

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ERICKA JACKSON, on behalf of and  
as parent and natural guardian  
of SH'MYIA McBEAN, a minor,

Petitioner,

vs.

Case No. 14-1001N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

THOMAS STAVOY, M.D., AND HALIFAX  
HOSPITAL MEDICAL CENTER, d/b/a  
HALIFAX MEDICAL CENTER,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon a Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on August 20, 2014.

STATEMENT OF THE CASE

On March 3, 2014, Petitioner, Erica Jackson, on behalf of and as parent and natural guardian of Sh'myia McBean (Sh'myia), 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 Thomas G. Stavoy, M.D., as the physician providing obstetrical services at the birth of Sh'myia on February 11, 2011, at Halifax Medical Center located in Daytona Beach, Florida.

DOAH served NICA with a copy of the Petition on March 6, 2014. DOAH served a copy of the Petition on Halifax Hospital Center, d/b/a Halifax Medical Center on March 7, 2014. On March 10, 2014, DOAH received a return receipt from the United States Postal Service showing that Dr. Stavoy had been served with a copy of the Petition.

On March 21, 2014, Thomas Stavoy, M.D., filed a Motion to Intervene, and on March 24, 2014, Halifax Hospital Medical Center, d/b/a Halifax Medical Center filed a Motion to Intervene, which were granted by Order dated April 3, 2014.

On August 20, 2014, NICA filed a Motion for Summary Final Order, asserting that Sh'myia did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. The motion was served by electronic mail on August 20, 2014. Respondent represented in its motion that Petitioner and Intervenors had no objection to the granting of the motion.

## FINDINGS OF FACT

1. Sh'myia McBean was born on February 11 2011, at Halifax Medical Center located in Daytona Beach, Florida. Sh'myia weighed 3,288 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Sh'myia, to determine whether an injury occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital due to oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period. Dr. Willis described his findings as follows in his medical report:

In summary, there was no significant fetal distress during labor. However, delivery was complicated by several failed attempts for vaginal delivery by vacuum and some delay in starting the Cesarean delivery due to problems with inadequate levels with a labor epidural. The baby was severely depressed at birth due to the difficult delivery. Full resuscitation was required. Cord blood gas was consistent with acidosis (pH 6.78). Seizure activity developed within 24 hours of birth and MRI on the day of birth confirmed cerebral ischemia.

There was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during delivery and continuing into the immediate postdelivery period. The oxygen deprivation resulted in brain injury. I am unable to comment about the severity of the brain injury.

3. NICA retained Michael S. Duchowny, M.D., a pediatric neurologist, to examine Sh'myia and to review her medical records. Dr. Duchowny examined Sh'myia on July 16, 2014, and opined as follows in his medical report:

In SUMMARY, Sh'myia's neurological examination is significant for a left lower extremity monoparesis. In contrast, her other three limbs are well preserved and her overall mental functioning is clearly at or above age level.

A review of Sh'myia's medical records confirms the family's impression that she had difficulties at birth. Of note, her mother was febrile to 101 degrees at time of delivery and Sh'myia was delivered by urgent cesarean section after four failed attempts at vaginal delivery with vacuum assistance. Sh'myia was born cyanotic, floppy, and apneic and required intubation in the delivery room. However, she was weaned from mechanical ventilation at 12 hours of age. Seizures were noted at 20 hours of age. Her Apgar scores were 0, 0, 3, and 4 at 1, 5, 10, and 20 minutes respectively. The cord pH was 6.78. Her white blood cell count showed a left shift and she was treated aggressively with antibiotics for 4 days until blood cultures came back normal. Hypocalcemia with a value of 6.7 was also treated immediately. Sh'myia weighed 7 pounds 4 ounces at birth and was 41 weeks gestation. An MRI scan the next day revealed edema consistent with diffuse changes and an EEG performed on February 15 revealed high voltage discharges but no evidence of birth suppression pattern.

Although Sh'myia did have birth-related difficulties, she has done remarkably well and she does not presently show a significant mental impairment. Her motor impairment in the left lower extremity is significant but she is undergoing therapy and I suspect that

she will ultimately regain a more normal range of motion through either her present therapies or possibly future surgery to lengthen her Achilles tendon.

In view of Sh'myia's good overall current neurologic status, I am not recommending her for compensation within the NICA program.

4. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinion of Dr. Willis that there was an obstetrical event that resulted in loss of oxygen to the brain. Dr. Willis' opinion is credited. There are no contrary expert opinions filed that are contrary to Dr. Duchowny's opinion that Sh'myia does not presently show a significant mental impairment or that any physical impairment is permanent. Dr. Duchowny's opinion is 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 most likely Sh'myia did sustain an injury to the brain caused by oxygen deprivation occurring in the course of delivery. The

evidence does not establish that the brain injury resulted in permanent and substantial mental and physical impairments. Therefore, Sh'myia 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 Erica Jackson, on behalf of and as parent and natural guardian of Sh'myia McBean, is dismissed with prejudice.

DONE AND ORDERED this 5th day of September, 2014, in Tallahassee, Leon County, Florida.



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BARBARA J. STAROS  
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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).