

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CICORRA CERVANTES, as Personal
Representative of the Estate of
CIMAYAH RAYVONNE ROSE THURSTON,
a deceased minor,

Petitioner,

vs.

Case No. 13-3287N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

GREGORY A. DELONG, M.D., KEY
WEST HMA PHYSICIAN MANAGEMENT,
LLC, AND KEY WEST HMA, LLC,
d/b/a LOWER KEYS MEDICAL CENTER,

Intervenors.

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PARTIAL SUMMARY FINAL ORDER

This cause came on for consideration upon the Amended Motion
for Summary Final Order, filed on November 26, 2013, by
Respondent, Florida Birth-Related Neurological Injury
Compensation Association (NICA).

STATEMENT OF THE CASE

On August 26, 2013, Petitioner, as Personal Representative
of the Estate of Cimayah Rayvonne Rose Thurston (Cimayah), a
deceased 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 Gregory DeLong, M.D., as the physician who provided obstetric services at the birth of Cimayah on February 12, 2009, at Lower Keys Medical Center in Key West, Florida.

DOAH served NICA with a copy of the Petition on September 4, 2013. DOAH served Dr. DeLong and Lower Keys Medical Center with copies of the Petition on September 3, 2013.

On November 27, 2013, Dr. DeLong and Key West HMA Physician Management, LLC, filed a petition for leave to intervene, which was granted by Order dated December 6, 2013. On December 2, 2013, Key West HMA, LLC, d/b/a Lower Keys Medical Center filed a petition to intervene, which was granted by Order dated December 11, 2013.

On November 26, 2013, NICA filed an Amended Motion for Summary Final Order alleging that the claim was compensable. Intervenor joined in the motion. On December 2, 2013, Petitioner filed Claimant's Response to Motion for Summary Final Order, stating that she does not dispute that the injury to Cimayah is compensable, but denies that notice was provided by the Intervenor as required by section 766.316.

FINDINGS OF FACT

1. Cimayah Rayvonne Rose Thurston was born on February 12, 2009, at Lower Keys Medical Center in Key West, Florida. Cimayah weighed 2,570 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), an obstetrician specializing in maternal-fetal medicine, was requested by NICA to review the medical records for Cimayah. In an affidavit dated November 4, 2013, Dr. Willis summarized his findings as follows:

It is my opinion that labor was induced due to preeclampsia. Fetal distress developed during labor with a terminal bradycardia and probable absent FHR prior to delivery. Emergency Cesarean section was done with delivery of a depressed newborn. Resuscitation, including chest compression was required. Seizures occurred shortly after delivery. EEG and MRI studies were consistent with brain injury. The newborn hospital course was prolonged and complicated. The child was subsequently diagnosed with microcephaly, cerebral palsy and died at 3 years of age.

As such, it is my opinion that there was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery, and the immediate post delivery period. The oxygen deprivation resulted in brain injury and death.

3. The opinion of Dr. Willis is credited. Based on his opinion, Cimayah sustained an injury to her brain during labor, delivery, and in the immediate resuscitation period after delivery due to oxygen deprivation, which resulted in her death.

CONCLUSIONS OF LAW

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

5. 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.

6. 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.

7. In determining the issue of compensability, 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.

8. 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.

9. The evidence, which is not refuted, established that Cimayah sustained a birth-related neurological injury and is eligible for benefits under the Plan.

10. Petitioner is entitled to proceed upon the issue of notice, and jurisdiction should be reserved to make such a determination.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED:

1. Respondent's Motion for Summary Final Order is granted, and Petitioner's claim is found and determined to be compensable.

2. Jurisdiction is reserved to determine the issue of an award pursuant to section 766.31.

3. Jurisdiction is reserved to determine whether the notice requirements of section 766.316 were satisfied.

DONE AND ORDERED this 12th day of December, 2013, in Tallahassee, Leon County, Florida.

Susan Belyeu Kirklund

SUSAN BELYEU KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of December, 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).