

awarded under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On June 22, 2001, Lissette Emilia Reyes and Juan Carlos Prieto, as parents and natural guardians of Caren Prieto (Caren), 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 June 26, 2001. NICA reviewed the claim and on October 31, 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 May 13, 2002.

At hearing, the parties stipulated to the factual matters set forth in paragraphs 1 and 2 of the Findings of Fact. Lissette Emilia Reyes testified on Petitioners' behalf, and Petitioners' Exhibit 1 (the medical records filed with DOAH on June 22, 2001), was received into evidence. Respondent's Exhibit 1 (the deposition of Michael Duchowny, M.D.) and Respondent's Exhibit 2 (the deposition of Donald Willis, M.D.), were received

into evidence. No other witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed June 13, 2002, 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, Lissette Emilia Reyes and Juan Carlos Prieto, are the parents and natural guardians of Caren Prieto, a minor. Caren, also known as Karen, was born a live infant on November 18, 2000, at Hialeah Hospital, a hospital located in Hialeah, Florida, and her birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Caren's birth was Ramon Hechavarria, 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.

Caren's birth

3. At or about 9:20 p.m., November 18, 2000, Ms. Reyes (with an estimated date of delivery of December 7, 2000, and the fetus at 37 weeks gestation) presented to Hialeah Hospital in labor. At the time, Ms. Reyes reported her membranes had ruptured at 8:30 p.m., with clear fluid noted, and provided a

medical history that included two previous cesareans and requested a repeat cesarean section.

4. Initial vaginal examination revealed the cervix at 4-5 centimeters dilation, effacement at 60 percent, and the fetus at station -3, with clear amniotic fluid observed. Uterine contractions were noted at a frequency of 2-3 minutes, and fetal heart rate was reassuring at 125-145 beats per minute, with accelerations.

5. At 9:30 p.m., Dr. Hechavarria was notified of Ms. Reyes' status, and a repeat cesarean section was scheduled for later that evening. In the interim, fetal heart rate continued to be reassuring.¹

6. According to the records, Ms. Reyes was in the operating at 11:30 p.m., anesthesia began at 11:40 p.m., surgery began at 11:45 p.m., and Caren was delivered, without difficulty, at 11:57 p.m.

7. On delivery, Caren was bulb-suctioned, stimulated and accorded blowby oxygen. Otherwise no intervention was required. Initial newborn assessment noted no apparent abnormalities, and Apgar scores were recorded as 9 at one minute and 9 at five minutes.

8. The Apgar scores assigned to Caren are a numeric 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 and five minutes, Caren's Apgar score totaled 9, with heart rate, respiratory effort, muscle tone, and reflex irritability being graded at 2 each, and color being graded at 1. Such scores are considered normal, and inconsistent with recent hypoxic insult or trauma.

9. Following the initial newborn assessment, Caren was transported to the newborn nursery, where she remained until approximately 7:25 a.m., November 20, 2000, when she was transferred to the neonatal intensive care unit (NICU) for septic workup. At the time, some fever was detected and a positive c-reactive protein (CRP) test was returned, consistent with, but not diagnostic of, the presence of an infectious process.² Blood culture was ordered, and Caren was started on a regime of antibiotics (Ampicillin and Gentamycin).

10. Following admission to the neonatal intensive care unit, Caren evidenced no distress until 7:05 a.m., November 21, 2000, when "what appeared to be a mild tremor . . . for about five seconds" was noted. Thereafter, at 11:00 a.m., Caren was noted to have a "jerking movement [and] twitching of [right] arm," and at 12:00 (noon), during the course of an electroencephalogram (EEG) "twitching of [the right] leg" was

noted. In response, Caren was given a loading dose of Phenobarbital, and a head ultrasound was ordered.

11. The results of the EEG were abnormal. Impression was:

ABNORMAL STUDY DUE TO THE PRESENCE OF
FREQUENT INTERICTAL EPILEPTIFORM ACTIVITY AS
WELL AS INTERMITTENT BRIEF SEIZURE ACTIVITY
THAT APPEARED PREDOMINANTLY ON THE
LEFT

The head ultrasound was also abnormal, and revealed a "left intraventricular and right caudate hemorrhage."

12. At 5:30 p.m., November 21, 2000, Caren was transferred to Jackson Memorial Hospital (JMH) and remained at that facility until discharged to her mother's care on January 3, 2001.

