

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BETTY D. JERNIGAN AND CARLOS
SANTIAGO, individually and on
behalf of KELIA SANTIAGO, a
minor,

Petitioners,

vs.

Case No. 14-5298N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION, a/k/a NICA,

Respondent,

and

ERICH WYCKOFF, 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 January 8, 2015.

STATEMENT OF THE CASE

On November 10, 2014, Petitioners, Betty D. Jernigan and Carlos Santiago, individually and on behalf of Kelia Santiago (Kelias), a minor, filed a Petition Under Protest Pursuant to Florida Statutes 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 Erich Wyckoff, M.D., as the physician who provided obstetric services for the birth of Kelia. The Petition stated that Kelia was born at Tampa General Hospital in Tampa, Florida.

DOAH served NICA with a copy of the Petition on November 14, 2014. DOAH received a return receipt from the United States Postal Service on November 19, 2014, showing that Tampa General Hospital had been served with a copy of the Petition. DOAH served a copy of the Petition on Dr. Wyckoff on November 20, 2014.

On December 11, 2014, Dr. Erich Wyckoff filed a Motion to Intervene, which was granted by Order dated December 19, 2014. As of the date of the Summary Final Order of Dismissal, Tampa General Hospital has not petitioned to intervene in this proceeding.

On January 8, 2015, NICA filed a Motion for Summary Final Order, requesting that a summary final order be entered finding that the claim was not compensable because Kelia did not meet the requisite minimum statutory birth weight as required by section 766.302(2), Florida Statutes. As of the date of this Summary Final Order of Dismissal, no response to the Motion for Summary Final Order has been filed. On January 20, 2015, Respondent

filed a Response to Order of January 8, 2015, and represented that Petitioners and Intervenor agreed with NICA that there is no need for a hearing in this matter. It is noted that the Petition Under Protest requests a determination that Kelia's injuries be determined to be non-compensable under the Plan.

FINDINGS OF FACT

1. Kelia Santiago was born on October 25, 2011, at Tampa General Hospital in Tampa, Florida. She was a single gestation.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Kelia. In a report dated December 11, 2014, Dr. Willis described his findings in pertinent part as follows:

Birth weight was reported as 2210 grams and 2201 grams in different sites in the mother's medical records. Apgar scores were not given. Cord blood pH was normal at 7.29.

No records were available from the NICU for review.

* * *

In summary, there was no fetal distress during labor. Delivery was by repeat Cesarean section with normal blood gas. Birth weight was <2,500 grams. NICU records were not available for review.

This baby was born prematurely due to premature rupture of the membranes. Birth weight appears to be less than 2,500 grams.

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor or

delivery. NICU records were not available, so I have no comment about oxygen deprivation in the post delivery period. Birth weight was <2,500 grams.

3. In an affidavit dated January 7, 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 or delivery, and his review of the medical records revealed that the birth weight was less than 2,500 grams.

4. A review of the file reveals that no contrary evidence was presented to dispute Dr. Willis' finding that Kelia's birth weight was less than 2,500 grams, or his opinion that there was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the brain during labor or delivery.

Dr. Willis' 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. NICA has determined that Petitioners do not have a claim that is compensable under the Plan and has filed a Motion for Summary Final Order, requesting that an order be entered finding that the claim is not compensable.

9. In ruling on the motion, 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).

§ 766.309(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 Kelia was a single gestation and did not weigh at least 2,500 grams at birth. Thus, Kelia did not sustain a birth-related neurological injury because she did not meet the minimum statutory weight as set forth in the definition of "birth-related neurological injury," in section 766.302(2).

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Betty D. Jernigan and Carlos Santiago, individually and on behalf of Kelia Santiago, a minor, is dismissed with prejudice.

DONE AND ORDERED this 26th day of January, 2015, in
Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of January, 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).