

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRAZER AKOMPRAH AND PHILOMINA
BENTLEY, on behalf of and as
parents and natural guardians of
SCARLETT T. AKOMPRAH, a deceased
minor,

Petitioners,

vs.

Case No. 18-3336N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

ORLANDO HEALTH, INC., d/b/a
WINNIE PALMER HOSPITAL FOR WOMEN
AND BABIES; AND MANUEL L.
HERRERA, M.D.,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

Respondent, Florida Birth-Related Neurological Injury Compensation Association ("NICA"), filed a Motion for Summary Final Order ("Motion") on October 22, 2018, which is due for consideration. The Motion relies on the medical records of the infant, Scarlett T. Akomprah, provided as certified business records maintained by the Winnie Palmer Hospital for Women and Babies ("Winnie Palmer Hospital").

STATEMENT OF THE ISSUE

The issue to be determined is whether the infant, Scarlett T. Akomprah, suffered a birth-related neurological injury as defined by section 766.302(2), Florida Statutes (2017).

PRELIMINARY STATEMENT

On June 4, 2018, Petitioners filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 ("Petition"), on behalf of and as parents and natural guardians for Scarlett T. Akomprah ("Scarlett"), for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan ("Plan"). When the original Petition was filed with the Division of Administrative Hearings ("DOAH" or "Division"), it was unsigned, and after notification by a Division clerk, a signed Petition was filed on June 25, 2018.

The Petition named Manuel Herrera, M.D., as the physician who provided obstetrical services at Scarlett's birth, and named Winnie Palmer Hospital as the hospital where Scarlett was born, on March 21, 2018.

On July 5, 2018, the Petition was served by certified mail on NICA, Dr. Herrera, and Winnie Palmer Hospital. A certified return receipt was received from NICA on July 9, 2018. No certified returns were received from either Dr. Herrera or Winnie Palmer Hospital; however, on July 20, 2018, a Motion to Intervene

was filed on their behalf, and was granted by Order dated July 30, 2018.

NICA requested and received two extensions of time to respond to the Petition. On October 19, 2018, NICA filed a Motion for Summary Final Order, which it amended on October 22, 2018.

Florida Administrative Code Rule 28-106.204 allows parties to file a response to a motion within seven days of service. At the end of the seven-day period, Petitioners had not filed a response to the Motion for Summary Final Order, and an Order Requiring Response was issued on October 30, 2018, directing a response by no later than November 9, 2018. To date, no response has been filed.

FINDINGS OF FACT

1. On March 21, 2018, at 10:29 a.m., Philomina Bentley gave birth to a baby girl. While the medical records describe her as "Baby Girl of Philomina-`Testimony,'" the Petition identifies her as Scarlett T. Akomprah. However, the Petition also identifies the mother as Philomina Bentley, and identifies the date of birth as March 21, 2018, at 10:29 a.m., and the birth being that of a single baby. No evidence has been presented suggesting that the baby referenced as "Testimony" in the medical records is not the baby referenced as "Scarlett T." in the Petition. For purposes of this Order, the baby is referenced as "Scarlett."

2. Scarlett was delivered at 26 weeks, 3 days gestation, and weighed 950 grams.

3. The only evidence submitted was the affidavit regarding business records and the accompanying medical records for the infant.

CONCLUSIONS OF LAW

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

5. The Plan was established by the Legislature "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" related to births occurring on or after January 1, 1989. § 766.303(1), Fla. Stat.

6. An injured infant, his or her 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. Section 766.305(4) provides that NICA, which administers the Plan, has 45 days from the date that a complete claim is served 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.

7. If NICA determines that the alleged injury is a birth-related neurological injury that is compensable under the Plan,

it may award compensation to the claimant, provided that the award is approved by the assigned administrative law judge. § 766.305(7), Fla. Stat. However, if NICA disputes the claim, as it does in this case, the dispute must be resolved by the assigned administrative law judge in accordance with chapter 120, Florida Statutes. §§ 766.304, 766.30, and 766.31, Fla. Stat.

8. The first inquiry is whether the infant has sustained a birth-related neurological injury as defined by section 766.302(2), which provides:

(2) "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 supplied).

9. If the administrative law judge determines that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that, as a result, the infant was rendered permanently and substantially mentally and physically impaired, then section 766.309(1) provides that

there is a rebuttable presumption that the injury is a birth-related neurological injury.

10. In this case, the evidence does not support such a finding. The undisputed evidence presented indicates that at birth, Scarlett weighed 950 grams, well below the threshold weight specified in the definition in section 766.302(2). This issue is dispositive with respect to compensability. Based upon this evidence, Scarlett did not sustain a birth-related neurological injury as defined in section 766.302(2), and is not eligible for benefits under the Plan.

CONCLUSION

Based on the Findings of Fact and Conclusions of Law provided above, Petitioners' claim is not compensable under the Plan, and the Petition is dismissed with prejudice.

DONE AND ORDERED this 4th day of December, 2018, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of December, 2018.

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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).