

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JENNIFER STUART AND VYACHESLAV  
GUTKIN, individually, and as  
parents of JOHNATHAN STUART  
GUTKIN, a minor,

Petitioners,

vs.

Case No. 14-0309N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

ADVENTIST HEALTH SYSTEM/SUNBELT,  
INC., d/b/a WINTER PARK MEMORIAL  
HOSPITAL,

Intervenor.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's  
Motion for Summary Final Order, filed March 12, 2014.

STATEMENT OF THE CASE

On January 6, 2014, Petitioners, Jennifer Stuart and  
Vyacheslav Gutkin, individually and as parents of  
Johnathan Stuart Gutkin (Johnathan), a minor, filed a Petition  
for Determination of Compensability 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 John Spencer Albritton, M.D., as the physician who provided obstetric services at the birth of Johnathan on September 25-26, 2012, at Winter Park Memorial Hospital, located in Winter Park, Florida.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the Petition on January 23, 2014. On March 13, 2014, DOAH received a receipt from the United States Postal Service that Winter Park Memorial Hospital had been served with a copy of the Petition.

On February 10, 2014, Dr. Albritton filed a Motion to Intervene, stating that he provided obstetrical care at the birth of Johnathan and that he was a participant in the Plan. A telephonic hearing was held on the Motion to Intervene on February 27, 2014. During the hearing, counsel for Dr. Albritton acknowledged that it did not appear that Dr. Albritton was a participant in the Plan. By Order dated February 28, 2014, Dr. Albritton was given leave to amend his Motion to Intervene on or before March 31, 2014. Dr. Albritton did not file an amended motion to intervene.

On March 24, 2014, Adventist Health System/Sunbelt, Inc., d/b/a Winter Park Memorial Hospital filed a Petition for Leave to Intervene, which was granted by Order dated April 3, 2014. An

Order was entered on April 3, 2014, extending the time for Intervenor to respond to Respondent's Motion for Summary Final Order. On April 17, 2014, Intervenor filed a response, stating that it had no basis for an objection to the granting of the Motion for Summary Final Order.

On March 12, 2014, NICA filed a Motion for Summary Final Order, stating that, at the time of Johnathan's birth, Dr. Albritton was not a "participating physician" as that term is defined by section 766.302(7), Florida Statutes. On April 23, 2014, Petitioners filed a Notice of Non-objection to NICA's Motion for Summary Final Order, stating Petitioners had no objection to the granting of the motion.

#### FINDINGS OF FACT

1. The Petition named Dr. Albritton as the physician providing obstetric services at Johnathan's birth on September 25-26, 2012.

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. John S. Albritton indicates that in the year 2012, the year in which Dr. Albritton participated in the delivery of Johnathan Gutkin, as indicated in the Petitioners' Petition for Benefits, Dr. Albritton 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. Albritton in relation to an exempt status for the year 2012. To the contrary, the attached "NICA CARES physician payment history/report" shows that in 2012, Dr. Albritton 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. Neither Petitioners nor Intervenor has offered any exhibits, affidavits or any other evidence refuting the affidavit of Mr. Daughtry, which shows that Dr. Albritton had not paid the assessment for a participating physician in 2012. Both Petitioners and Intervenor have stated that they have no objection to the granting of the Motion for Summary Final Order.

5. At the time of the birth of Johnathan, Dr. Albritton 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. Albritton had not paid an assessment of \$5,000 for a participating physician at the time Johnathan was born; therefore, Dr. Albritton was not a participating physician at the time of Johnathan's birth. No evidence was submitted that, at the time of Johnathan's birth, Dr. Albritton was exempt from paying the \$5,000 assessment required for participating physicians. The evidence established that at the time of

Johnathan's birth, Dr. Albritton had elected to be a non-participating physician by paying the assessment of \$250.

13. The obstetrical services provided during Johnathan's birth were not provided by a participating physician. Thus, the claim of Johnathan 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 24th day of April, 2014, in Tallahassee, Leon County, Florida.

*Susan Belyeu Kirklund*

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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).