STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SYLVIA TRICE and JOHNNY BROWN, as parents and natural guardians of DEANNA RENEA BROWN, a minor,	)	
Petitioners,	)	
vs.	)	Case No. 01-1538N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent.	)	

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 December 3, 2001, by video teleconference, with sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Johnny Brown, pro se
Sylvia Trice, pro se
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For Respondent: B. Forest Hamilton, Esquire
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On April 25, 2001, Sylvia Trice and Johnny Brown, as parents and natural guardians of Deanna Renea Brown (Deanna), 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 April 27, 2001. NICA reviewed the claim and on June 29, 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 the issue of compensability." Such a hearing was held on December 3, 2001.

At hearing, the parties stipulated to the factual matters set forth in paragraphs 1 and 2 of the Findings of Fact. Petitioners Sylvia Trice and Johnny Brown testified on their own behalf, and Petitioners' Exhibit 1 (the medical records filed with DOAH on April 25, 2001), and Petitioners' Exhibit 2

(additional medical records from Children's Medical Services), as well as Respondent's Exhibit 1 (the deposition of Michael Duchowny, M.D., filed at hearing), and Respondent's Exhibit 2 (the deposition of Donald C. Willis, M.D., filed December 20, 2001), were received into evidence.[1] No other witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed December 10, 2001, and the parties were initially accorded 10 days from that date to file proposed final orders; however, at Petitioners' request the time for filing was extended to January 4, 2002. Consequently, the requirement that a final order be rendered within 30 days after the transcript has been filed was waived. See Rule 28-106.216(2), Florida Administrative Code. Respondent elected to file such a proposal, and it has been duly considered.

FINDINGS OF FACT

Fundamental findings

1. Petitioners, Sylvia Trice and Johnny Brown, are the parents and natural guardians of Deanna Renea Brown, a minor. Deanna was born a live infant on April 24, 1996, at Lawnwood Regional Medical Center, a hospital located in Fort Pierce, Florida, and her birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Deanna's birth was William Bryan King, M.D., who, at all times material hereto, was a "participating physician" in the Florida Birth-

Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

Deanna's birth

3. At or about 6:00 a.m., April 24, 1996, Ms. Trice (with an estimated date of delivery of May 8, 1996, and the fetus between 37 and 38 weeks gestation) awoke, while at home in bed, with contractions/cramping and vaginal bleeding. Suspecting a placental abruption, which she had experienced with a previous pregnancy, Ms. Trice immediately telephoned her physician's office and was advised to proceed to the emergency room at Lawnwood Regional Medical Center.

4. Ms. Trice presented at the Lawnwood Regional Medical Center emergency room at approximately 6:25 a.m., April 24, 1996, with the complaint of "bleeding, contractions." Admission assessment noted the membranes intact, the presence of vaginal bleeding, a closed cervix, and a fetal heart rate of 130 beats per minute. The admission notes further reveal that Dr. King was notified of Ms. Trice's evaluation at 7:00 a.m., and that Ms. Trice apparently remained in the emergency room until 8:05 a.m., when, following Dr. King's arrival, she was admitted to a labor room for further evaluation.

5. Regarding that evaluation, the record reveals that extending from approximately 8:05 a.m. to 9:00 a.m., external fetal monitoring was reassuring, with a fetal heart rate baseline

of 130 beats per minute, average long term variability, accelerations, and no apparent decelerations. Monitoring further revealed uterine activity at every 3 minutes, with a duration of 50 to 60 seconds, of moderate intensity.

6. The record further reveals that, following admission to the labor room, Dr. King performed a vaginal examination which revealed a moderate amount of bright red blood, with small clots. The examination further revealed that "the cervix was closed, soft, presenting part out of the pelvis." Diagnosis of suspected abruption was made, which was confirmed by ultrasound, and it was resolved to deliver by cesarean section.

7. Ms. Trice was moved to the operating room at or about 9:25 a.m., surgery started at 9:42 a.m., and Deanna was delivered at 9:47 a.m., without apparent difficulty. During the cesarean section, abruption with retroplacental clot was confirmed.

8. On delivery, Deanna evidenced a spontaneous cry, but weak respiratory effort despite a heart rate above 120 beats per minute. Deanna was suctioned and accorded oxygen by bag/mask and blowby, with improved color and muscle tone. Otherwise, no intervention was required. Apgar scores were recorded as 7 at one minute and 8 at five minutes.

