

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SUSAN HACKERMAN and STEVEN)
HACKERMAN, as parents and)
natural guardians of KEVIN A.)
HACKERMAN, a minor,)
)
Petitioners,)
)
vs.) Case No. 02-3276N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
PAMELA P. CARBIENER, M.D. and)
HALIFAX HOSPITAL MEDICAL)
CENTER,)
)
Intervenors.)
_____)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a hearing in the above-styled case on November 21, 2003, by video teleconference, with sites in Tallahassee and Orlando, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Kevin A. Hackerman, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On August 19, 2002, Susan Hackerman and Steven Hackerman, on behalf of and as parents and natural guardians of Kevin A. Hackerman (Kevin), 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 August 20, 2002, and on January 17, 2003, NICA 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 case on the issue of compensability."

In the interim, Pamela P. Carbiener, M.D., and Halifax Hospital Medical Center, were accorded leave to intervene.

At hearing, Petitioners presented the testimony of Susan Hackerman and Beverley Giardina, and Petitioners' Exhibit 1 (the medical records filed with DOAH on August 19, 2002), Exhibit 2 (the deposition of Michael Duchowny, M.D.), Exhibit 3 (Dr. Duchowny's report of neurological evaluation, dated November 27, 2002), Exhibit 4 (Dr. Duchowny's report, dated December 19, 2002), Exhibit 5 (Dr. Duchowny's report, dated January 6, 2003), Exhibit 6 (the deposition of Rubin Lopez, M.D.), Exhibit 7 (the deposition of Pamela Carbiener, M.D.), Exhibit 8 (the deposition of Robert Hartmann, M.D.), Exhibit 9 (the deposition of Susan Newell, R.N.), and Exhibit 10 (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 December 8, 2003, and the parties were accorded 10 days from that date to file proposed orders. Respondent elected to file such a proposal and it has been duly considered.

FINDINGS OF FACT

Fundamental findings

1. Petitioners, Susan Hackerman and Steven Hackerman, are the parents and natural guardians of Kevin A. Hackerman, a minor.

Kevin was born a live infant on September 25, 2000, at Halifax Hospital Medical Center, a hospital located in Daytona Beach, Florida, and his birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Kevin's birth was Pamela Carbiener, 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.¹

Coverage under the Plan

3. Pertinent to this case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as an "injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired." § 766.302(2), Fla. Stat. See also §§ 766.309 and 766.31, Fla. Stat.

4. Here, indisputably, Kevin is permanently and substantially mentally and physically impaired. What remains to resolve is whether the proof supports the conclusion that, more likely than not, Kevin's neurologic impairment resulted from an "injury to the brain . . . caused by oxygen deprivation or mechanical injury, occurring in the course of labor, delivery, or

resuscitation in the immediate postdelivery period," as required for coverage under the Plan.

The cause and timing of Kevin's neurological impairment

5. To address the cause and timing of Kevin's neurological impairment, Petitioners offered selected medical records related to Kevin's birth and subsequent development (Petitioners' Exhibit 1); the deposition of Michael Duchowny, M.D., a physician board-certified in pediatrics, neurology with special competence in child neurology, and clinical neurophysiology (Petitioners' Exhibit 2); the results of Dr. Duchowny's neurologic examination of Kevin, as well as Dr. Duchowny's conclusions following review of the medical records (Petitioners' Exhibits 3-5); the deposition of Rubin Lopez, M.D., a physician board-certified in pediatrics, who attended Kevin on September 26, 2000, at Halifax Hospital (Petitioners' Exhibit 6); the deposition of Pamela Carbiener, M.D., the delivering obstetrician (Petitioners' Exhibit 7); the deposition of Robert Hartmann, M.D., a physician board-certified in pediatrics, who practices pediatrics and neonatology, and who attended Kevin at Halifax Hospital (Petitioners' Exhibit 8); the deposition of Susan Newell, R.N., the nurse who attended Kevin following delivery (Petitioners' Exhibit 9); the deposition of Donald Willis, M.D., an obstetrician who reviewed the medical records (Petitioners'

Exhibit 10); and the lay testimony of Susan Hackerman, Kevin's mother, and Beverley Giardina, Kevin's maternal grandmother.

