

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

OCTAVIA PIERSON, on behalf of  
and as parent and natural  
guardian of KALEAH TURNER, a  
minor,

Petitioner,

vs.

Case No. 14-4277N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent.

\_\_\_\_\_ /

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 March 26, 2015.

STATEMENT OF THE CASE

On September 12, 2014, Petitioner, Octavia Pierson, on behalf of and as parent and natural guardian of Kaleah Turner (Kaleah), 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 Johanne

Compas-Baril, M.D., as the physician providing obstetrical services at the birth of Kaleah on September 14, 2009, at Jackson North Medical Center located in North Miami Beach, Florida.

DOAH served NICA with a copy of the Petition on September 19, 2014. DOAH served Johanne Yves Compas-Baril, M.D., and Jackson North Medical Center on September 22, 2014.

Neither Johanne Compas-Baril, M.D., nor Jackson North Medical Center has petitioned to intervene in this proceeding.

On March 26, 2015, NICA filed a Motion for Summary Final Order, asserting that Kaleah did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. On April 1, 2015, Petitioner filed an Objection and Response to Motion for Summary Final Order. A telephonic motion hearing was held on April 13, 2015. On May 27, 2015, Petitioner filed an Amended Response to Respondent's Motion for Summary Final Order stating that Petitioner does not oppose the motion.

#### FINDINGS OF FACT

1. Kaleah Turner was born on September 14, 2009, at Jackson North Medical Center located in North Miami Beach, Florida. Kaleah weighed in excess of 2,500 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Kaleah. In a medical report

dated February 26, 2015, Dr. Willis described his findings as follows:

In summary, the mother presented at 36 weeks with rupture of the membranes and in labor. Although there were some variable FHR decelerations during labor, the baby was not depressed at birth. Apgar scores were 9/9. Mild respiratory distress was present a few hours after birth, and did not require intubation. MRI showed subtle abnormalities in the white matter adjacent to the lateral ventricles.

I am unsure about the significance of the MRI findings. However, the baby was not depressed at birth and went to the normal nursery, consistent with no significant birth related hypoxic event.

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

3. In an affidavit dated March 23, 2015, Dr. Willis reaffirmed his opinion that there was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery or the immediate post-delivery period.

4. NICA retained Michael Duchowny, M.D. (Dr. Duchowny), a pediatric neurologist, to examine Kaleah and to review her medical records. Dr. Duchowny examined Kaleah on February 25, 2015. In an affidavit dated March 18, 2015, Dr. Duchowny opined as follows:

It is my opinion that KALEAH TURNER's neurological examination reveals no abnormal findings. She is developing at age level and shows no associated problems with either mental or physical abilities.

A review of her medical records likewise discloses no significant findings to suggest that a mechanical injury or that a period of oxygen deprivation occurred during either labor or delivery.

Based [on] my evaluation and record review, I am not recommending KALEAH for inclusion within the NICA program.

5. A review of the file in this case reveals that there have been no 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 during labor, delivery, or the immediate post-delivery period, and Petitioner does not oppose NICA's Motion for Summary Final Order finding that the injury is not compensable under the plan. Dr. Willis' opinion is credited. There are no contrary opinions filed that are contrary to Dr. Duchowny's opinion that Kaleah is developing at age level and shows no associated problems with either mental or physical abilities, and that the medical records disclose no significant findings to suggest that a mechanical injury or that a period of oxygen deprivation occurred during either labor or delivery. Dr. Duchowny's opinion is credited.

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 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.

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. 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.

12. The evidence, which is not refuted, established that there was no apparent obstetrical event that resulted in oxygen deprivation or mechanical trauma to the baby's brain in the course of labor, delivery, or in the immediate post-delivery period. Further, the evidence established that Kaleah is developing at age level and shows no associated problems with either mental or physical abilities. Therefore, Kaleah 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 Octavia Pierson, on behalf of and as parent and natural guardian of Kaleah Turner, is dismissed with prejudice, and the final hearing scheduled for August 4, 2015, is canceled.

DONE AND ORDERED this 2nd day of June, 2015, in Tallahassee,  
Leon County, Florida.



---

BARBARA J. STAROS  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 2nd day of June, 2015.

COPIES FURNISHED:  
(via certified mail)

Kenney Shipley, Executive Director  
Florida Birth Related Neurological  
Injury Compensation Association  
2360 Christopher Place, Suite 1  
Tallahassee, Florida 32308  
(eServed)  
(Certified Mail No. 7014 2120 0003 1052 8040)

Darryn L. Silverstein, Esquire  
Silverstein, Silverstein and Silverstein, P.A.  
20801 Biscayne Boulevard, Suite 504  
Aventura, Florida 33180  
(eServed)  
(Certified Mail No. 7014 2120 0003 1052 8057)

David W. Black, Esquire  
Frank, Weinberg and Black, P.L.  
7805 Southwest 6th Court  
Plantation, Florida 33324  
(eServed)  
(Certified Mail No. 7014 2120 0003 1052 8064)



Amie Rice, Investigation Manager  
Consumer Services Unit  
Department of Health  
4052 Bald Cypress Way, Bin C-75  
Tallahassee, Florida 32399-3275  
(Certified Mail No. 7014 2120 0003 1052 8071)

Elizabeth Dudek, Secretary  
Health Quality Assurance  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308  
(Certified Mail No. 7014 2120 0003 1052 8088)

Jackson North Medical Center  
Attention: Risk Management  
160 Northwest 170th Street  
North Miami Beach, Florida 33169  
(Certified Mail No. 7014 2120 0003 1052 8095)

Johanne Yves Compas-Baril, M.D.  
17874 Northwest 2nd Street  
Pembroke Pines, Florida 33029  
(Certified Mail No. 7014 2120 0003 1052 8101)

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).