

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ERICKA GARDENER AND LORINZA
HOLLINGER, INDIVIDUALLY AND AS
PARENTS AND NATURAL GUARDIANS OF
ZYON HOLLINGER, MINOR CHILD,

Petitioners,

vs.

Case No. 21-2544N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,

Respondent,

and

BAYFRONT HMA MEDICAL CENTER, LLC
D/B/A BAYFRONT BABY PLACE,

Intervenor.

SUMMARY FINAL ORDER

This cause comes for consideration on Respondent's Motion for Summary Final Order, filed on September 24, 2021. Respondent moves for entry of a final order determining that Petitioners' claim is not compensable under the provisions of chapter 766.301, et seq., Florida Statutes.

STATEMENT OF THE CASE

On August 23, 2021, Petitioners, Ericka Gardener and Lorinza Hollinger, individually and as parents and natural guardians of Zyon Hollinger ("Zyon"), a minor child, filed an Amended Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (the "Petition"), with the Division of Administrative

Hearings ("DOAH") for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan").¹

The Petition identified Jenny Marie Bagg, APRN, and Courtney Nicole Mascoe, M.D., as the healthcare practitioners who provided obstetrical services at Zyon's birth on November 21, 2019, at Bayfront HMA Medical Center, LLC d/b/a Bayfront Baby Place ("Bayfront") in St. Petersburg, Florida.

DOAH served Ms. Bagg and Dr. Mascoe with copies of the Petition on August 24, 2021, and served Bayfront that same date. DOAH also served Respondent, the Florida Birth-Related Neurological Injury Compensation Association ("NICA"), with a copy of the Petition on August 24, 2021.

Bayfront moved to intervene in this matter on August 24, 2021, which was granted.

On September 24, 2021, NICA filed a Motion for Summary Final Order, with supporting affidavit, requesting the Administrative Law Judge enter a summary final order finding that Petitioners' claim is not compensable under the NICA statute because the healthcare providers who delivered Zyon were not "participating physicians" under section 766.302(7).

On September 27, 2021, Petitioners filed a Response to Respondent's Motion for Summary Final Order stating that they did not oppose Respondent's motion. Intervenor Bayfront did not file a response to NICA's motion.

FINDINGS OF FACT

1. Zyon was born on August 8, 2019, at Brandon Regional located in Brandon, Florida.

¹ Petitioners filed an initial Petition on August 17, 2021.

2. According to Petitioners' Petition, Jenny Marie Bagg, APRN, and Courtney Nicole Mascoe, M.D., were the delivering physicians at Zyon's birth at Brandon Regional. In addition, NICA, upon review of the pertinent medical records, determined that Michael Kinder, M.D., and Amy Gabriel, M.D., also provided healthcare services at Zyon's birth.

3. To support its motion, NICA produced from its official records a payment history, which shows that, in 2019 (the year Zion was born), neither Dr. Kinder nor Dr. Gabriel paid to NICA the annual \$5,000 assessment required of physicians who elect to participate in the Plan. On the contrary, the payment history for Dr. Kinder and Dr. Gabriel reveals that they paid \$250 to NICA, which is the specific assessment for physicians who elect not to participate in the Plan. *See* § 766.314(4)(b) and (5)(a), Fla. Stat. In addition, NICA's files do not contain any record of an annual \$2,500 assessment payment from Ms. Bagg for 2019, which was required for her participation in the Plan. *See* § 766.314(4)(c), Fla. Stat. Further, no evidence was presented demonstrating that either Dr. Kinder, Dr. Gabriel, or Ms. Bagg were exempt from paying the assessment to participate in the Plan in 2019.

4. Based on the evidence in its records, NICA determined, on the date that Zyon was born, neither Ms. Bagg, Dr. Kinder, nor Dr. Gabriel qualified as "participating physicians" in the Plan as that term is defined in section 766.302(7). Therefore, NICA asserts that Petitioners' claim does not meet the statutory requirements for compensability under the Plan.

5. Petitioners do not oppose NICA's motion or representations. Bayfront did not file a response opposing NICA's motion or offering evidence to the contrary.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 766.301 through 766.316. The undersigned, as an Administrative Law Judge ("ALJ"), has "exclusive

jurisdiction to determine whether a claim filed under NICA is compensable."

§§ 766.301(1)(d), 766.304, and 766.311(1), Fla. Stat.

