

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ASHLEY SUZANNE TILKA,
individually and on behalf of
ADDYSON TILKA, a minor,

Petitioner,

vs.

Case No. 14-6146N

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

Respondent,

and

BAYFRONT HEALTH, EDUCATION AND
RESEARCH ORGANIZATION, INC.,
f/k/a BAYFRONT MEDICAL CENTER,
INC.,

Intervenor.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon an Amended Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on August 8, 2016.

STATEMENT OF THE CASE

On December 29, 2014, Petitioner, Ashley Suzanne Tilka, individually and on behalf of Addyson Tilka (Addyson), a minor, filed a Petition Under Protest Pursuant to Florida Statute

Section 766.301 et seq. with the Division of Administrative Hearings (DOAH) for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). On November 9, 2015, Petitioner filed an Amended Petition Under Protest (Petition).

DOAH served NICA with a copy of the Petition on January 5, 2015. DOAH served Bayfront Medical Center, Inc., with a copy of the Petition on January 6, 2015. The Petition named Jennifer Gilby, M.D., as the physician who provided obstetrical services at the birth of Addyson on June 22, 2012, at Bayfront Medical Center, Inc., located in St. Petersburg, Florida. Bayfront Health, Education and Research Organization, Inc., f/k/a Bayfront Medical Center, Inc., filed a Motion to Intervene, which was granted by Order dated January 27, 2015.

On April 9, 2015, DOAH received a notice from the United States Postal Service showing that Jennifer Gilby, M.D., had been served with a copy of the Petition. As of the date of this Summary Final Order of Dismissal, Jennifer Gilby, M.D., has not petitioned to intervene into this proceeding.

On February 11, 2016, NICA filed a Response to Petition for Benefits, asserting that Addyson did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes, and requested that a hearing be scheduled to determine compensability. The case was scheduled

for final hearing on August 30, 2016. Petitioner's attorney filed a Motion to Withdraw as Counsel, which was granted by Order dated May 26, 2016.

On August 8, 2016, NICA filed an Amended Motion for Summary Final Order. The final hearing was cancelled. Intervenor's request for an extension of time in which to respond to NICA's Amended Motion for Summary Final Order was granted. Ultimately, the parties were ordered to respond to NICA's Motion for Summary Final Order no later than March 7, 2017. On February 28, 2017, Intervenor filed a notice that it does not oppose NICA's Amended Motion. As of the date of this Summary Final Order of Dismissal, Petitioner has not filed a response to NICA's Amended Motion.

FINDINGS OF FACT

1. Addyson Tilka was born on June 22, 2012, at Bayfront Medical Center, Inc., located in St. Petersburg, Florida. Addyson 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 Addyson. In an affidavit dated August 3, 2016, Dr. Willis opined as follows:

In summary, the baby was delivered prematurely at 34 weeks due to premature rupture of the membranes. Apgar scores were 5/8. The baby had respiratory distress syndrome of prematurity. Oxygen and ventilation support was required for respiratory distress. Neurologic exam was appropriate for gestational age. The baby did not have seizures. No head imaging

studies were done during the newborn hospital course.

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

3. NICA retained Laufey Y. Sigurdardottir, M.D.

(Dr. Sigurdardottir), a pediatric neurologist, to examine Addyson and to review her medical records. Dr. Sigurdardottir examined Addyson on January 20, 2016. In an affidavit dated August 5, 2016, Dr. Sigurdardottir summarized her examination of Addyson and opined as follows:

NEUROLOGICAL EXAM: Mental status: Addyson is a beautiful, interactive girl who speaks in full sentences with minor pronunciation difficulties. She has no autistic features and seems age appropriate in all aspects. Cranial nerves are intact. Pupils are equal and reactive to light. Visual fields are full. There is nystagmus, no amblyopia, no strabismus. Her facial expressions are symmetric. There is no hearing abnormality noted. Her motor exam reveals normal muscle tone, motor strength, symmetric reflexes are present. Balance and coordination seems grossly intact for age.

ASSESSMENT AND PLAN: In summary, here we have a 3 year 6 month old girl who was born premature at 34 weeks and needed a neonatal intensive care unit (NICU) stay due to respiratory compromise. There are, however, no clear concerns of her development at this time. No suggestions of physical impairment. There is nothing on history or record review that suggests neurologic injury to the brain or spinal cord acquired due to oxygen deprivation or mechanical injury.

Results as to question 1: The patient is found to have no substantial physical or mental impairment.

Results as to question 2: there is no evidence of perinatal neurologic depression and no evidence of ischemic injury at birth or in the immediate postnatal period.

Results as to question 3: We would expect full life expectancy as no noted abnormalities are found on exam.

In light of the above-mentioned details, I do not recommend Addyson to be included in the Neurologic Injury Compensation Association program and will be happy to answer additional questions.

All of my opinions are within a reasonable degree of medical probability.

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 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. Dr. Willis' opinion is credited. There are no expert opinions filed that are contrary to Dr. Sigurdardottir's opinion that Addyson does not have a substantial physical or mental impairment. Dr. Sigurdardottir'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 Addyson did not sustain an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital which rendered her permanently and substantially mentally and physically impaired. Therefore, Addyson 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 Amended Petition filed by Ashley Tilka, individually and as mother of Addyson Tilka, is dismissed with prejudice.

DONE AND ORDERED this 9th day of March, 2017, 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 9th day of March, 2017.

COPIES FURNISHED:
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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).