

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARL HILAIRE AND MAYSTERLINE
SESSE, on behalf of and as
parents and natural guardians of
MICAH HILAIRE, a minor,

Petitioners,

vs.

Case No. 18-6626N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

*CORRECTED AS TO CASE
STYLE OF CERTIFIED COPIES
MAILED

Respondent,

and

ST. MARY'S MEDICAL CENTER, INC.,
d/b/a ST. MARY'S MEDICAL CENTER,

Intervenor.

_____ /

*CORRECTED SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Respondent's Motion for Summary Final Order (Respondent's Motion), filed August 7, 2019. Petitioners did not file a response to Respondent's Motion.

STATEMENT OF THE CASE

On December 17, 2018, Petitioners filed a Petition for Benefits 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 George O'Neil, Jr., M.D., as the physician who provided obstetric services at the birth of Micah Hilaire (Micah) on December 6, 2016, at St. Mary's Medical Center in West Palm Beach, Florida.

On December 28, 2018, DOAH mailed a copy of the Petition to Respondent, Dr. O'Neil, and St. Mary's Medical Center by certified mail. Respondent was served with the Petition on or before January 18, 2019. On January 9, 2019, St. Mary's Medical Center, Inc., d/b/a St. Mary's Medical Center, filed its Petition to Intervene. Said petition was granted on January 29, 2019.

On July 24, 2019, after four extensions of time, Respondent filed its Response to Petition for Benefits, suggesting that the subject claim was not compensable, and requesting a hearing to address such issue. On July 25, 2019, the undersigned issued an Order wherein the parties were ordered to confer and advise the undersigned as to the need for a final hearing.

Respondent's Motion was filed on August 7, 2019. The following day, Respondent filed its Response to Order of July 25, 2019, representing that, despite diligent efforts, it had been unable to confer with Petitioners' counsel but did not believe a final hearing would be necessary. On August 15, 2019, the undersigned issued an Order to Show Cause wherein Petitioners were ordered to show cause in writing, on or before August 22,

2019, why Respondent's Motion should not be granted. Petitioners did not comply with the Order to Show Cause.

FINDINGS OF FACT

1. Micah was born on December 6, 2016, at St. Mary's Medical Center. She was a single gestation, weighing over 2,500 grams at birth.

2. Respondent retained Donald Willis, M.D., an obstetrician specializing in maternal-fetal medicine, to review the medical records of Micah and her mother, Petitioner Maysterline Sesse, and opine as to whether there was an injury to her brain or spinal cord that occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period due to oxygen deprivation or mechanical injury. In his report dated May 10, 2019, Dr. Willis set forth the following, in pertinent part:

Cesarean section was done for the non-reassuring fetal heart rate (FHR) pattern. The mother was not in labor. Birth weight was 2,620 grams. Umbilical cord gas was not done.

The baby was not depressed at birth. Apgar scores were 8/9. No resuscitation was required. Muscle tone was appropriate with a strong cry after birth and the baby was stated to be "comfortable on room air." NICU admission was not required.

Newborn hospital course was uncomplicated. The baby was managed in the normal nursery and discharged home three days after birth. There was no seizure activity. No fetal head imaging was done during newborn hospital course.

Gross motor delays were noted at 2 months of age. Hemiplegia was subsequently diagnosed. MRI was done at about 22 months of age. The MRI showed significant chronic abnormalities related to infarction in the right cerebral hemisphere with cystic encephalomalacia.

* * *

The baby has brain damage as identified by MRI at 22 months of age. The mother was not in labor prior to birth. The baby was not depressed at birth and did not require resuscitation. The new born hospital course was essentially uncomplicated. The brain injury does not appear to be birth related.

There was no apparent obstetrical event that resulted in oxygen deprivation or mechanical trauma to the brain or spinal cord during labor, delivery or the immediate post-delivery period.

3. Attached to Respondent's Motion is Dr. Willis's affidavit, dated August 5, 2019. In his affidavit, Dr. Willis affirms, to a reasonable degree of medical probability, the above-quoted findings and opinions from his report.