Caren's subsequent development

13. On September 4, 2001, following the filing of the subject claim, Caren was examined by Dr. Michael Duchowny, a physician board-certified in pediatrics, neurology with special competence in child neurology, and clinical neurophysiology. Dr. Duchowny reported the results of his neurology evaluation, as well as the history he obtained from the parents, as follows:

HISTORY ACCORDING TO MR. AND MRS. PRIETO:
The mother began by explaining that Karen is 10 months old, but has a significant delay. She has just begun rolling over and is unable to sit up on her own. She attends the rehabilitation program at Jackson Memorial Hospital here in Miami and receives physical therapy twice weekly.

Mrs. Prieto indicated that Karen was "born normal". In the first week of life she was

noted to have evidence of bulging fontanelle and hydrocephalus was diagnosed. A right ventricular peroneal shunt was performed and it is still in place and functional. Her head circumferences have been followed at Jackson Memorial Hospital by Dr. Isidro Lopez, Karen's pediatrician.

Karen experienced a flurry of seizures in the first week of life. She was placed on phenobarbital and remains on 4 cc b.i.d. She has had no further seizures.

Mrs. Prieto has also noted that Karen's "right eye turns in" and she feel[s] that her "left arm is weak". Her thumb was fistled in the past, but has opened up at this point.

Karen's vision and hearing are said to be normal and her feeding has been quite stable. She sleeps through the night. There has been no recent exposure to toxic or infectious agents.

* * *

PHYSICAL EXAMINATION today reveals an alert, pleasant and socially responsive 10-month-old infant who sits on her mother's lap. The skin is warm and moist. There is a right asymmetry with the right eye appearing smaller than the left. There are no other dysmorphic features and no evidence of dysraphism. The right VP shunt is palpated and appears normal. Her head circumference measures 40.6 cm and the anterior and posterior fontanelles are both patent and flat. The neck is supple without masses, thyromegaly or adenopathy and the cardiovascular, respiratory and abdominal examinations are normal. There are no neurocutaneous stigmata.

NEUROLOGICAL EXAMINATION reveals evidence of a child with significant motor delay. Karen can roll over in both directions, but clearly lacks the ability to sit on her own. She has

generalized hypotonia with bilateral hyperreflexia and extensor plantar responses. Her head control is poor. The tonic neck response is present and not obligate in both directions. Moro response is absent. There is no force grasping or sucking responses and I saw no evidence of fisting of the thumbs. There are no adventitious movements, focal weakness or atrophy. At the same time, Karen does have an asymmetry of movement where by she moves the right arm more than the left. There is full range of movement on the left however. The cranial nerves examination reveals no visual fields to confrontation testing. There is an alternating isotropia, more prominent on the right. Pupils are 3 mm and briskly reactive to direct and conceptually presented light. There are no fundusopic abnormalities. Sensory examination is intact to withdrawal of all extremities to touch. The neurovascular examination is unremarkable. Karen has no[] evidence of sitting balance and has poor head control.

In SUMMARY, Karen's neurologic examination is significant for marked motor developmental delay with an asymmetry of movement. She additionally has hydrocephalus which is stable and has an alternating isotropia which is being followed by Ophthalmology. Her seizures are no longer a clinical problem and I suspect that her medications will be withdrawn in the near term. An EEG would be appropriate.

14. As for Caren's mental development, Dr. Duchowny expressed his views as follows:

. . . It is very hard to assess her mental development at age 10 months.

You know, I think that her mental development is difficult to assess, but I didn't find evidence of a severe mental

impairment in that she was aware and socially responsive.

15. Here, the only proof of record regarding Caren's mental development are the observations and opinions expressed by Dr. Duchowny. Consequently, while it may be fairly resolved that Caren has suffered a significant or substantial motor impairment, there is no proof of record to support a conclusion that she is substantially mentally impaired.

The cause and timing of Caren's neurologic insult

16. To address the issue of whether Caren'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 Caren's birth and subsequent development, and Respondent offered the deposition testimony of Dr. Duchowny, whose qualifications were previously 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 Caren's impairments, it was Dr. Duchowny's opinion, based on the results of his neurologic examination and review of the medical records, that Caren's impairments were caused by the intercranial hemorrhage

she suffered after birth, and are not related to the birth process. More particularly, Dr. Duchowny expressed his views, as follows:

Q. Did you form any opinions as to the etiology of her physical and mental impairment?

A. Yes, I did. I thought that her impairment[s] were due to the intercranial hemorrhage, the hydrocephalus that she developed after birth.

Q. Did you form an opinion -- you indicated after birth. Did you have a more specific indication of the timing of the hydrocephalus and the hemorrhage? Indication as to time.

