

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAUREN BURY, on behalf of and as
parent and natural guardian of
MAURICE BURY, a minor,

Petitioner,

vs.

Case No. 13-4240N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent.

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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 March 12, 2014.

STATEMENT OF THE CASE

On October 21, 2013, Petitioner, Lauren Bury, on behalf of and as parent and natural guardian of Maurice Bury (Maurice), 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 a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Barbara Telan, CNM, as the midwife providing obstetric services

at the birth of Maurice at St. Mary's Medical Center in West Palm Beach, Florida.

DOAH served NICA with a copy of the Petition on October 31, 2013. DOAH served a copy of the Petition on St. Mary's Medical Center on December 18, 2013. DOAH served a copy of the Petition on Barbara W. Flowers Telan, ARNP, on December 18, 2013. As of the date of this Summary Final Order of Dismissal, neither Ms. Telan nor St. Mary's Medical Center has petitioned to intervene in this proceeding.

On March 12, 2014, NICA filed a Motion for Summary Final Order, asserting that Maurice did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes (2012). On March 27, 2014, an Order to Show Cause was entered, requiring Petitioner to show cause why the motion should not be granted.

On April 7, 2014, Petitioner filed Petitioner's Motion for Extension of Time to File Response to Respondent's Motion for Summary Final Order, which was granted by Order dated April 8, 2014. On April 24, 2014, Petitioner filed Petitioner's Notice of No Objection to Respondent's Motion for Summary Final Order.

FINDINGS OF FACT

1. Maurice Bury was born on February 9, 2012, at St. Mary's Medical Center in West Palm Beach, Florida. Maurice weighed 3,230 grams at birth.

2. NICA retained Donald Willis, M.D., an obstetrician specializing in maternal-fetal medicine, to examine the medical records for Maurice and his mother, Lauren Bury. After reviewing the records, Dr. Willis gave the following opinion in his Affidavit dated March 6, 2014:

It is my opinion that there was no obvious fetal distress during labor. The baby was not depressed at birth. Apgar scores were 9/9. The baby was described as vigorous after birth. The newborn hospital course was apparently normal for several hours after birth. Seizure activity was noted more than 12 hours after birth. MRI studies one week apart, showed findings consistent with evolving hypoxic brain injury.

This child suffered hypoxic brain injury. However, there are no findings suggesting the brain injury occurred during labor, delivery, or the immediate past [sic] delivery period.

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery, or the immediate post delivery period.

3. Michael S. Duchowny, M.D., a pediatric neurologist, was requested by NICA to do an independent medical examination of Maurice. Dr. Duchowny examined Maurice on January 29, 2014. Based on his examination, Dr. Duchowny opined the following:

It is my opinion that Maurice Bury Maurice's [sic] general, physical and neurological examinations reveal evidence of hypotonic weakness of all four limbs and absence of expressive or receptive communication skills. Maurice manifests findings consistent with a cortical visual impairment, microcephaly, and

omotor incoordination. These findings are indicative of a substantial mental and motor impairment.

I reviewed the medical records. Although the records confirm the mother's history that Maurice was born with a true knot in the nuchal cord, his neonatal course did not show evidence of postnatal depression, abnormal Apgar scores, or old multi-organ system failure. These findings would be expected given his poor outcome and MRI findings. Furthermore, the medical records document a clear change in fetal movement that occurred prior to the onset of labor.

As such, it is my opinion that Maurice Bury's neurologic impairment did not result from oxygen deprivation either in the course of labor or delivery. Although his substantial and mental impairments are permanent, I would not recommend that Maurice be considered for inclusion within the NICA program.

4. A review of the file does not show any contrary opinion that Maurice's injuries were not a result of oxygen deprivation or mechanical injury during labor, delivery, or resuscitation in the immediate post-delivery period. The opinions of Dr. Willis and Dr. Duchowny as stated above 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 there was not an obstetrical event that resulted in loss of oxygen or mechanical trauma to Maurice's brain during labor, delivery, or the immediate post-delivery period. Therefore, Maurice 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 Lauren Bury on behalf of and as parent and natural guardian of Maurice Bury, is dismissed with prejudice.

DONE AND ORDERED this 1st day of May, 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
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this 1st day of May, 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).