9. The Apgar scores assigned to Deanna are a numerical expression of the condition of a newborn infant, and reflect the sum points gained on assessment of heart rate, respiratory

effort, muscle tone, reflex irritability, and color, with each category being assigned a score ranging from the lowest score of 0 through a maximum score of 2. As noted, at one minute Deanna's Apgar score totaled 7, with heart rate and reflex irritability being graded at 2 each, and respiratory effort, muscle tone, and color being graded at 1 each. At five minutes, Deanna's Apgar score totaled 8, with heart rate, respiratory effort, and muscle tone being graded at 2 each, and reflex irritability and color being graded at 1 each. Such scores are not consistent with an acute neurologic insult.

10. Following a brief stay in the intermediate nursery, Deanna was transported to the newborn nursery, where she remained until she was discharged with her mother on April 27, 1996. Notably, the newborn nursery admission assessment, at 10:30 a.m., was grossly normal, and there is no evidence of any significant complication during her stay in the hospital.

Deanna's subsequent development

11. Deanna's early development was apparently without any significant complication until three to four months of age when she was observed to be nonresponsive to loud sounds, and at or about eleven months of age when evidence of hypotonia was observed and she was seen by Dr. Luis Bello, a physician associated with the Palm Beach Neurology Group. In his report of

April 7, 1997, Dr. Bello noted the results of his evaluation, as follows:

> Deanna was seen in follow-up visit today after she had an MRI. She is an 11-month-old-youngster that I saw at the DEI Clinic in Stuart. The child has evidence of hypotonia. The child is still not able to sit up or walk. She has hypotonia that was assessed to be a sign of underlying brain dysfunction. There has not been history of regression. She had a history of abruptio placentae.
>
> On examination today, her head circumference is 46 cm which is close to the 50th percentile. The child did not have dysmorphic features. She still remains with the axial and distal hypotonia. Reflexes remain normal with plantar responses downgoing.
>
> I had the chance to review the MRI of the brain today at St. Mary's Hospital. The MRI of the brain demonstrated the presence of poor myelination pattern, especially in both parietal regions. There is also evidence of increased signal in the posterior occipital regions which suggests the presence of a mild degree of leukomalacia. No evidence of ventricular asymmetry was noticed . . . .
>
> <u>IMPRESSION:</u>
>
> This young [child] remains with history of hypotonia which appears to be secondary to the presence of some degree of leukoencephalopathy associated with poor myelination pattern. Certainly it is consistent with an insult that may be related to the abruptio placentae that has now resulted in delay in the gross and fine motor skills. This is consistent with the presence of static encephalopathy. At the present time it is quite unpredictable, when the child is going to be achieving milestones. Intense PT, occupational therapy, and speech

> therapy will be needed. The parents have inquired about the possibility of mental retardation and cerebral palsy. Certainly, at the present time it is quite unpredictable because many of the youngsters like this could catch up with normal development with intense therapy.

12. Since September 1997, Deanna has been followed through Children's Medical Services. There, Deanna presented for her initial pediatric screening visit with Dr. Robert Schloegel on September 17, 1997. Dr. Schloegel reported the results of that visit, as follows:

> . . . This child has been referred by the Community Health Center in Ft. Pierce for evaluation of elevated calcium and phosphate levels in her serum. She has also been recently diagnosed with severe hearing loss. She has been evaluated at the Hear Center in Port St. Lucie as well as having a BAER testing done at St. Mary's this last summer. She is being fitted for hearing aids in the near future. She has also had significant developmental delays. She is a client of the Early Intervention Program and is currently getting occupational and physician therapies.
>
> According to the mother, this 16-month-old child is just able to sit up on her own. She cannot crawl, she cannot walk. She does wave and socially interacts, although she does not have any speech development, apparently secondary to severe hearing problem.
>
> She has been seen by the neurologist, Dr. Bello, through a recommendation of the Early Intervention Program. An MRI was done that did show delayed maturation of the white matter. No other specific abnormalities. She has had some blood testing including chromosomes done that were apparently normal . . . .

> PHYSICAL EXAMINATION: . . . .
>
> EXTREMITIES: Grossly normal. She had good ROM. There was no spasticity noted. Her reflexes were brisk bilaterally, symmetrical.
>
> NEUROLOGIC EXAMINATION: She was able to sit on her own. When placed on her stomach, she could not get up to a crawling position. She did not support her own weight. Again, there was no speech.
>
> ASSESSMENT:
>
> 1. Developmental delay, mainly gross motor and speech.
> 2. Apparently severe hearing loss bilaterally . . . .

