

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SEAN MARTIN AND AMY MARTIN, on
behalf of and as parents and
natural guardians of HUNTLEY
CLAY MARTIN, a minor,

Petitioners,

vs.

Case No. 16-4095N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

HIGHLANDS REGIONAL MEDICAL
CENTER,

Intervenor.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This came before the undersigned upon Respondent, Florida Birth-Related Neurological Injury Compensation Association's (NICA), Unopposed Motion for Summary Final Order, filed on January 2, 2018. Concurrently with the filing of the motion, Respondent filed medical records relating to the birth of Huntley Clay Martin, deposition transcripts of two physicians, and a list of all NICA-participating physicians in the year 2012. The motion represents that Petitioners do not oppose the

granting of the motion, and that Intervenor takes no position on the motion.

STATEMENT OF THE CASE

The issue in this case is whether Huntley Clay Martin (Huntley) suffered a birth-related injury as defined by section 766.302(2), Florida Statutes, for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan (the Plan).

PRELIMINARY STATEMENT

On July 18, 2016, Petitioners filed a Petition for Benefits (Petition), alleging that Huntley suffered brain damage as a result of a birth-related neurological injury, and requesting for themselves and their minor child benefits available under the Plan. The Petition also asserted that the physicians providing obstetric services who were present at the birth of Huntley included Dr. David Guerra (Dr. Guerra) and Dr. Nasim Khan (Dr. Khan).

The Division of Administrative Hearings served NICA, Dr. Khan, Dr. Guerra, and Highlands Regional Medical Center (Highlands Regional), with a copy of the original claim under cover letter dated July 21, 2016. On August 4, 2016, Highlands Regional moved to intervene, and on August 19, 2016, an Order was entered granting Highlands Regional's intervention.

On December 19, 2016, NICA responded to the Petition for Benefits and gave notice that NICA was of the view that the claim was not compensable because Huntley had not suffered a birth-related neurological injury as defined by section 766.302(2).

On January 18, 2017, Administrative Law Judge Barbara J. Staros entered a Notice of Hearing and Order of Pre-hearing Instructions. Said notice set the final hearing of this matter via video teleconference for August 8, 2017, with locations in Tampa and Tallahassee, Florida. The final hearing was continued upon stipulation of the parties.

On January 2, 2018, Respondent filed an Unopposed Motion for Summary Final Order with the aforementioned medical records in support of the Motion for Summary Final Order.

FINDINGS OF FACT

1. Huntley was born on June 11, 2012, at Highlands Regional, 3600 South Highlands Avenue, Sebring, Florida. The pregnancy, labor, and delivery of his mother, Amy Martin, were managed by employees of Highlands Regional and Dr. Guerra.

2. Hospital delivery records indicate that Dr. Guerra was the delivering physician. The records also reflect that Dr. Guerra was the sole admitting, attending, delivering, and discharging physician for Amy Martin on June 11, 2012. In addition, nursing notes reveal that no other physicians other

than Dr. Rivabem (anesthesiologist) and Dr. Guerra were present for the birth of Huntley.

3. The deposition of Dr. Khan was taken on October 17, 2017, and the deposition of Dr. Guerra was taken on November 27, 2017. Dr. Khan testified in pertinent part that she was not present in the room for the labor, delivery, or post-resuscitative period and that she was not otherwise involved therein. Dr. Guerra testified in pertinent part that Dr. Khan was not present with him during the birth of Huntley and that he had no recollection of Dr. Khan having otherwise participated in the labor, delivery, or post-delivery resuscitation of Huntley.

4. Section 766.309 provides that the Administrative Law Judge "shall" determine, based on all available evidence, inter alia, "[w]hether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post delivery period in a hospital."

5. Section 766.302(7) defines "participating physician" as:

[A] physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full time or part time and who had paid or was exempted from payment at the time of the injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred.

6. A listing of all NICA-participating physicians for the year 2012 was attached to Respondent's motion. Dr. Guerra is not listed as a NICA-participating physician in 2012. Accordingly, it is found that Dr. Guerra was not a "participating physician" at the time of Huntley's delivery.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2016).

8. The Plan was established by the Legislature "to provide compensation on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation." § 766.301, Fla. Stat. The Plan applies only to a birth-related neurological injury, which 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. This definition shall apply to live births only and shall not include

disability or death caused by genetic or congenital abnormality.

(emphasis added).

9. 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 submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." § 766.305(4), Fla. Stat.

10. 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.

11. In discharging this responsibility, the Administrative Law Judge must make the following determinations based upon all 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. 766.302(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.

12. In the instant case, it is unnecessary for the undersigned to determine whether Huntley suffered a birth-related neurological injury, since it is uncontroverted that obstetrical services were not delivered by a participating physician at birth. Accordingly, section 766.31(1) precludes approving an award under the Plan.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Sean Martin and Amy Martin, on behalf of and as parents and natural guardians of Huntley Clay Martin, is dismissed with prejudice.

DONE AND ORDERED this 23rd day of January, 2018, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
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 23rd day of January, 2018.

COPIES FURNISHED:
(via certified mail)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
Suite 1
2360 Christopher Place
Tallahassee, Florida 32308
(eServed)
(Certified Mail No. 7016 0910 0001 7987 6602)

Justine D. Adamski, Esquire
La Cava & Jacobson, P.A.
501 East Kennedy Boulevard, Suite 1250
Tampa, Florida 33602
(eServed)
(Certified Mail No. 7016 0910 0001 7987 6619)

Ronald S. Gilbert, Esquire
Colling Gilbert Wright & Carter, LLC
Suite 830
801 North Orange Avenue
Orlando, Florida 32801
(eServed)
(Certified Mail No. 7016 0910 0001 7987 6626)

Brooke M. Gaffney, Esquire
Smith Bigman Brock
Suite 900
444 Seabreeze Boulevard
Daytona Beach, Florida 32118
(eServed)
(Certified Mail No. 7016 0910 0001 7987 6633)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified Mail No. 7016 0910 0001 7987 6640)

Justin Senior, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)
(Certified Mail No. 7016 0910 0001 7987 6657)

Nasim Summer Khan, M.D.
919 Mall Ring Road
Sebring, Florida 33872
(Certified Mail No. 7016 0910 0001 7987 6664)

David Guerra, M.D.
919 Mall Ring Road
Sebring, Florida 33872
(Certified Mail No. 7016 0910 0001 7987 6671)

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).