A. Review of the records suggest that the hemorrhage probably occurred on the third day of life.

Q. What in the medical records indicated to you that it was the third day in life?

A. Her post-natal course was essentially uncomplicated until the third day of life when she developed seizures. At that time, an ultrasound revealed the evidence of hemorrhage and she had a left intraventricular hemorrhage and also a hemorrhage on the right side as well.

This was, from a timing standpoint suggest[s] to me that that was when -- the seizures would suggest to me that was the timing of the hemorrhage, since there had been no abnormalities prior to that time.

Q. In your review of the medical records, did you specifically look at the records pertaining to Karen's birth itself?

A. Yes, I did. Yes.

Q. And what were your opinions as to her delivery course?

A. I thought there was no problem[] that I could detect either during labor[,] delivery and even in the immediate post-natal period. Things actually were quite stable.

And I don't think that there is any indication from the medical records that she had any serious problem ongoing at that point.

Q. What is your opinion as to Karen's condition, her prognosis and their relationship to your understanding of the NICA statute as far as whether or not they were birth-related injuries?

A. . . . I think that the timing of the acquisition of her neurological impairment is most constant with events after birth. And that the intra partum period, during labor and delivery were, in fact, not relevant to Karen's neurologic problems.

Q. . . . [If there were an injury during labor and delivery], how would you expect that to manifest itself . . . [at birth]?

* * *

A. I think there would be evidence that the newborn had sustained some injury and that would include items such as depressed Apgar scores, absence of respiration requiring intubation, immediate seizures. Evidence of systemic damage such as cardiac, liver or kidney damage, shock, dissimilar intravascular coagulation, I think would be some of the things that I would look for to indicate that there had been a significant problem during labor and delivery.

Q. And in your review of the medical records, did you find any of the things that you have just mentioned?

A. No. No, I didn't.

As for Dr. Willis, he was also of the opinion that the medical records revealed no evidence of oxygen deprivation or other trauma associated with Caren's birth.

18. The medical records, as well as the testimony of the physicians and Ms. Reyes, have been carefully considered. So considered, it must be concluded that the proof failed to demonstrate, more likely than not, that any impairment Caren suffers was occasioned by 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.

CONCLUSIONS OF LAW

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.")

26. Here, the proof failed to support the conclusion that, more likely than not, Caren 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 the hospital, or that any injury she did receive rendered her permanently and substantially mentally and physically impaired. Consequently, the record developed in this case failed to demonstrate that Caren 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), and Nagy v. Florida Birth-Related Neurological Injury Compensation Association, 813 So. 2d 155 (Fla. 4th DCA 2002).

27. 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 Lissette Emilia Reyes and Carlos Prieto, as parents and natural guardians of Caren Prieto, a minor, be and the same is hereby denied with prejudice.

DONE AND ORDERED this 10th day of July, 2002, in
Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of July, 2002.

ENDNOTES

1/ There is only one incident of decreased fetal heart rate noted in the medical records, and that occurred at 10:50 p.m., when a variable deceleration was noted to 85 beats per minute, with a quick recovery to baseline. Such an isolated incident is not consistent with fetal distress, and does not detract from the conclusion that fetal heart rate continued to be reassuring during labor. (Respondents' Exhibit 2, at pages 25 and 26).

2. CRP testing is a basic screening test for infection but, since a positive result is consistent with an inflammation of infectious or noninfectious origin, it is not diagnostic. Here, Sepsis was always suspected, but not confirmed. If confirmed, Sepsis might offer a reasonable explanation for the hemorrhage Caren suffered. (Dorland's Illustrated Medical Dictionary, Twenty-sixth Edition (1985); Respondent's Exhibit 1, at pages 14, 15, and 17; and Respondent's Exhibit 2, at pages 8 and 9).

COPIES FURNISHED:
(By certified mail)

Lynn Larson, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
1435 Piedmont Drive, East, Suite 101
Post Office Box 14567
Tallahassee, Florida 32312

B. Forest Hamilton, Esquire
Post Office Box 38454
Tallahassee, Florida 32315-8454

Barbara C. McCauley, Esquire
Post Office Box 566272
Miami, Florida 33256-6272

Ramon Hechavarria, M.D.
Medical Arts Building
1190 Northwest 95th Street
Miami, Florida 33150-2063

Hialeah Hospital
651 East 27th Street
Hialeah, Florida 33013-3637

Ms. Charlene Willoughby
Agency for Health Care Administration
Consumer Services Unit
Post Office Box 14000
Tallahassee, Florida 32308

Mark Casteel, General Counsel
Department of Insurance
The Capitol, Lower Level 26
Tallahassee, Florida 32399-0300

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.