petition on Winnie Palmer Hospital on July 31, 2013. DOAH served a copy of the Petition on Dr. Londoño on August 7, 2013.

On August 23, 2013, Dr. Londoño and Orlando Health, Inc., d/b/a Winnie Palmer Hospital filed a petition for leave to intervene, which was granted by Order dated September 10, 2013.

On February 3, 2014, NICA filed a Motion for Summary Final Order, asserting that Yancel did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. NICA represented in the motion that counsel for Petitioner and counsel for Intervenors were contacted and had no objection to the granting of the motion.

FINDINGS OF FACT

1. Yancel Peraza was born on April 1, 2009, at Winnie Palmer Hospital in Orlando, Florida. Yancel weighed 3,525 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Yancel. In a medical report dated November 27, 2013, Dr. Willis opined the following:

The newborn was not depressed. Apgar scores were 8/9. No cord blood gas was done. No resuscitation was required after birth. The baby had a weak right arm and some mild respiratory distress with grunting and flaring. The respiratory distress resolved shortly after birth.

Neurology consultation was obtained at one day of age for evaluation of a weak right arm. Erb's palsy was suspected. New born hospital course was otherwise uncomplicated. The baby was discharged home two days after birth with Neurology follow-up scheduled for reevaluation of the weak right arm.

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery, or the immediate post delivery period. The baby did have a brachial plexus injury, but no damage to the spinal cord.

3. NICA retained Michael S. Duchowny, M.D., to perform an independent medical examination of Yancel. Dr. Duchowny examined Yancel on September 25, 2013. In a medical report dated September 25, 2013, Dr. Duchowny reported his findings and gave the following opinion:

In summary, Yancel's neurologic examination is significant for a right Erb's (upper brachial plexus) palsy involving the C5 and C6 dermatomes. He has a preserved individual finger dexterity and fine motor coordination but is mechanically limited by a fixed elbow contracture on the right. In contrast, there

are no other significant findings on the neurologic examination.

Despite the absence of supplementary medical records, Yancel's neurological examination today that is consistent with an Erb's palsy of the upper cervical nerve roots anatomically places his deficit outside the central nervous system (brain and spinal cord). For this reason, I do not believe that Yancel should be considered for compensation within the NICA program.

4. A review of the file does not show any contrary opinion, and Petitioner and Intervenors have no objection to the issuance of a summary final order finding that the injury is not compensable under Plan. The opinion of Dr. Willis that Yancel did not suffer a neurological injury due to oxygen deprivation or mechanical injury during labor, delivery, or resuscitation in the immediate postdelivery period is credited. The opinion of Dr. Duchowny that Yancel has Erb's palsy, which is outside the central nervous system, meaning that the injury does not involve the brain or spinal cord, 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 Yancel 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 postdelivery period in a hospital. Therefore, Yancel 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 Nathalie Jorge, on behalf of and as parent and natural guardian of Yancel Peraz, is dismissed with prejudice.

DONE AND ORDERED this 7th day of February, 2014, in Tallahassee, Leon County, Florida.

Susan Belyeu Kirklund

SUSAN BELYEU KIRKLAND
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of February, 2014.

COPIES FURNISHED:
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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).