6. As for the event, and its timing, which caused Kevin's neurologic impairment, it was Dr. Duchowny's opinion, based on the results of his neurologic evaluation of Kevin on November 27, 2002, and review of the medical records, that, while of unknown etiology, Kevin's neurologic impairment was prenatal (developmental) in origin, having occurred prior to the onset of labor, and not associated with oxygen deprivation or mechanical injury, during labor, delivery, or resuscitation. Dr. Duchowny described the bases for his opinion, as follows:

Q. . . . Could you tell me why [in your opinion Kevin does not qualify under the NICA statute]?

A. I believe that Kevin's neurologic impairment was unlikely to be acquired in the course of labor, delivery or the immediate resuscitation period. He was born at 40 weeks gestation, but was small for his gestational age in that his birth weight was only five pounds-seven ounces. His head circumference was small at birth. It was 32 centimeters, indicating an inadequate development of the brain prior to birth and, additionally, he had Apgar scores which were three and eight, and the eight Apgar score at five minutes suggested he was doing reasonably well at the time of delivery. In fact, he was doing well enough that the doctors didn't need to intubate him and provide ventilatory support, elected not to draw blood gases and, in fact, felt that he was reasonably stable just after delivery.

Kevin did experience some respiratory problems subsequently in that he developed left lower lobe pneumonia and a left tension pneumothorax but, in my opinion, these problems were treated adequately and he was not significantly hypoxic nor was there any evidence of damage to the brain as a consequence of these postnatal events.

Furthermore, Kevin's MRI scan which was performed in May of 2001 demonstrated the possibility of a small degree of periventricular leukomalacia [PVL] but was otherwise within normal limits. In my opinion, this MRI finding is inconsistent with the severe nature of Kevin's neurologic impairment.

Q. When you say that that MRI was . . . inconsistent, what do you mean by that, doctor?

A. What I mean is that given Kevin's severe degree of impairment, had the cause been perinatal hypoxia, I would have expected to see many more abnormalities and more widespread involvement on the MRI scan, abnormalities such as diffuse brain atrophy, enlargement of the ventricles, possibly areas of abnormal signal. None of those were present.

* * *

Q. There is some notation in the records throughout this case of meconium staining.

Can you please indicate whether or not the meconium staining that is noted has any significance with regard to your medical opinion.

A. Yes Meconium staining represents distress in utero and requires approximately 72 hours for this finding to take place. This finding, therefore, again, predates

Kevin's neurological problems prior to the onset of labor and delivery.

7. The opinions of Daniel Shanks, M.D., Kevin's consulting pediatric neurologist following discharge from Halifax Hospital, were consistent with those expressed by Dr. Duchowny. Pertinent to this case, Dr. Shanks evaluated Kevin on March 30, 2001, at 6 months of age, and concluded:

IMPRESSION: Developmental delays likely global but worse in regard to his motor skills as compared to social skills. Language skills may be significantly delayed as well. He has microcephaly and has had this since birth. This suggests more likely a prenatal situation which could either be related to malformation, injury, chromosomal or metabolic abnormality, or alternate syndromic-type diagnosis. Often, no specific etiology can be established with certainty.

My bias would be to pursue initial evaluations to include brain MRI Scan, high-resolution karyotype and lactate, and baseline ophthalmologic evaluation. It would seem reasonable also to undergo a baseline genetics evaluation to help guide additional need for metabolic work up or for review of any abnormalities on karyotype. Additional work up can be guided by the above.

