

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHAWN E. WARE, individually and
on behalf of JORDAN WARE, a
minor,

Petitioner,

vs.

Case No. 15-6199N

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

Respondent,

and

ORLANDO HEALTH, INC., d/b/a
WINNIE PALMER HOSPITAL; JAYASRI
BUKKAPATNAM, M.D.; AND STEPHANIE
L. ZOBEL, M.D., f/k/a STEPHANIE
L. LADOWSKI, M.D.,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon an Unopposed Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on February 16, 2016.

STATEMENT OF THE CASE

On November 3, 2015, Petitioner, Shawn E. Ware, individually and on behalf of Jordan Ware (Jordan), 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 Jayasri Bukkapatnam, M.D., and Stephanie L. Ladowski, M.D., as the physicians who provided obstetric services for the birth of Jordan on July 28, 2008, at Winnie Palmer Hospital in Orlando, Florida.

According to the United States Postal Service website, DOAH served NICA with a copy of the Petition on November 5, 2015. DOAH served Jayasri Bukkapatnam, M.D., and Winnie Palmer Hospital a copy of the Petition on November 9, 2015. DOAH served Stephanie L. Ladowski, M.D., with a copy of the Petition on November 13, 2015.

On November 19, 2015, Orlando Health, d/b/a Winnie Palmer Hospital, Jayasri Bukkapatnam, M.D., and Stephanie L. Zobel, M.D., f/k/a Stephanie L. Ladowski, M.D., filed a Petition to Intervene, which was granted by Order dated December 2, 2015.

On February 16, 2016, NICA filed an Unopposed Motion for Summary Final Order, requesting that a summary final order be entered finding that the claim was not compensable because Jordan did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes.

FINDINGS OF FACT

1. Jordan Ware was born on July 28, 2008, at Winnie Palmer Hospital in Orlando, Florida.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Jordan. In a report dated December 14, 2015, Dr. Willis described his findings in pertinent part as follows:

Cesarean section was uncomplicated. Amniotic fluid was clear. Birth weight was 2,914 grams or 6 lbs 7 oz's. The baby was not depressed at birth. Apgar scores were normal at 9/9. Cord blood gas was normal with a pH of 7.25.

* * *

Seizures were diagnosed in 2003, at about 5 years of age. Neurology clinic at 6 years of age gives a history of seizures and developmental delay. EEG's were either read as normal, or patterns consistent with heightened tendency for seizures.

CT scan was done at one year of age for failure to thrive and was negative. MRI in 2014 identified mesial temporal sclerosis, which is a finding consistent with epilepsy.

In summary, Cesarean section delivery was done at 36 weeks due to a non-reassuring FHR pattern and reduced amniotic fluid volume. The baby was not depressed at birth. Apgar scores were 9/9 and pH was normal at 7.25. The baby was described as a healthy newborn. The newborn hospital course was benign.

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. A review of the file reveals that no contrary evidence was presented to dispute Dr. Willis' finding that Jordan's injuries were not the result of oxygen deprivation or mechanical injury during labor, delivery, or the immediate post-delivery period. Dr. Willis' opinion is credited.

4. The Petition was filed on November 3, 2015, which is more than five years after Jordan's birth.

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 Petitioner does 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 there was not an obstetrical event that resulted in loss of oxygen or mechanical trauma to Jordan's brain during labor, delivery or the immediate post-delivery period. Thus, Jordan is not eligible for benefits under the Plan.

12. Moreover, the Petition Under Protest was filed more than five years after the birth of Jordan. This is beyond the five-year statute of limitations set forth in section 766.313, and is, therefore, barred.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Shawn E. Ware, individually and on behalf of Jordan Ware, a minor, is dismissed with prejudice.

DONE AND ORDERED this 24th day of February, 2016, 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 24th day of February, 2016.

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).