

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TAMICA QUARRIE AND NICOY LATOUCHE,
INDIVIDUALLY AND AS PARENTS AND
NEXT FRIENDS OF RHEA LATOUCHE, A
MINOR,

Petitioners,

vs.

Case No. 20-0818N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

NORTH BROWARD HOSPITAL DISTRICT
D/B/A BROWARD HEALTH CORAL SPRINGS
A/K/A CORAL SPRINGS MEDICAL CENTER;
ALISON T. CLARKE DESOUZA, M.D.;
ALISON T. CLARKE DESOUZA, M.D., LLC;
PEDRO MOSCOSO, M.D.; AND PEDIATRIX
MEDICAL GROUP OF FLORIDA, INC.,

Intervenors.

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SUMMARY FINAL ORDER OF DISMISSAL

This matter came before the undersigned on Respondent's Motion for Summary Final Order (Respondent's Motion), filed June 17, 2020; and Petitioners' Response, filed July 6, 2020.

STATEMENT OF THE CASE

On February 7, 2020, Petitioners filed an "Amended Petition Filed Under Protest for Determination as to the Applicability of Florida Birth-Related Neurological Injury Compensation Plan" (Amended Petition) at the Division

of Administrative Hearings (DOAH). The Amended Petition named Alison T. Clarke DeSouza, M.D., as the physician who provided obstetric services at the birth of Rhea LaTouche (Rhea) on August 18, 2017, at Coral Springs Medical Center, in Coral Springs, Florida.

The Amended Petition alleges that Dr. DeSouza was a participant in the Florida Birth-Related Neurological Injury Compensation Association Plan (the Plan), and provided timely notice to Petitioners of her participation in the Plan. The Amended Petition further alleges that Coral Springs Medical Center, a hospital, while also a NICA participant, did not timely provide notice of its participation in the Plan.

DOAH served Respondent with a copy of the Amended Petition on or before February 19, 2020. On February 18, 2020, DOAH mailed a copy of the Amended Petition by certified mail to Dr. DeSouza and Coral Springs Medical Center.

On March 10, 2020, North Broward Hospital District d/b/a Broward Health Coral Springs a/k/a Coral Springs Medical Center's (BHCS) Petition for Leave to Intervene was granted; and, on May 11, 2020, Alison T. Clarke DeSouza, M.D. and Alison T. Clarke DeSouza, M.D., LLC's Motion for Leave to Intervene was granted.

On March 10, 2020, Petitioners filed a "Motion for Partial Summary Judgement as to NICA Notice." After an extension of time was granted, on April 27, 2020, BHCS filed its response to said motion. On May 11, 2020, Petitioners' motion was denied as material facts remained in dispute concerning the notice issue.

On June 11, 2020, Pedro Moscoso, M.D. and Pediatrix Medical Group of Florida, Inc., filed a Motion for Leave to Intervene. Petitioners' response in

opposition was filed June 15, 2020. The motion to intervene was granted on June 29, 2020.

On June 17, 2020, Respondent's Motion was filed wherein Respondent contends that Rhea sustained a birth-related neurological injury and requests the undersigned enter a summary final order concluding that Petitioners' claim is compensable. On July 2, 2020, the undersigned issued an Order to Show Cause, whereby Petitioners were ordered to show cause in writing why Respondent's Motion should not be granted.

On June 17, 2020, Petitioners filed their response to Respondent's Motion. Said response provides, in pertinent part, as follows:

Petitioners do not oppose NICA's Motion for Summary Final Order. Petitioners do not dispute that RHEA LATOUCHE sustained a severe hypoxic ischemic injury resulting in substantial mental and physical impairments that are permanent. Petitioners do not dispute that the injuries are felt to be birth related.

WHEREFORE, Petitioners do not oppose the entry of a Summary Final Order determining that the claim is compensable under the NICA plan as a matter of law and reserving a determination of the applicability of NICA based on the evidentiary hearing on notice, which is to be set for the last week of August. Petitioners' position is that BHCS failed to give timely notice.

FINDINGS OF FACT

1. Rhea was born a live infant on August 18, 2017, at BHCS, located in Coral Springs, Florida.
2. At the time of birth, Rhea weighed at least 2500 grams.
3. BHCS is a "hospital," as defined by section 766.302(6), Florida Statutes.

4. Obstetrical services were delivered by Alison T. Clarke DeSouza, M.D., in the course of the subject labor, delivery, or resuscitation in the immediate post-delivery period in a hospital; BHCS.

5. At the time of Rhea's birth, Dr. DeSouza was a "participating physician," as defined in section 766.302(7).

6. Dr. DeSouza satisfied the notice requirements of section 766.316.

7. Donald Willis, M.D., an obstetrician specializing in maternal-fetal medicine, was retained by Respondent to review the medical records for Rhea and her mother. In his affidavit dated June 16, 2020, Dr. Willis opines to a reasonable degree of medical probability, as follows:

There was an apparent obstetrical event that resulted in oxygen deprivation to the brain during labor, delivery and continuing into the immediate post-delivery period. The oxygen deprivation resulted in brain injury.

8. Respondent further retained Luis E. Bello-Espinosa, M.D., a pediatric neurologist. Dr. Bello-Espinosa was retained to review the available medical records and conduct an examination of Rhea to determine whether she suffers from an injury which rendered her permanently and substantially mentally and physically impaired; and whether such injury is consistent with an injury caused by oxygen deprivation or mechanical injury occurring during the course of labor, delivery, or the immediate post-delivery period in the hospital.

