

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VALENTIN MARES AND YUDIRIA
CHAVEZ, on behalf of and as
parents and natural guardians of
EILEEN MARES, a minor,

Petitioners,

vs.

Case No. 16-6519N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's
Motion for Summary Final Order, filed on January 31, 2017.

STATEMENT OF THE CASE

On November 2, 2016, Petitioners, Valentin Mares and
Yudiria Chavez, on behalf of and as parents and natural guardians
of Eileen Mares (Eileen), a minor, filed a Petition for Benefits
Pursuant to Florida Statute Section 766.301 et seq. (Petition)
with the Division of Administrative Hearings (DOAH) for
determination of compensability under the Florida Birth-Related
Neurological Injury Compensation Plan (Plan). The Petition named
Joanna B. Davis, M.D., as the physician who provided obstetric

services at the birth of Eileen at Jackson South Community Hospital on August 30, 2014.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the Petition on November 9, 2016. DOAH served Joanna B. Davis, M.D., on November 10, 2016. The docket reflects that DOAH received a Certified Return Receipt from the United States Postal Service on January 13, 2017, showing that Jackson South Community Hospital had been served with a copy of the Petition.

On January 12, 2017, Petitioners filed a Motion for Leave to File an Amended Petition for Benefits. The Motion was granted, and the Amended Petition corrected the name of the physician who provided obstetric services at Eileen's birth to be Molrine Andrea Tracey, M.D. DOAH served a copy of the Amended Petition on Molrine Andrea Tracey, M.D., on January 20, 2017. DOAH's docket reflects that NICA was served with a copy of the Amended Petition on January 21, 2017, and Jackson Community Hospital was served a copy of the Amended Petition on January 24, 2017.

As of the date of this Summary Final Order of Dismissal, neither Jackson South Community Hospital nor Dr. Tracey has petitioned to intervene in this proceeding.

On January 31, 2017, NICA filed a Motion for Summary Final Order, stating that, at the time of Eileen's birth, Dr. Tracey was not a "participating physician" as that term is defined by

section 766.302(7), Florida Statutes (2015). Petitioners filed a Motion in Partial Support to Respondent's Motion for Summary Final Order, on February 10, 2017.

FINDINGS OF FACT

1. The Amended Petition named Dr. Tracey Molrine as the physician providing obstetric services at Eileen's birth on August 30, 2014.

2. Attached to the Motion for Summary Final Order is an affidavit of NICA's custodian of records, Tim Daughtry, attesting to the following, which has not been refuted:

One of my official duties as Custodian of Records is to maintain NICA's official records relative to the status of physicians as participating physicians in the Florida Birth-Related Neurological Compensation Plan who have timely paid the Five Thousand Dollar (\$5,000.00) assessment prescribed in Section 766.314(4)(c), Florida Statutes, and the status of physicians who may be exempt from payment of the Five Thousand Dollar (\$5,000.00) assessment pursuant to Section 766.314(4)(c), Florida Statutes. Further, I maintain NICA's official records with respect to the payment of the Two Hundred Fifty Dollar (\$250.00) assessment required by Section 766.314(4)(b)1., Florida Statutes, by all non-participating, non-exempt physicians.

* * *

As payments of the requisite assessments are received, NICA compiles data in the "NICA CARES" database for each physician. The "NICA CARES physician payment history/report" attached hereto for Dr. Tracey Molrine [sic] indicates that in the year 2014, the year in which Dr. Molrine [sic] participated in the

delivery of Eileen Mares, as indicated in the Petitioners' Petition for Benefits, Dr. Morline [sic] did not pay the Five Thousand Dollar (\$5,000) assessment required for participation in the Florida Birth-Related Neurological Injury Compensation Plan.

Further, it is NICA's policy that if a physician falls within the exemption from payment of the Five Thousand Dollar (\$5,000) assessment due to their status as a resident physician, assistant resident physician or intern as provided in Section 766.314(4)(c), Florida Statutes, annual documentation as to such exempt status is required to be provided to NICA. NICA has no records with respect to Dr. Molrine [sic] in relation to an exempt status for the year 2014. To the contrary, the attached "NICA CARES physician payment history/report shows that in 2013 [sic], Dr. Molrine [sic] paid the Two Hundred and Fifty Dollar (\$250) assessment required by Section 766.314(4)(b)1., Florida Statutes, for non-participating, non-exempt licensed physicians.

3. The physician payment history/report for Dr. Tracey supports Mr. Daughtry's affidavit.

4. Petitioners acknowledge in their Motion in Partial Support of Respondent's Motion for Final Summary Order that the requirement of section 766.309(1)(b), that obstetric services be provided by a participating physician, has not been satisfied.

5. At the time of the birth of Eileen, Dr. Tracey was not a participating physician in the Plan.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 766.301-766.316, Fla. Stat.

7. 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.

8. 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.

9. 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.

10. 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.

11. Pertinent to this case, "participating physician" is defined by section 766.302(7) to mean:

[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.

12. Dr. Tracey had not paid her assessment of \$5,000 at the time Eileen was born; therefore, she was not a participating physician at the time of Eileen's birth. No evidence was submitted that, at the time of Eileen's birth, Dr. Tracey was excluded from paying the \$5,000 assessment required for participating physicians. To the contrary, the physician payment history/report shows that in 2014, Dr. Tracey paid the \$250 assessment required by section 766.314(4)(6)1., for non-participating, non-exempt licensed physicians.

13. The obstetrical services provided during Eileen's birth were not provided by a participating physician. Thus, the claim on behalf of Eileen is not compensable under the Plan.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law, it is ORDERED that Respondent's Motion for Summary Final Order is granted, and the Amended Petition filed by Valentin Mares and Yudiria Chavez, on behalf of and as parents and natural guardians of Eileen Mares, a minor, is dismissed with prejudice.

DONE AND ORDERED this 28th day of February, 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 28th day of February, 2017.

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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).