7. The Florida Legislature created the Plan as a means to alleviate the high costs of medical malpractice insurance for physicians practicing obstetrics. *Bennett v. St. Vincent's Med. Ctr., Inc.*, 71 So. 3d 828, 836 (Fla. 2011); and *Univ. of Miami v. Ruiz*, 164 So. 3d 758, 764 (Fla. 3d DCA 2015). The Plan's purpose is to "provid[e] compensation, irrespective of fault, for birth-related neurological injury claims." § 766.303(1), Fla. Stat.

8. When considering whether a claim is compensable under the NICA Plan, section 766.309(1) charges the ALJ to make the following determinations based upon "all available evidence":

(a) Whether the injury claimed is a birth-related neurological injury ... ;

(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; and

(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. The administrative law judge has the exclusive jurisdiction to make these factual determinations.

9. The term "participating physician" is defined in section 766.302(7), and means:

a physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full time or part time and who had paid or was exempted from payment at the time of the injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury

occurred. Such term shall not apply to any physician who practices medicine as an officer, employee, or agent of the Federal Government.

10. Section 766.314(4)(c) further states:

Participating physicians include any certified nurse midwife who has paid 50 percent of the physician assessment required by this paragraph and paragraph (5)(a) and who is supervised by a participating physician who has paid the assessment required by this paragraph and paragraph (5)(a).

11. The Plan provides limited remedies as a statutory substitute for common law rights and liabilities. Therefore, the NICA statute "should be strictly construed to include only those subjects clearly embraced within its terms." *Bennett*, 71 So. 3d at 836; and *Fla. Birth-Related Neuro. Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings*, 686 So. 2d 1349 (Fla. 1997).

12. Upon determining that a claim qualifies for compensation, section 766.31(1) directs that:

Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for the following items relative to such injury:

13. On the other hand, if a claim does not qualify for an award of compensation, section 766.309(2) instructs:

If the administrative law judge determines that ... obstetrical services were not delivered by a participating physician at the birth, she or he shall enter an order and shall cause a copy of such order to be sent immediately to the parties by registered or certified mail.

14. The burden of proof in this matter falls on Petitioners, as the "claimants," to prove that Zyon is covered by the NICA Plan. § 766.302, Fla. Stat., and *Balino v. Dep't of Health & Rehab. Servs.*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977)("The general rule is, that as in court proceedings, the burden of proof, apart from statute,

is on the party asserting the affirmative of an issue before an administrative tribunal."). If Petitioners demonstrate the statutory prerequisites for NICA benefits, a rebuttable presumption of compensation arises in their favor. *Bennett*, 71 So. 3d at 845; and *Fla. Health Scis. Ctr., Inc. v. Div. of Admin. Hearings*, 974 So. 2d 1096, 1099 (Fla. 2d DCA 2007).

15. The preponderance of the evidence standard is applicable to this matter. See § 120.57(1)(j), Fla. Stat.

16. Turning to the injury in this case, based upon "all available evidence," the obstetrical services Zyon received at his birth were not delivered by a "participating physician," as defined in section 766.302(7). Therefore, Petitioners' claim does not meet the requirements for compensation under the Plan, and Zyon is not eligible for NICA benefits.

DISPOSITION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition is DISMISSED, with prejudice.

DONE AND ORDERED this 21st day October, 2021, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
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 21st day of October, 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 0000 1053 7624)

Kim Kellum, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(Certified No. 7020 2450 0000 1053 7617)

Kenney Shipley, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
Post Office Box 14567
Tallahassee, Florida 32317
(Certified No. 7020 2450 0000 1053 7600)

David P. Ferrainolo, Esquire
Hall, Prangle and Schoonveld,
3507 East Frontage Road, Suite 140
Tampa, Florida 33607
(Certified No. 7020 2450 0000 1053 7594)

Courtney Nicole Mascoe, M.D.
700 6th Street South
St. Petersburg, Florida 33701
(Certified No. 7020 2450 0000 1053 7587)

Simone Marstiller, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(Certified No. 7020 2450 0000 1053 7570)

Thomas M. Hoeler, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(Certified No. 7020 2450 0000 1053 7563)

Armando T. Lauritano, Esquire
Morgan & Morgan
201 North Franklin Street
7th Floor
Tampa, Florida 33602
(Certified No. 7020 2450 0000 1053 5229)

Jenny Marie Bagg, APRN
1344 22nd Street South
St. Petersburg, Florida 33712
(Certified No. 7020 2450 0000 1053 7525)

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).