

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WESLEN BASTIEN, on behalf of and
as parent and natural guardian
of TAYLOR JOSEPH, a minor,

Petitioner,

vs.

Case No. 17-1830N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

SELVA GANESH, M.D.; AND BETHESDA
HOSPITAL, INC.,

Intervenors.

_____ /

PARTIAL SUMMARY FINAL ORDER

This cause came on for consideration upon a Motion for Partial Summary Final Order filed on July 27, 2017, by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA).

STATEMENT OF THE CASE

On March 13, 2017, Petitioner, Weslen Bastien, individually and on behalf of Taylor Joseph (Taylor), a minor, filed a Petition 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 Selva Ganesh, M.D. (Dr. Ganesh), as the physician who provided obstetric services at the birth of Taylor on July 4, 2015, at Bethesda Hospital East (Bethesda), in Boynton Beach, Florida.

DOAH served NICA with a copy of the Petition on April 10, 2017. DOAH served Dr. Ganesh with a copy of the Petition on March 28, 2017. DOAH served Bethesda with a copy of the Petition on March 30, 2017.

On April 14, 2017, a Motion to Intervene was filed by Dr. Ganesh. On April 17, 2017, an Order was entered granting Dr. Ganesh's Motion to Intervene. On May 10, 2017, Bethesda filed a Motion to Intervene. On May 12, 2017, an Order was entered granting Bethesda's Motion to Intervene.

On July 27, 2017, NICA filed a Motion for Partial Summary Final Order on the issue of birth-related neurological injury. Also on July 27, 2017, NICA filed a Response to Order of July 20, 2017, in which it was represented that:

Counsel for the Petitioners and Intervenors have agreed that they do not need a hearing on the issue of Compensability and that the ALJ can enter an Interim Order finding the Claim to be Compensable, reserving jurisdiction to determine whether the notice requirements of section 766.316 were satisfied and to determine the issue of an

award pursuant to section 766.31, if necessary.

FINDINGS OF FACT

1. Taylor Joseph was born on July 4, 2015, at Bethesda, in Boynton Beach, Florida. Taylor weighed in excess of 2,500 grams at birth. The circumstances of the labor, delivery, and birth of the minor child are reflected in the medical records of Bethesda submitted with the Petition.

2. In order for a claim to be compensable under the Plan, certain statutory requisites must be met. Section 766.309 provides:

(1) The Administrative Law Judge shall 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 § 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.

(c) How much compensation, if any, is awardable pursuant to § 766.31.

(2) If the Administrative Law Judge determines that the injury alleged is not a birth-related neurological injury or that obstetrical services were not delivered by a participating physician at birth, she or he shall enter an order

(3) The term "birth-related neurological injury" is defined in Section 766.302(2), Florida Statutes, as:

. . . 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).

3. In the instant case, NICA has retained Donald Willis, M.D. (Dr. Willis) as its medical expert specializing in maternal-fetal medicine pediatric neurology. Upon examination of the pertinent medical records, Dr. Willis opined:

In summary, it is my opinion that delivery was complicated by a shoulder dystocia lasting 6 minutes. The newborn was severely depressed with no heart beat until 20 minutes after birth. Newborn hospital

course was complicated by multi-system organ failures. MRI was consistent with HIE.

Dr. Willis's medical Report is attached to his Affidavit. His Affidavit reflects his ultimate opinion that:

There was an obstetrical event that resulted in loss of oxygen to the baby's brain during delivery and continuing into the immediate post delivery period. The oxygen deprivation resulted in brain injury.

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. The opinion of Dr. Willis that Taylor did suffer an obstetrical event that resulted in loss of oxygen to the baby's brain during delivery and continuing into the immediate post-delivery period, which resulted in brain injury, is credited.

5. In the instant case, NICA has retained Michael S. Duchowny, M.D. (Dr. Duchowny), as its medical expert in pediatric neurology. Upon examination of the child and the pertinent medical records, Dr. Duchowny opined:

In summary, TAYLOR's neurological examination reveals a permanent and substantial mental and motor impairment. She has 4-limb spasticity with double hemiparesis, severe microcephaly, simple pathologic reflexes, absence of verbal communication and an indwelling gastrostomy.

Dr. Duchowny's medical report is attached to his Affidavit. His Affidavit reflects his ultimate opinion that:

TAYLOR's substantial mental and motor impairment were due to oxygen deprivation that was acquired in the course of labor and delivery.

6. 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. Duchowny. The opinion of Dr. Duchowny that Taylor did suffer a substantial mental and motor impairment, due to oxygen deprivation that was acquired in the course of labor and delivery, is credited.

CONCLUSIONS OF LAW

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

8. 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.

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 to 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 brain-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. 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. 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.

12. The evidence, which is unrebutted, established that Taylor did sustain an injury to the brain caused by oxygen deprivation occurring during the course of labor and delivery, and continuing into the immediate post delivery period, which resulted in permanent and substantial mental and motor impairment. Thus, Taylor sustained a birth-related neurological injury and is eligible for benefits under the Plan.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED:

1. Respondent's Motion for Partial Summary Final Order on the issue of birth-related neurological injury is granted, and Petitioner's claim is found and determined to be compensable.

2. Jurisdiction is reserved to determine the issue of an award pursuant to section 766.31.

3. Jurisdiction is reserved to determine whether the notice requirements of section 766.316 were satisfied.

DONE AND ORDERED this 15th day of September, 2017, in Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
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this 15th day of September, 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).