4. Respondent also retained Michael S. Duchowny, M.D., a pediatric neurologist, to review the pertinent medical records, conduct an Independent Medical Examination (IME) of Micah, and opine as to whether she suffers from a permanent and substantial mental and physical impairment as a result of a birth-related neurological injury. Dr. Duchowny reviewed the medical records, obtained historical information from Micah's parents, and performed an IME on July 9, 2019.

5. Respondent's Motion also relies upon the attached affidavit from Dr. Duchowny, dated August 6, 2019. In his affidavit, Dr. Duchowny testifies, in pertinent part, as follows:

It is my opinion that MICAH's evaluation reveals neurological findings consistent with a mild-moderate left hemiparesis with motor impairment primarily affecting upper and lower extremities. In contrast, MICAH has preserved cognitive function and social awareness. She evidences slightly increased muscle tone in the left distal upper and lower extremities and increased deep tendon reflexes.

A review of MICAH's records reveals that she was born at 36 weeks gestation at St. Mary's Hospital and weighed 5 pounds 12 ounces. Her Apgar scores were 8 and 9 at 1 and 5 minutes; cord blood gases were not done. She remained in the nursery for three days and was discharged home in good condition. Her development proceeded satisfactorily but the lack of motor development triggered an MRI scan of the brain which revealed right temporo-parietal cerebral hemispheric cystic encephalomalacia with compensatory dilation of the right lateral ventricle, findings consistent with an old right middle cerebral artery infarct.

MICAH's hemiparesis is most likely related to an intra-uterine acquired cerebrovascular accident, and is not birth-related. Her cognitive level is age-appropriate and should continue to develop normally in the future. For these reasons, I am not recommending MICAH's acceptance into the NICA program.

6. In his affidavit, Dr. Duchowny testifies that his opinions are to a reasonable degree of medical probability. A review of the file reveals that no contrary evidence was

presented to dispute the findings and opinions of Drs. Willis and Duchowny. Their opinions are credited.

CONCLUSIONS OF LAW

7. DOAH 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 Respondent determines that the injury alleged is a claim that 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 (ALJ) to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the

other hand, Respondent disputes the claim, as here, the dispute must be resolved by the assigned ALJ in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

11. In its present posture, the ALJ is required to make the following threshold 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. An award may be sustained only if the ALJ concludes that the "infant has sustained a birth-related neurological injury" § 766.31(1), Fla. Stat.

12. 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.

13. The undisputed evidence establishes that there was not an injury to Micah's brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.

14. The undisputed evidence further establishes that Micah did not sustain a permanent and substantial mental impairment. Thus, she did not sustain a birth-related neurological injury as defined in section 766.302(2), Florida Statutes, and, therefore, is not eligible for benefits under the Plan.

DONE AND ORDERED this 5th day of September, 2019, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
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 5th day of September, 2019.

COPIES FURNISHED:
(via certified mail)

Spencer Kuvin, Esquire
Law Offices of Craig Goldenfarb, P.A.
Suite 400
1800 South Australian Avenue
West Palm Beach, Florida 33409
(Certified No. 7015 0640 0003 7646 4270)

Kenney Shipley, Executive Director
Florida Birth Related Neurological
Injury Compensation Association
Suite 1
2360 Christopher Place
Tallahassee, Florida 32308
(eServed)
(Certified No. 7015 0640 0003 7646 4287)

Robert Scott Covitz, Esquire
Falk, Waas, Hernandez, Cortina,
Solomon and Bonner
Suite 210E
1900 Northwest Corporate Boulevard
Boca Raton, Florida 33431
(eServed)
(Certified No. 7015 0640 0003 7646 4294)

David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest 6th Court
Plantation, Florida 33324
(eServed)
(Certified No. 7015 0640 0003 7646 4300)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified No. 7015 0640 0003 7646 4317)

Mary C. Mayhew, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)
(Certified No. 7015 0640 0003 7646 4324)

George O'Neil, Jr., M.D.
Suite 103
927 45th Street
West Palm Beach, Florida 33407
(Certified No. 7015 0640 0003 7646 4331)

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).