

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HILDA LOZANO, individually and
on behalf of AARON LORA, minor,

Petitioner,

vs.

Case No. 13-4675N

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 February 6, 2014.

STATEMENT OF THE CASE

On December 4, 2013, Petitioner, Hilda Lozano, individually and on behalf of Aaron Lora (Aaron), 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 Manuel Alvarado, M.D., and Shawn Lundbert, ARNP as

the physicians providing obstetric services at the birth of Aaron at Leesburg Regional Medical Center in Leesburg, Florida.

DOAH served NICA with a copy of the Petition on December 6, 2013. DOAH served a copy of the Petition on Leesburg Regional Medical Center on December 11, 2013. On December 11, 2013, DOAH received return receipts from the United States Postal Service showing that Dr. Alvarado and Mr. Lundbert had been served with copies of the Petition.

As of the date of the Summary Final Order of Dismissal, no petitions to intervene have been filed by Dr. Alvarado, Mr. Lundbert, or Leesburg Regional Medical Center.

On February 6, 2014, NICA filed a Motion for Summary Final Order, asserting that Aaron 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 was contacted and had no objection to the granting of the motion.

FINDINGS OF FACT

1. Aaron Lora was born on January 16, 2012, at Leesburg Regional Medical Center in Leesburg, Florida. Aaron weighed 3,850 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Aaron. Dr. Willis reported the following:

I have reviewed the medical records for the above individual [Aaron]. The mother, Hilda Lozano was a 37 year old G3 P1011 with one prior Cesarean section delivery. Pregnancy was complicated by a placenta previa and Gestational Diabetes. Gestational Diabetes was diagnosed during the third trimester and managed with oral agents. Weekly NST's were done for fetal evaluation and showed no distress.

Vaginal bleeding occurred during pregnancy. Placenta previa was diagnosed. Steroids were given to enhance fetal lung maturity. The mother was admitted at 39 weeks gestational age for repeat Cesarean section delivery. She was not in labor. A large amount of amniotic fluid was described at time of delivery.

Birth weight was 8 lbs 8oz's (3,850 grams). The baby was not depressed. Apgar scores were 8/9. No resuscitation was required. The baby was described as "vigorous" after delivery. Newborn hospital course was uncomplicated.

The child was subsequently diagnosed with Global development delay. MRI at about one year of age was abnormal.

In summary: The mother was not in labor prior to delivery. Elective repeat Cesarean section was done with delivery of a healthy baby. No resuscitation was required. Apgar scores were 8/9.

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

3. A review of the file does not show any contrary opinion, and Petitioner has 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 Aaron's mother was not in labor and that Aaron did not suffer a neurological injury due to oxygen deprivation or mechanical injury during delivery or resuscitation in the immediate post-delivery period is credited.

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. 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.

8. 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.

9. 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.

10. The evidence, which is not refuted, established that Aaron 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 post-delivery period in a hospital. Therefore, Aaron 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 Hilda Lozano, individually and on behalf of Aaron Lora, a minor, is dismissed with prejudice.

DONE AND ORDERED this 11th 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
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this 11th 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).