

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CHRISTINA DUNBAR AND CURTIS  
SCOTT, Individually and on  
behalf of CHRISTIAN SCOTT, a  
minor,

Petitioners,

vs.

Case No. 14-5299N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent.

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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, Christina Dunbar and Curtis Scott, individually and on behalf of Christian Scott (Christian), 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 Mario A.

Gomez, M.D., as the physician providing obstetrical services at the birth of Christian on August 2, 2011, at Homestead Hospital located in Homestead, Florida.

DOAH served NICA with a copy of the Petition on November 14, 2014. DOAH served a copy of the Petition on Mario A. Gomez, M.D., on November 20, 2014. On December 30, 2014, DOAH received the envelope from the United States Postal Service in which the Petition had been mailed to Homestead Hospital marked "Return to Sender, Unclaimed, Unable to Forward." A copy of the Petition was again mailed to Homestead Hospital and it was again returned to DOAH marked "Return to Sender, Unclaimed, Unable to Forward" on February 5, 2015. A copy of the Petition was again mailed to Homestead Hospital and was served on February 9, 2015.

As of the date of this Summary Final Order of Dismissal, neither Mario A. Gomez, M.D., nor Homestead Hospital has petitioned to intervene in this proceeding.

On January 8, 2015, NICA filed a Motion for Summary Final Order, asserting that Christian did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. It is noted that the Petition was filed under protest and asserts that the parents are not claimants. Referencing the Petition and the affidavit attached to the Motion for Summary Final Order, NICA asserts that there are no genuine issues of material fact regarding the

compensability of this claim. No objection has been filed to the Motion.

FINDINGS OF FACT

1. Christian Scott was born on August 2, 2011, at Homestead Hospital located in Homestead, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Christian. In a report dated December 19, 2014, Dr. Willis described his findings as follows:

The mother was admitted to the hospital at 40 5/7 weeks in labor. The fetal heart rate (FHR) tracing during labor was reviewed. There was a normal baseline FHR on admission of 150 bpm. The pattern was reactive and did not suggest any fetal distress. Fetal tachycardia developed shortly after hospital admission with a FHR of 160 bpm. The pattern continued to be reactive. A brief episode of later FHR decelerations occurred about two hours prior to birth. The baseline FHR was 180 bpm when the monitor was removed about twenty-five minutes before delivery.

Cesarean section delivery was done for a non-reassuring FHR pattern, which appears to be primarily fetal tachycardia. Amniotic fluid was clear when membranes were ruptured at time of delivery. Birth weight was 3,475 grams or 7 lbs 10 oz's. Delivery was described as uncomplicated.

The baby was not depressed at birth. Apgar scores were 9/9. No resuscitation was required. The baby was noted to have a fever and apparently the mother was also febrile. Antibiotics were started. The baby was transferred to another facility due to persistent vomiting. No medical records were available from the second hospital.

The baby was delivered at Homestead Hospital. No dictated admission or discharge note from the nursery was available for review. Doctor's hand written notes were included in the medical records. Some of these notes were difficult to read. Medical records for a subsequent twin pregnancy in 2014 for the mother, Christina Dunbar, were also included.

In summary: the mother was admitted to the hospital at term in labor. Cesarean section was done for a non-reassuring FHR pattern, which was primarily fetal tachycardia. The baby was not depressed at birth and required no resuscitation. Apgar scores were 9/9.

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 January 7, 2015, Dr. Willis confirmed his opinion as stated in his medical report and opined as follows:

5. It is my opinion that the mother was admitted to the hospital at term in labor. Cesarean section was done for a non-reassuring FHR pattern, which was primarily fetal tachycardia. The baby was not depressed at birth and required no resuscitation. Apgar scores were 9/9.

6. As such, it is my 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. 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 Petitioners have filed their Petition under Protest, stating that they are not claimants. 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. 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 post delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired.

11. The evidence, which is not refuted, established that Christian did not sustain an injury to the brain caused by oxygen deprivation or mechanical injury in the course of labor, delivery or the immediate post-delivery period. Therefore, Christian 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 Christina Dunbar and Curtis Scott, individually and on behalf of Christian Scott, a minor, is dismissed with prejudice.

DONE AND ORDERED this 19th day of March, 2015, in  
Tallahassee, Leon County, Florida.



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BARBARA J. STAROS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of March, 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).