

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

KHAI NGUYEN, Individually and as  
Personal Representative of the  
Estate of MAITUYET NGUYEN, and  
on behalf of as Parent of KADEN  
NGUYEN, a minor,

Petitioner,

vs.

Case No. 13-3715N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent.

\_\_\_\_\_ /

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 April 21, 2014.

STATEMENT OF THE CASE

On September 23, 2013, Petitioner, Khai Nguyen, individually and as Personal Representative of the Estate of Maituyet Nguyen, and on behalf and as parent of Kaden Nguyen (Kaden), 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 Alex Birman, M.D., and Georges Edouard, M.D., as the physicians providing obstetric services at the birth of Kaden at Plantation General Hospital in Plantation, Florida.

DOAH served NICA with a copy of the Petition on September 27, 2013. DOAH served a copy of the Petition on Plantation General Hospital on September 30, 2013. DOAH served a copy of the Petition on Dr. Edouard on October 7, 2013. On October 1, 2013, NICA served a copy of the Petition on Dr. Birman. As of the date of the Summary Final Order of Dismissal, no petitions to intervene in this proceeding have been filed by Dr. Birman, Dr. Edouard, or Plantation General Hospital.

On April 21, 2014, NICA filed a Motion for Summary Final Order, asserting that Kaden did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes (2012). Petitioner did not file a response to the motion for summary final order.

#### FINDINGS OF FACT

1. Kaden Nguyen was born on July 26, 2012, at Plantation General Hospital and weighed 3,827 grams at birth.

2. NICA retained Donald Willis, M.D., to review the medical records for Kaden. After reviewing the records, Dr. Willis opined as follows:

In summary, the mother suffered a cardiac arrest during labor due to a suspected amniotic fluid embolism and could not be resuscitated. Fetal oxygen deprivation resulted from maternal cardiac arrest, as reflected by fetal bradycardia. Emergency Cesarean section was done while maternal CPR continued. The baby was depressed at birth and continued to develop worsening respiratory distress. Despite the obvious lack of oxygen, there was no seizure activity and the MRI on DOL 17 was normal.

There was an obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery, and continuing into the immediate post delivery period. However, the oxygen deprivation did not result in any significant brain injury. The lack of significant brain injury is based primarily on the normal MRI on DOL 17, absence of any seizure activity and age appropriate developmental milestones achieved at 9 months of age.

3. Michael Duchowny, M.D. (Dr. Duchowny), was requested by NICA to do an independent medical evaluation of Kaden.

Dr. Duchowny examined Kaden on February 12, 2014. Based on his examination, Dr. Duchowny opined the following:

In summary, Kaden's neurological examination reveals no specific focal or lateralizing findings. He does not evidence any motor or mental impairment and his growth and development are proceeding satisfactorily.

I had an opportunity to review medical records which were sent to me on December 5, 2013 which documented the catastrophic perinatal course. Of note, head ultrasound examinations performed on July 28th and 30th, 2012 were within normal limits. No further neuroimaging studies were undertaken.

As Kaden's neurological examination is normal today, I do not believe that he should be considered for acceptance into the NICA program.

4. A review of the file does not show any contrary opinions to the opinions of Dr. Willis and Dr. Duchowny that Kaden did not have a brain injury that resulted in permanent and substantial physical and mental impairments. The opinions of Dr. Willis and Dr. Duchowny 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 Kaden does not have a permanent and substantial motor or mental impairment; thus, Kaden has not sustained a birth-related neurological injury because he is not permanently and substantially physically impaired. Therefore, Kaden 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 is dismissed with prejudice.

DONE AND ORDERED this 1st day of May, 2014, in Tallahassee, Leon County, Florida.

*Susan Belyeu Kirkland*

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Filed with the Clerk of the  
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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).