

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ASHLEY GAYLORD AND PAUL GAYLORD,
on behalf of and as parents and
natural guardians of PHOENIX
GAYLORD, a minor,

Petitioners,

vs.

Case No. 14-0603N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

ORLANDO HEALTH, INC., d/b/a
WINNIE PALMER HOSPITAL FOR WOMEN
AND BABIES; WOMEN'S CARE
FLORIDA, d/b/a DELANEY
OBSTETRICS AND GYNECOLOGY AND
THE WOMEN'S CENTRE FOR
EXCELLENCE; STEPHEN SNOW, M.D.;
CHERISE CHAMBERS, M.D.;
APRIL MERRITT, M.D.; AND
PARMELEE THATCHER, M.D.,

Intervenors.

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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 May 2, 2014.

STATEMENT OF THE CASE

On February 10, 2014, Petitioners, Ashley Gaylord and Paul Gaylord, on behalf of and as parents and natural guardians of Phoenix Gaylord (Phoenix), 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 Cherise Chambers, M.D.; Stephen Snow, M.D.; Parmelee Thatcher, M.D.; and April Merritt, M.D., as the physicians providing obstetric services at the birth of Phoenix at Winnie Palmer Hospital in Orlando, Florida.

On February 24, 2014, Orlando Health, Inc., d/b/a Winnie Palmer Hospital for Women filed a Petition to Intervene, which was granted by Order dated March 11, 2014. On February 28, 2014, Women's Care Florida d/b/a Delaney Obstetrics & Gynecology and The Women's Centre for Excellence; Stephen Snow, M.D.; Cherise Chambers, M.D.; April Merritt, M.D.; and Parmelee Thatcher, M.D., filed a Petition for Leave to Intervene, which was granted by Order dated March 11, 2014.

On May 2, 2014, NICA filed a Motion for Summary Final Order, asserting that Phoenix did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes.

On May 15, 2014, Respondent filed a Notice, advising that Petitioners and Intervenors did not oppose the granting of the Motion for Summary Final Order.

FINDINGS OF FACT

1. Phoenix Gaylord was born on October 5, 2011, at Winnie Palmer Hospital for Women and Babies in Orlando, Florida.

Phoenix weighed 4,140 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records of Phoenix. Based on his review, Dr. Willis opined the following:

In summary, delivery was complicated by a shoulder dystocia. The shoulder dystocia resulted in a brachial plexus injury, but did not cause any significant oxygen deprivation or mechanical trauma to the spine or brain. Umbilical cord blood gas was normal within a pH of 7.3 and the baby had an otherwise normal hospital course.

There was a maternal infection during labor, which was treated with antibiotics. The maternal infection did not adversely affect the baby. The maternal infection did not result in any oxygen deprivation during labor, delivery or the immediate post delivery period.

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

3. A review of the file does not show any contrary opinion that Phoenix sustained a brain or spinal cord injury as a result

of a loss of oxygen or mechanical trauma during labor, delivery, or resuscitation in the immediate post-delivery period.

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 Phoenix did not sustain an injury to his brain or spinal cord caused by oxygen deprivation or mechanical injury during labor, delivery, or resuscitation in the immediate post delivery period. Phoenix did not sustain a birth-related neurological injury and 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 Ashley Gaylord and Paul Gaylord, on behalf of and as parents and natural guardians of Phoenix Gaylord, is dismissed with prejudice.

DONE AND ORDERED this 19th day of May, 2014, in Tallahassee,
Leon County, Florida.

Susan Belyeu Kirkland

SUSAN BELYEU KIRKLAND
Administrative Law Judge
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Filed with the Clerk of the
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this 19th day of May, 2014.

COPIES FURNISHED:
(via certified mail)

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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).