

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

CATHERINE CHRISTIN SILVA AND VICTOR
SILVA, INDIVIDUALLY AND AS PARENTS
AND NATURAL GUARDIANS OF SAVANNAH
SILVA, A MINOR CHILD,

Petitioners,

vs.

Case No. 21-0482N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

SOUTH MIAMI HOSPITAL, INC,

Intervenor.

FINAL ORDER

This matter came before the undersigned on Petitioners' and Respondent's Stipulation and Joint Motion for Final Order Deeming Claim Compensable Pursuant to Chapter 766, Florida Statutes and Joint Motion for Additional Time to File Joint Stipulation Concerning the Award, or Alternatively, to Advise the Court that a Hearing is Required Concerning Award (Joint Motion for Summary Final Order), filed October 29, 2019.¹

PRELIMINARY STATEMENT

On February 1, 2021, Petitioners filed a Petition for Compensation Pursuant to Florida Statute Section 766.301 et seq. (Petition) with the

¹ The undersigned has construed the filing as a motion for summary final order as the parties stipulate to the material facts and jointly seek an order approving Respondent's determination that the claim is compensable.

Division of Administrative Hearings (DOAH), for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

On February 23, 2021, South Miami Hospital, Inc.'s, Petition for Leave to Intervene was granted. On May 11, 2021, Respondent's Response to the Petition was filed, wherein Respondent opined that Petitioner's claim was not compensable as the injury did not meet the definition of a "birth-related neurological injury," as defined in section 766.302(2), Florida Statutes.

On May 11, 2021, the final hearing on the issue of compensability was scheduled for October 7 and 8, 2021. Thereafter, the parties engaged in robust discovery.

On September 28, 2021, Respondent's Unopposed Motion for Leave to File Amended Response to Petition and Respondent's Amended Response to Petition was filed. Pursuant to Respondent's Amended Response, Respondent now opined that Petitioners' claim was compensable. On the same date, Respondent's Unopposed Motion to Cancel Final Hearing was filed. Said motion was granted on September 29, 2021, and the final hearing was canceled. As noted above, the subject Joint Motion for Summary Final Order was filed on October 29, 2021.

FINDINGS OF FACT

Pursuant to the Joint Motion for Summary Final Order, Petitioners and Respondent stipulate to the following facts:

1. Catherine Christin Silva and Victor Silva, individually and as parents and natural guardians of Savannah Silva (Savannah), a minor, are the "Claimants," as defined by section 766.302.

2. Savannah incurred a “birth-related neurological injury,” as that term is defined in section 766.302(2), on or about August 13, 2020, the date Savannah was born.

3. Savannah was a single gestation who, at birth, weighed 3,460 grams.

4. Ellen Joy Schwartzbard, M.D., rendered obstetrical services in the delivery of Savannah and, at all times, was a “participating physician,” as defined in section 766.302(7).

5. South Miami Hospital is a hospital located in Miami, Florida, and is the “hospital,” as that term is defined in section 766.302(6), where Savannah was born.

6. South Miami Hospital and Dr. Schwartzbard complied with the statutory notice requirements under section 766.316.

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. Section 766.301(2) provides that it is “the intent of the Legislature to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation.” 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. The administrative law judge (ALJ) has exclusive jurisdiction to determine whether a claim filed under the Plan is compensable. § 766.304, Fla. Stat.

10. In discharging this responsibility, pursuant to section 766.309(1), the ALJ must 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 s. 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 s. 766.31.

(d) Whether, if raised by the claimant or other party, the factual determinations regarding the notice requirements in s. 766.316 are satisfied.

11. Here, based on the stipulated Findings of Fact set forth above, the undersigned concludes that Savannah sustained a birth-related neurological injury; and that obstetrical services were delivered by a participating physician, Dr. Schwartzbard, in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, South Miami Hospital. The undersigned further concludes that both Dr. Schwartzbard and South Miami Hospital satisfied the notice requirements in section 766.316.

CONCLUSION

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

1. The Joint Motion for Summary Final Order is granted, and Petitioners' 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. Petitioners shall, within thirty (30) days of this Order, provide written notice of whether Petitioners desire a hearing to determine the issue of an award pursuant to section 766.31 or whether the parties intend to file a stipulation and joint petition concerning an award.

DONE AND ORDERED this 3rd day of November, 2021, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of November, 2021.

COPIES FURNISHED:
(via certified mail)

Amie Rice, Investigation Manager
Consumer Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-75
Tallahassee, Florida 32399-3275
(Certified No. 7020 2450 0002 1970 6562)

Simone Marstiller, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(Certified No. 7020 2450 0002 1970 6579)

Kim Kellum, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(Certified No. 7020 2450 0002 1970 6586)

Thomas M. Hoeler, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(Certified No. 7020 2450 1970 6647)

Jackson F. McCoy, Esquire
Wicker, Smith, O'Hara,
McCoy & Ford, P.A.
Suite 800
2800 Ponce de Leon Boulevard
Coral Gables, Florida 33134
(Certified No. 7020 2450 0002 1970 6593)

Kenney Shipley, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
Post Office Box 14567
Tallahassee, Florida 32317
(Certified No. 7020 2450 0002 1970 6630)

Scott Edward Solomon, Esquire
Falk, Waas, Hernandez, Solomon,
Mendlestein & Davis, PA
Suite 500
135 San Lorenzo Avenue
Coral Gables, Florida 33146
(Certified No. 7020 2450 0002 1970 6609)

Brooke M. Gaffney, Esquire
Smith, Stout, Bigman & Brock, P.A.
Suite 900
444 Seabreeze Boulevard
Daytona Beach, Florida 32118
(Certified No. 7020 2450 0002 1970 6623)

Ellen Joy Schwartzbard, M.D.
Suite 500
6280 Sunset Drive
South Miami, Florida 33143
(Certified No. 7020 2450 0002 1970 6616)

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).