9. Dr. Bello-Espinosa conducted the examination on June 12, 2020. In his affidavit dated June 16, 2020, he opines to a reasonable degree of medical probability, in pertinent part, as follows:

In summary, Rhea is a 34-month old girl with a history of severe hypoxic-ischemic encephalopathy of birth. She was documented in the NICU to have acute refractory electroclinical and electrographic seizures, as well as MRI of the brain which were all

indicative of a neonatal hypoxic-ischemic injury. On her examination, today is evident Rhea has severe neurological sequela. At 34-months of age, she has marked delayed acquisition of language and motor skills with salient signs on her neurological examination. She has mild axial hypotonia, moderate hypertonia in her left arm and both legs, including sustained dystonic posturing of her left hand, extensor posturing of her feet, and inability to walk, all of which are signs indicative of combined athetoid spastic triplegic cerebral palsy.

Rhea is found to have substantial mental and physical impairments at this time.

Rhea's mental and physical impairments are permanent.

In reviewing all of the available documents, the evolution of her symptoms, the acute brain MRI changes, her acute neonatal electroclinical seizures, it is evident that she had an acute hypoxic event perinatally. The injury is felt to be acquired due to oxygen deprivation of the brain. The injuries are felt to be birth-related.

In summary, it is felt that the permanent and substantial mental and physical impairments accrued during the perinatal period of labor and delivery.

10. The undisputed opinions of Dr. Willis and Dr. Bello-Espinosa are credited. Based on their opinions, the undersigned finds that Rhea sustained an injury to the brain caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, which rendered Rhea permanently and substantially mentally and physically impaired.

CONCLUSIONS OF LAW

11. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 766.301-766.316, Fla. Stat.

12. 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.

13. 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. Respondent, 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.

14. 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 ALJ to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, compensability is disputed, as alleged in the Amended Petition, 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.

15. In discharging this responsibility, the ALJ is required to make the following threshold determinations 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.

16. 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.

17. The evidence establishes that Rhea was born a live infant weighing at least 2,500 grams. The unrefuted evidence further establishes that there was an injury to Rhea’s brain caused by oxygen deprivation occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital. The undisputed evidence further establishes that said injury has rendered her permanently and substantially mentally and physically impaired.

18. The undisputed evidence further establishes that obstetrical services were delivered by a participating physician, Dr. DeSouza, in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, Coral Springs Medical Center. It is further undisputed that

Dr. DeSouza complied with the notice requirements of section 766.316. Accordingly, the undersigned concludes that Rhea has sustained a compensable birth-related neurological injury.

CONCLUSION

Based on the Findings of Fact and the Conclusions of Law, it is ORDERED:

1. Respondent's Motion is granted, and Petitioners' claim is found and determined to be compensable.
2. Jurisdiction is reserved to determine whether the notice requirements of section 766.316 were satisfied by BHCS.
3. Jurisdiction is reserved to determine the issue of an award pursuant to section 766.31.

DONE AND ORDERED this 17th day of July, 2020, 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 17th day of July, 2020.

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 No. 7019 1640 0000 2208 6972)

Nancy La Vista, Esquire
Clark Fountain La Vista Prather Keen & Littky-Rubin
2nd Floor
1919 North Flagler Drive
West Palm Beach, Florida 33407
(eServed)
(Certified No. 7019 1640 0000 2208 6989)

Robert Scott Covitz, Esquire
Falk, Waas, Hernandez, Cortina,
Solomon and Bonner
Suite 210E
1900 Northwest Corporate Boulevard
Boca Raton, Florida 33431
(eServed)
(Certified No. 7019 1640 0000 2208 6996)

David W. Black, Esquire
Frank, Weinberg & Black, P.L.
7805 Southwest 6th Court
Plantation, Florida 33324
(eServed)
(Certified No. 7019 1640 0000 2208 7009)

Patrick Sullivan, Esquire
Lubell & Rosen, LLC
Suite 900
200 South Andrews Avenue
Fort Lauderdale, Florida 33301
(eServed)
(Certified No. 7019 1640 0000 2306 4948)

Jeffery R. Lawley, Esquire
Billing, Cochran, Lyles, Mauro and Ramsey, P.A.
6th Floor
515 East La Olas Boulevard
Fort Lauderdale, Florida 33301
(eServed)
(Certified No. 7019 1640 0000 2208 6422)

John W. Mauro, Esquire
Billing, Cochran, Lyles, Mauro & Ramsey, P.A.
6th Floor
515 East Las Olas Boulevard
Fort Lauderdale, Florida 33301
(eServed)
(Certified No. 7019 1640 0000 2208 6439)

Scott C. Cochran, Esquire
Billing, Cochran, Lyles, Mauro & Ramsey, P.A.
SunTrust Center, 6th Floor
515 East Las Olas Boulevard
Fort Lauderdale, Florida 33301
(eServed)
(Certified No. 7019 1640 0000 2208 6446)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified No. 7019 1640 0000 2208 6453)

Mary C. Mayhew, Secretary
Health Quality Assurance
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)
(Certified No. 7019 1640 0000 2208 6460)

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).