

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

KENIA ALVAREZ, individually and  
on behalf of MIA BENITEZ, a  
minor,

Petitioner,

vs.

Case No. 14-0013N

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 February 18, 2014.

STATEMENT OF THE CASE

On December 31, 2013, Petitioner, Kenia Alvarez,  
individually and on behalf of Mia Benitez (Mia), 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 Miguel A. Albert, M.D., as the  
physician who provided obstetric services at the birth of Mia on  
May 27, 2011, at Mercy Hospital, Inc., d/b/a Mercy Hospital,  
located in Miami, Florida.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the Petition on January 8, 2014. DOAH served Dr. Albert with a copy of the Petition on January 13, 2014. Mercy Hospital was served with a copy of the Petition on March 10, 2014. Neither Dr. Albert nor Mercy Hospital has petitioned to intervene in this proceeding.

On February 18, 2014, NICA filed a Motion for Summary Final Order, stating that, at the time of Mia's birth, Dr. Albert was not a "participating physician" as that term is defined by section 766.302(7), Florida Statutes. No response to the motion was filed by Petitioner.

#### FINDINGS OF FACT

1. The Petition named Dr. Albert as the physician providing obstetric services at Mia's birth on May 27, 2011.
2. Attached to the Motion for Summary Final Order is an affidavit of NICA's custodian of records, Tim Daughtry, attesting to the following, which has not been refuted:

One of my official duties as Custodian of Records is to maintain NICA's official records relative to the status of physicians as participating physicians in the Florida Birth-Related Neurological Injury Compensation Plan who have timely paid the Five Thousand Dollar (\$5,000) assessment prescribed in Section 766.314(4)(c), Florida Statutes, and the status of physicians who may be exempt from payment of the Five Thousand Dollar (\$5,000) assessment pursuant to Section 766.314(4)(c), Florida Statutes. Further, I maintain NICA's official records

with respect to the payment of the Two Hundred Fifty Dollar (\$250.00) assessment required by Section 766.314(4)(b)1., Florida Statutes, by all non-participating, non-exempt physicians.

\* \* \*

As payments of the requisite assessments are received, NICA compiles data in the "NICA CARES" database for each physician. The "NICA CARES physician payment history/report" attached hereto for Dr. Miguel Albert indicates that in the year 2011, the year in which Dr. Albert participated in the delivery of Mia Benitez, as indicated in the Petitioners' Petition for Benefits, Dr. Albert did not pay the Five Thousand Dollar (\$5,000) assessment required for participation in the Florida Birth-Related Neurological Injury Compensation Plan.

Further, it is NICA's policy that if a physician falls within the exemption from payment of the Five Thousand Dollar (\$5,000) assessment due to their status as a resident physician, assistant resident physician or intern as provided in Section 766.314(4)(c), Florida Statutes, annual documentation as to such exempt status is required to be provided to NICA. NICA has no records with respect to Dr. Albert in relation to an exempt status for the year 2011. To the contrary, the attached "NICA CARES physician payment history/report" shows that in 2011, Dr. Albert paid the Two Hundred and Fifty Dollar (\$250) assessment required by Section 766.314(4)(b)1, Florida Statutes, for non-participating, non-exempt licensed physicians.

3. The NICA CARES statement attached to the affidavit of Mr. Daughtry supports the representations made in the affidavit.

4. Petitioner has not offered any exhibits, affidavits or any other evidence refuting the affidavit of Mr. Daughtry, which shows that Dr. Albert had not paid the assessment for a participating physician in 2011.

5. At the time of the birth of Mia, Dr. Albert was not a participating physician in the Plan.

#### CONCLUSIONS OF LAW

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

7. 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.

8. 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 the Division of Administrative Hearings. §§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. The Florida Birth-Related Neurological Injury Compensation Association, 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.

9. 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.

10. 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.

11. Pertinent to this case, "participating physician" is defined by section 766.302(7), to mean:

[A] physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full-time or part-time and who had paid or was exempt from payment at the time of the injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred.

12. Dr. Albert had not paid an assessment of \$5,000 for a participating physician at the time Mia was born; therefore, he was not a participating physician at the time of Mia's birth. No evidence was submitted that, at the time of Mia's birth, Dr. Albert was exempt from paying the \$5,000 assessment required for participating physicians. The evidence established that at the time of Mia's birth, Dr. Albert had elected to be a non-participating physician by paying the assessment of \$250.

13. The obstetrical services provided during Mia's birth were not provided by a participating physician. Thus, the claim of Mia is not compensable under the Plan.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law, it is ORDERED that Respondent's Motion for Summary Final Order is granted, and the Petition is dismissed with prejudice.

DONE AND ORDERED this 23rd day of April, 2014, in Tallahassee, Leon County, Florida.

*Susan Belyeu Kirklund*

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of April, 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).