

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RANDY and DENISE LARKIN, as parents)		
and natural guardians of MIRANDA)		
P. LARKIN, a minor,)		
)		
Petitioners,)		
)		
vs.)	Case No. 00-5144N	
)		
FLORIDA BIRTH-RELATED NEUROLOGICAL)		
INJURY COMPENSATION ASSOCIATION,)		
)		
Respondent,)		
)		
and)		
)		
BIG SUN HEALTHCARE SYSTEMS, INC.,)		
d/b/a MUNROE REGIONAL MEDICAL)		
CENTER, INC. and SEABORN M.)		
HUNT, M.D.,)		
)		
Intervenors.)		
_____)		

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a final hearing in the above-styled case on May 16, 2001, by telephone.

APPEARANCES

For Petitioner:	Keith J. Carden, Esquire Morgan, Colling & Gilbert, P.A. Post Office Box 4979 Orlando, Florida 32802-4979
For Respondent:	David W. Black, Esquire Frank, Weinberg & Black, P.L. 7805 Southwest 6th Court Plantation, Florida 33324

For Intervenor Big Sun Healthcare Systems, Inc.,
d/b/a Munroe Regional Medical:

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For Intervenor Seaborn M. Hunt, M.D.:

M. Suzanne Chistolini, Esquire
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STATEMENT OF THE ISSUE

At issue in this proceeding is whether Miranda P. Larkin, a minor, suffered an injury for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On November 20, 2000, Petitioners, Randy Larkin and Denise Larkin, as parents and natural guardians of Miranda P. Larkin (Miranda), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on January 1, 2001.¹ NICA reviewed the claim and on January 22, 2001, gave notice that it had "determined that such claim is not

a 'birth-related neurological injury' within the meaning of Section 766.302(2), Florida Statutes," and requested that "an order [be entered] setting a hearing in this cause [on such issue]." Such a hearing was held on May 16, 2001.

At hearing, the parties stipulated to the factual matters set forth in paragraphs 1 and 2 of the Findings of Fact. Petitioners' Exhibit 1 (the medical records filed with DOAH on December 29, 2000) and Respondent's Exhibit 1 (the deposition of Michael S. Duchowny, M.D., filed with DOAH on May 14, 2001) were received into evidence. No witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed May 30, 2001, and the parties were accorded 10 days from that date to file proposed final orders. Respondent elected to file such a proposal and it has been duly considered.

FINDINGS OF FACT

Fundamental findings

1. Petitioners, Randy Larkin and Denise Larkin, are the parents and natural guardians of Miranda P. Larkin, a minor. Miranda was born a live infant on November 24, 1998, at Munroe Regional Medical Center, a hospital located in Ocala, Florida, and her birth weight was in excess of 2,500 grams.

2. The physician providing obstetrical services during the birth of Miranda was Seaborn Hunt, M.D., who was at all times

material hereto a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(2), Florida Statutes.

Coverage under the Plan

3. Pertinent to this case, coverage is afforded under the Plan when the claimants demonstrate, more likely than not, that the infant suffered an "injury to the 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, which renders the infant permanently and substantially mentally and physically impaired." Section 766.302(2), Florida Statutes. Here, the uncontroverted proof demonstrates that the infant has neither a substantial mental nor a substantial physical impairment. Consequently, it is unnecessary to address whether she suffered an injury to the brain or spinal cord, and if so, whether any such injury occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital.

Miranda's mental and physical presentation

4. On February 9, 2000, at Petitioners' request, Miranda was examined by Michael S. Duchowny, M.D., a pediatric neurologist associated with Miami Children's Hospital, Miami, Florida. The results of that evaluation were reported, as follows:

. . . Miranda is a 14 month old girl who was brought by her mother for an evaluation of developmental status.

Mrs. Larkin began by explaining that Miranda's problems are the result of birth related trauma. She was born at 37 weeks gestation at Monroe Regional Hospital. Mrs. Larkin's pregnancy was complicated by gestational diabetes and toxemia with hypertension. The delivery, itself, was complicated by some respiratory distress and metabolic instability, followed by 1 or 2 seizures. Miranda was transferred to Shan's Hospital and remained in their Newborn Unit for 13 days. Mrs. Larkin's feels that Miranda was "under stress for a long time".

Upon returning home, Miranda's course stabilized. She did have a history of her head turning to the right and her skull growth was noted to be asymmetric. She was ultimately diagnosed with right coronal synostosis and had surgical repair in October of 1999 at age 11 months. She had a prior work up including an MRI, EEG and EKG. The MRI apparently revealed "fluid on the brain on one side", but Mrs. Larkin does not have further information. She does not believe that Miranda has lateralized weakness.

Miranda sat at 6 months and stood at 7 months. She was walking now in an unsteady fashion, but is able to ambulate without support. She speaks in multiple words.