(Petitioners' Exhibit 1.) Following testing, Kevin was again evaluated by Dr. Shanks on June 15, 2001. Dr. Shanks reported the results of that testing and his evaluation as follows:

. . . Kevin is seen today in the Pediatric Neurology Clinic for follow-up of evaluation for static encephalopathy and quadriplegic cerebral palsy. He underwent neuroimaging with brain MRI last month that demonstrated findings suspicious for PVL, however,

somewhat difficult to well assess due to his age. He had chromosomes high resolution that were negative and a normal lactate. No specific etiology is apparent for his encephalopathy and he continues to evidence significant motor delays. Language delays are a little bit more difficult to assess. He is very visually alert and socially attentive. He has poor head control and low truncal tone and low base tone when relaxed. He has very limited mobility

(Petitioners' Exhibit 1.) Following evaluation, Dr. Shanks, reported his impression, as follows:

. . . Static encephalopathy likely from a prenatal process. No specific etiology has been established to this point. If he has a dysmyelinating or PVL type evolution, this would suggest a process that adversely affected CNS during third trimester. There is no evidence of tissue loss or an injury.

8. As for Dr. Willis, the obstetrician who reviewed the medical records, it was his opinion that the birth records failed to support a conclusion that Kevin suffered a brain injury from oxygen deprivation or other trauma associated with his birth or resuscitation. Dr. Carbiener, the attending obstetrician, was also of the opinion that it was unlikely Kevin suffered an injury during labor and delivery, but declined to address the period following delivery, since she was attending the mother, not the child, at the time.

9. Dr. Lopez, the pediatrician who examined Kevin at approximately 4 hours of age (12:38 a.m., July 26, 2000), offered no opinion regarding the etiology of Kevin's developmental

delays, or whether he suffered oxygen deprivation or mechanical injury during labor and delivery.² Dr. Hartmann, the attending neonatologist at Halifax Hospital, likewise ventured no opinion regarding the etiology of Kevin's developmental delays or whether he suffered oxygen deprivation during labor; however, based on the newborn resuscitation record, Dr. Hartmann was of the opinion that Kevin did not suffer any significant lack of oxygen from the time of delivery until positive pressure ventilator was initiated. Nurse Newell, who attended Kevin following delivery, voiced no opinion regarding the likelihood that Kevin suffered brain injury from oxygen deprivation or other trauma.

10. Given the record, it must be concluded that the proof demonstrated, more likely than not, that Kevin's deficits were not occasioned by an injury to the brain caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period, but were occasioned by a developmental abnormality, that preceded the onset of labor. See, e.g., Wausau Insurance Company v. Tillman, 765 So. 2d 123, 124 (Fla. 1st DCA 2000) ("Because the medical conditions which the claimant alleged had resulted from the workplace incident were not readily observable, he was obliged to present expert medical evidence establishing that causal connection."); Thomas v. Salvation Army, 562 So. 2d 746, 749 (Fla. 1st DCA 1990) ("In evaluating medical evidence, a judge

of compensation claims may not reject uncontroverted medical testimony without a reasonable explanation."). In so concluding, the testimony of Mrs. Hackerman and Mrs. Giardina has not been overlooked; however, while competent to demonstrate that Kevin was depressed at birth, and later developed respiratory distress, it was not competent proof to support any conclusion regarding the etiology of Kevin's developmental delays. See, e.g., Vero Beach Care Center v. Ricks, 476 So. 2d 262, 264 (Fla. 1st DCA 1985)("[L]ay testimony is legally insufficient to support a finding of causation where the medical condition involved is not readily observable.").

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 766.301, et seq, Fla. Stat.

12. 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. § 766.303(1), Fla. Stat.

13. 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 the Division of Administrative Hearings. §§ 766.302(3),

766.303(2), 766.305(1), and 766.313, Fla. Stat. 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." § 766.305(3), Fla. Stat.

14. 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. § 766.305(6), Fla. Stat. 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. §§ 766.304, 766.309, and 766.31, Fla. Stat.

15. 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.

§ 766.309(1), Fla. Stat. 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."

§ 766.31(1), Fla. Stat.

16. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), 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 postdelivery 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.