13. Deanna continued to be followed at Children's Medical Services through physicians associated with the Pediatric Clinic, Endocrine Clinic, Neurology Clinic, Genetic Clinic, Orthopedic Clinic, and ENT Clinic until at least March 2000, and was seen at the Department of Otolaryngology, Shands Health Care, on November 16, 2000, for a cochlear evaluation. Impression during the course of treatment at Children's Medical Services was cerebral palsy, with mild developmental delay, and significant delay in speech development, secondary to severe bilateral deafness.

14. On June 5, 2001, following the filing of the subject claim, Deanna was examined by Dr. Michael Duchowny, a physician board-certified in pediatrics, neurology with special competence

in child neurology, and clinical neuropsychology. Dr. Duchowny reported the results of his neurology evaluation, as follows:

> PHYSICAL EXAMINATION reveals Deanna to be alert and cooperative. She weighs 48-pounds and is 42 inches tall. The head circumference measures 51.2 cm and the fontanelles are closed. There are no cranial or facial anomalies or asymmetries. The skin is warm and moist without cutaneous stigmata. She has antimongoloid slant to her eyes, but no other dysmorphic features. The spine is straight without dysraphism. Hearing aids are noted in both ears. The neck is supple without masses, thyromegaly or adenopathy and the cardiovascular, respiratory and abdominal examinations are unremarkable.
>
> NEUROLOGICAL EXAMINATION reveals Deanna to be alert, pleasant and cooperative. There is an absence of spoken language, but she can communicate with her mother in simple sign language. This appears rudimentary however and she clearly is not communicating at an age appropriate level. She says some words but they lack intonation as one might expect in a hearing impaired child. She has an appropriate attention span for age and is socially interactive and playful. There is good central gaze fixation with conjugate following movements and the pupils are 3 mm and briskly reactive to direct and conceptually presented light.
>
> The funduscopic examination discloses well demarcated disc margins without optic pallor. The eye grounds are negative. There are no facial asymmetries. The tongue and palate move well. Motor examination reveals mild generalized hypotonia without atrophy, focal weakness or fasciculations. There are no adventitious movements. The outstretched hands are held in a symmetric fashion with minimal dystonic posturing. She cannot perform rapid alternating movement sequences. The deep tendon reflexes are 2-3+ bilaterally

> with both plantar responses in flexion. Her gait is stable and appropriately based. She turns well. The sensory examination reveals no obvious sensitivity to touch of any of the extremities. The neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries.
>
> In SUMMARY, Deanna presents as a 5-year-old ambidextrous girl with minimal dysmorphism, hearing impairment and hearing based speech impediment. She additionally displays further delay in terms of her expressive communication skills and has mild generalized hypotonia.

15. In his deposition testimony (Respondent's Exhibit 1), Dr. Duchowny addressed the findings of his examination and the significance of Deanna's impairments, as follows:

> Q. Can you . . . give me a brief overview of what your findings were during that medical examination?
>
> A. Yes. Deanna . . . is a hearing impaired five-year-old girl who has no spoken language and communicated with her mother in simple sign language.
>
> The communication skills via sign appeared to be rudimentary and she said some words but there was a lack of phonic intonation.
>
> I thought that her attention span was appropriate for her age; that she was socially interactive and playful, and she had some minimal problems with coordination and posturing, meaning holding her hands in a mannered form.
>
> Also that her muscle tone was slightly decreased for her age level, and that she had what is called an antimongoloid slant or a downward slant to her eyes, which is a dysmorphic feature, but essentially that was

the sum total of the abnormalities that were noted on the neurological examination on that day.

Q. And did you form an opinion as to the degree of the . . . physical difficulties that Deanna has?

A. From the physical standpoint I actually thought that Deanna was functioning essentially at age level.

She has . . . some mild hypotonia, but really she was able to perform most movements without difficulty, and certainly appears to have a good functionality.

* * *

Q. And as to the . . . mental damage that Deanna suffered?

A. Well, I think the only findings that can be classified as mental would be her communication skills and I think that the type of speech impairment that she displayed is more likely related to her peripheral nerve deficit than it is to any brain injury.

* * *

Q. Did you form an opinion as to Deanna's . . . future . . . develop[ment] . . . ?

A. Yes, I think that Deanna's prognosis is actually quite good. I think she will have normal or very close to normal motor function and might end up being slightly clumsy, but nothing more serious than that.

