

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOVETRE LEACH AND DAMIEN
LAWRENCE, on behalf of and as
parents and natural guardians of
O'URI LAWRENCE, a minor,

Petitioners,

vs.

Case No. 14-2048N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

JAMES MARSHALL PALMER, M.D.,

Intervenor.

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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 April 28, 2015.

STATEMENT OF THE CASE

On March 24, 2014, Petitioners, Lovetre Leach and Damien Lawrence, on behalf of and as parents and natural guardians of O'uri Lawrence (O'uri), 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 James Palmer, M.D., as the physician providing obstetrical services at the birth of O'uri on February 18, 2012, at Tampa General Hospital located in Tampa, Florida.

DOAH served NICA with a copy of the Petition on May 6, 2014. On May 9, 2014, DOAH received a return receipt from the United States Postal Service showing that Tampa General Hospital had been served with a copy of the Petition. On May 14, 2014, DOAH received a return receipt from the United States Postal Service showing that Dr. Palmer had been served with a copy of the Petition.

On June 6, 2014, James Marshall Palmer, M.D., filed a Petition to Intervene which was granted by Order dated June 19, 2014.

As of the date of this Summary Final Order of Dismissal, Tampa General Hospital has not petitioned to intervene in this proceeding.

On April 28, 2015, NICA filed a Motion for Summary Final Order, asserting that O'uri 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 e-mail on April 28, 2015. An Order to Show Cause was entered on May 6,

2015, advising Petitioners and Intervenor to show cause in writing why Respondent's Motion for Summary Final Order should not be granted. On May 15 and May 19, 2015, various medical records concerning O'uri Lawrence were fax-filed with the Division of Administrative Hearings.

FINDINGS OF FACT

1. O'uri Lawrence was born on February 18, 2012, at Tampa General Hospital located in Tampa, Florida. O'uri weighed 4,520 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for O'uri, to determine whether an injury occurred 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 medical report dated November 4, 2014, Dr. Willis described his findings in part as follows:

Vaginal delivery was complicated by a shoulder dystocia. Birth weight was 4,520 grams. Despite the shoulder dystocia, the baby was not depressed at birth. Apgar scores were 8/9. Cord blood gas had a normal pH of 7.26 and a normal base of 2.

Evaluation in the nursery indicated the baby was in no acute distress and was alert. Decreased movement of the left arm was noted. X-Ray did not identify any bone fractures. Other than the Erb's palsy, the baby had a relatively normal hospital course.

In summary, delivery was complicated by a shoulder dystocia and resulting Erb's palsy. There was no fetal distress during labor. The newborn was not depressed at birth. The newborn hospital course did not suggest hypoxic ischemic injury.

Follow-up care after hospital discharge primarily concerned evaluation and management of the Erb's palsy.

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

3. Dr. Willis reaffirmed his opinion in an affidavit dated April 7, 2015.

4. NICA retained Michael S. Duchowny, M.D. (Dr. Duchowny), a pediatric neurologist, to examine O'uri and to review his medical records. Dr. Duchowny examined O'uri on January 28, 2015. In an affidavit dated April 7, 2015, Dr. Duchowny opined as follows:

In summary, O'uri's neurological examination today reveals findings consistent with a left Erb's palsy affecting the C5/C6 musculature. He has preserved fine motor coordination of his distal extremity but supination is limited at the wrist and he does not consistently fully extend the left elbow. In contrast, there are no findings on today's evaluation that indicate injury to either the brain or spinal cord. Mechanical injury was therefore sustained outside the central nervous system and for this reason, I am not recommending O'uri for compensation within the NICA program.

5. Various medical records of O'uri were fax-filed with DOAH following the entry of the Order to Show Cause. However, as further addressed in the Conclusions of Law, whether or not these documents would be admissible in a formal hearing, they would not affect the ultimate conclusion reached in this case.

6. 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 no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spine during labor, delivery or the immediate post-delivery period. Dr. Willis' opinion is credited. There are no contrary expert opinions filed that are contrary to Dr. Duchowny's opinion that there are no findings that indicate injury to the brain or spinal cord, and that mechanical injury was therefore sustained outside the central nervous system. Dr. Duchowny's opinion is credited.

CONCLUSIONS OF LAW

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

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. As referenced above, medical records of O'uri were fax-filed following the entry of the Order to Show Cause. However, whether or not these documents would be admissible in a formal hearing, they would not affect the ultimate conclusion reached in this case. That is, section 766.302(2), Florida Statutes, specifically requires that the injury to the brain or spinal cord be "caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period which renders the infant permanently and substantially mentally and physically impaired." The evidence, which is not refuted by any contrary expert opinions, established that O'uri did not sustain an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury in the course of labor and delivery. Therefore, O'uri is not eligible for benefits under the Plan. §§ 766.302(2) and 766.309(1), Fla. Stat.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Lovetre Leach and Damien Lawrence, on behalf of and as parents and natural guardians of O'uri Lawrence, is dismissed with prejudice, and the final hearing scheduled for June 2, 2015, is canceled.

DONE AND ORDERED this 21st day of May, 2015, in Tallahassee,
Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
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this 21st day of May, 2015.

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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).