Miranda's health has otherwise been stable. She is on no chronic medications. Her vision and hearing are said to be normal. Miranda is not yet sleeping through the night. She has an excellent appetite.

The FAMILY HISTORY reveals the father to be 44; the mother to be a 35 year old, gravida 1, para 1, ABO. There are no family members with neurodegenerative illnesses, mental retardation or cerebral palsy.

Miranda is fully immunized and has no known allergies. She has had additional surgeries, including a probe of her tear duct and tubes in her ears.

PHYSICAL EXAMINATION reveals Miranda to be alert, pleasant and cooperative. She sits quietly in her mother's lap and displays an appropriate degree of stranger anxiety. The head circumference measures 47.9 cm, which is at the 80th percentile for age matched controls. The coronal synostosis surgical scar is healing well. There is an asymmetric cranial vault with relative depression on the left and the left eye appears lower than the right with narrowing of the palpebral fissure. The tongue movements are coordinated. The neck is supple without masses, thyromegaly or adenopathy. There are no neurocutaneous stigmata and no digital or palmar abnormalities. The cardiovascular, respiratory and abdominal examinations are normal.

Miranda's NEUROLOGIC EXAMINATION reveals her to be socially alert and interactive. She maintains good central gaze fixation and has conjugate following eye movements. The pupils are 3 mm and react briskly to direct and consensually presented light. There are no fundoscopic changes. Motor examination reveals symmetric strength and bulk. The tone is slightly diminished for age. There is no focal weakness and no atrophy. There are no adventitious movements. Miranda is able to walk with some developmental instability, but she does not fall or lean to either side. There is no evidence of torticollis. The stance is somewhat wide based. There is withdrawal of all extremities to stimulation. The deep tendon reflexes are 2+ throughout and the plantar responses are equivocal. Neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Miranda's neurologic examination reveals evidence of mild generalized hypotonia with some axial instability. She additionally has craniofacial dysmorphism, secondary to her coronal synostosis.

5. It was Dr. Duchowny's opinion that Miranda's neurologic examination revealed no significant neurologic abnormalities, and that she does not suffer either a substantial motor or mental impairment. Such opinion is uncontroverted, grossly consistent with the record, and credible. Consequently, for reasons appearing more fully from the Conclusions of Law which follow, it must be resolved that Miranda does not qualify for coverage under the Plan.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Section 766.301, et seq., Florida Statutes.

7. The Florida Birth-Related Neurological Injury Compensation 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. Section 766.303(1), Florida Statutes.

8. The injured "infant, his personal representative, parents, dependents, and next of kin," may seek compensation under the Plan by filing a claim for compensation with the

Division of Administrative Hearings. Sections 766.302(3), 766.303(2), 766.305(1), and 766.313, Florida Statutes. The Florida Birth-Related Neurological Injury Compensation Association, 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." Section 766.305(3), Florida Statutes.

9. If NICA determines that the injury alleged in a claim 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 to whom the claim has been assigned. Section 766.305(6), Florida Statutes. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned administrative law judge in accordance with the provisions of Chapter 120, Florida Statutes. Sections 766.304, 766.307, 766.309, and 766.31, Florida Statutes.

10. In discharging this responsibility, the administrative law judge must make the following 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).

(b) Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery 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 post-delivery period in a hospital.

Section 766.309(1), Florida Statutes. An award may be sustained only if the administrative law judge concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth." Section 766.31(1), Florida Statutes.

11. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, to mean:

. . . injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth 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, 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.

12. As the claimants, the burden rested on Petitioners to demonstrate entitlement to compensation. Section 766.309(1)(a), Florida Statutes. See also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977), ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal").

13. Here, the proof failed to demonstrate that Miranda is permanently and substantially mentally and physically impaired. Consequently, the proof failed to demonstrate that the claim is compensable under the Plan. Sections 766.302(2), 766.309(1), and 766.31(1), Florida Statutes.

14. Where, as here, the administrative law judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . he [is required to] enter an order [to such effect] and . . . cause a copy of such order to be sent immediately to the parties by registered or certified mail." Section 766.309(2), Florida Statutes. Such an order constitutes final agency action subject to appellate court review. Section 766.311(1), Florida Statutes.

CONCLUSION

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

ORDERED that the petition for compensation filed by Randy Larkin and Denise Larkin, as parents and natural guardians of Miranda P. Larkin, a minor, be and the same is hereby denied with prejudice.

DONE AND ORDERED this 15th day of June, 2001, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of June, 2001.

ENDNOTE

1/ The delay in service was occasioned by Petitioners' initial failure to submit the filing fee, as well as adequate copies of the petition and medical records for service as required by Section 766.305(2), Florida Statutes.

COPIES FURNISHED:
(By certified mail)

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Sections 120.68 and 766.311, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 120.68(2), Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992). The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.