I think she will continue to have speech problems, but as with other hearing impaired individuals, I would anticipate that Deanna would be able to communicate, nonverbally, primarily by signing.

The cause and timing of Deanna's impairments

16. To address the issue of whether Deanna's impairments were associated with 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," as required for coverage under the Plan, Petitioners offered selected medical records relating to Ms. Trice's antepartum course, as well as those associated with Deanna's birth and subsequent development. Additionally, Petitioners testified on their own behalf, and Respondent offered the deposition testimony of Dr. Duchowny, whose qualifications are heretofore noted, and the deposition testimony of Dr. Donald Willis, a physician board-certified in obstetrics and gynecology, as well as maternal-fetal medicine.

17. As for the cause and timing of Deanna's impairments, it was Dr. Duchowny's opinion that the detriments Deanna suffers are, more likely than not, developmental in nature, and attributable to an event of unknown etiology which occurred prior to labor or delivery. As for Dr. Willis, he was of the opinion that the medical records revealed no evidence of oxygen deprivation or other trauma associated with Deanna's birth and, moreover, that Ms. Trice was not in labor at the time she

presented to the hospital or thereafter. Dr. Willis expressed his views, as follows:

> Q. Before we get to the actual condition of the child at birth and her hospital course, did you form a conclusion as to whether or not Sylvia Trice was in labor, given the medical records that you reviewed?
>
> A. I do not feel that she was in labor. The cervix was closed and the presenting part was out of the pelvis, which would suggest that she was not in labor at the time of her presentation or at the time of delivery.
>
> Q. Okay. Please continue with your description of the child's hospital course.
>
> A. Well, let me go back and get some things in order a little bit. We do not have the actual fetal monitor strip available from this case, but the nurse's notes are available, which describe about 45 minutes of fetal monitoring that was done after admission to the hospital and prior to her Cesarean section delivery, and the nurse's notes describe a normal fetal rate pattern with normal variability and no fetal distress.
>
> At birth the baby's weight was 3,145 grams, consistent with 38 weeks. Apgar scores were 7/8. And at the time of Cesarean section, I should mention that the placental abruption was confirmed.
>
> The baby did require some blow-by oxygen and five to six breaths with assisted ventilation with the bag and mask. And otherwise, really no resuscitative efforts were required. The baby went to the intermediate nursery for a brief period of observation and then was transferred to the normal newborn nursery and was discharged home with the mother on day three of life.

> Q. In your review of the medical records, did you find any indication that the child had suffered a hypoxic or ischemic event during labor or delivery?
>
> A. No, I did not find evidence of either of those.
>
> Q. In your opinion, did the child evidence any traumatic event during labor or delivery?
>
> A. No.
>
> Q. Would you describe Deanna Brown's delivery to be that of a normal healthy child?
>
> A. That's correct. I would describe it as normal. The Apgar scores were not low. In fact, the baby did so well after birth, actually no blood gases were done or are available in the chart, and the baby went to the normal newborn nursery shortly after delivery, so essentially a normal newborn.

Coverage under the Plan

18. Pertinent to this case, coverage is affordable by the Plan for infants who suffer a "birth-related neurological injury," defined as 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.

19. Here, the medical records and the testimony of the physicians and other witnesses offered by the parties have been

carefully considered. So considered, it must be concluded that the proof failed to demonstrate that Deanna suffered a "birth-related neurological injury" since the proof failed to demonstrate that, more likely than not, her impairments were associated with a brain or spinal cord injury caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period, or that any injury Deanna may have suffered rendered her permanently and substantially mentally and physically impaired.

CONCLUSIONS OF LAW

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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").

27. Here, the proof failed to support the conclusion that, more likely than not, Deanna 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 that rendered her permanently and substantially mentally and physically impaired. Consequently, the record developed in this case failed to demonstrate that Deanna suffered a "birth-related neurological injury," within the meaning of Section 766.302(2), Florida Statutes, and the subject claim is not compensable under the Plan. Sections 766.302(2), 766.309(1), and 766.31(1), Florida Statutes. See also Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1997).

28. 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 Sylvia Trice and Johnny Brown, as parents and natural guardians of Deanna Renea Brown, a minor, be and the same is hereby denied with prejudice.

DONE AND ORDERED this 24th day of January, 2002, 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 24th day of January, 2002.

ENDNOTE

1/ Respondent was accorded 7 days from the date the transcript was filed to note any objection it might have to Petitioners' Exhibit 2. Respondent noted no objection and Petitioners' Exhibit 2 has been received into evidence.

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.