17. As the claimants, the burden rested on Petitioners, as the proponents of the issue, to demonstrate that Kevin suffered a "birth-related neurological injury." § 766.309(1)(a), Fla. Stat.

See also Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1997)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.").

18. Here, the proof failed to support the conclusion that, more likely than not, Kevin's neurologic impairments resulted from an "injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation." Consequently, the record developed in this case failed to demonstrate that Kevin suffered a "birth-related neurological injury," within the meaning of Section 766.302(2), and the claim is not compensable. §§ 766.302(2), 766.309(1), and 766.31(1), Fla. Stat.

19. 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." § 766.309(2), Fla. Stat. Such an order constitutes final agency action subject to appellate court review. § 766.311(1), Fla. Stat.

CONCLUSION

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

ORDERED that the claim for compensation filed by Susan Hackerman and Steven Hackerman, on behalf of and as parents and natural guardians of Kevin A. Hackerman, a minor, is dismissed with prejudice.

DONE AND ORDERED this 19th day of December, 2003, in Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of December, 2003.

ENDNOTES

1/ All citations are to Florida Statutes (2000), unless otherwise indicated.

2/ The dialogue between Petitioners' counsel and Dr. Lopez regarding the etiology of Kevin's developmental delays was quite uninformative:

Q. . . . Do you have an opinion as to what was causing the respiratory distress at that point in time [12:38 a.m., July 26, 2000].

A. No.

Q. All right. Do you have an opinion as to whether or not the respiratory distress was causing any immediate injury to the baby?

A. Immediate injury?

Q. Yes.

A. No.

Q. You don't have an opinion, one way or another?

A. Right.

Q. I want you to assume -- you're not aware of any -- of the status of this baby today?

A. Not at all.

Q. Or any of the diagnostic studies that have been done?

A. Not at all.

Q. All right. Was there any demonstrated microcephaly at the time that you did your examination?

A. Not according to my note.

Q. You would have written that down if there had been?

A. Yes.

Q. I want you to assume that Kevin Hackerman has since been diagnosed with developmental delays that are global in nature, that he has difficulty with language and communication, that he has microcephaly today, and that

genetic studies have ruled out any birth defect issues that are genetically based. Given that additional information regarding Kevin's current status, that he suffers from global developmental delay, do you have an opinion within a reasonable degree of medical probability as to whether or not the respiratory distress that you diagnosed at the time you saw Kevin was in any way related to the ultimate developmental delay that he has suffered?

A. I don't know.

Q. All right.

A. I can't say that specifically.

Q. All right. Do you have an opinion as to whether or not the developmental delay that I've now told you about is in any way related to the events of labor or delivery?

A. That's a possibility.

Q. When you say it's possible, let's define your opinion a little better, if we can.

I've told you that genetic studies were done that ruled out any genetic basis for the developmental delay. I want you to assume that there's been no injury or acute process or disease processes since the time that you saw Kevin on September 26, 2000 that would account for the developmental delay.

And given your examination of him on that date that he was in respiratory distress, do you have an opinion -- with the understanding that I just laid out, do you have an opinion within a reasonable degree of medical probability as to whether or not the developmental delay issues are related to labor and delivery?

A. Yes, it would be then.

Q. Okay.

A. Assuming nothing else, as you've said.

Q. Do you have an opinion as to whether or not the use of the vacuum in any way adversely affected this baby?

A. No, I don't know.

Q. You don't know.

Do you have an opinion as to whether or not there was actual oxygen deprivation that occurred during labor or delivery?

A. I don't know that.

Q. Do you have an opinion as to whether or not there was actual mechanical injury suffered by the baby during labor and delivery?

A. I don't know that.

Q. Although you're unable to state the exact etiology of any injury during labor and delivery, given the genetic studies that I told you about and the lack of any injury or acute disease process after your examination of the baby, do I understand that it is your opinion that more likely than not, this baby did suffer some type of insult during labor and delivery that has since manifested itself as developmental delay?

A. Yes.

(Petitioners' Exhibit 6, pages 16-19.) Moreover, given the record in this case, Dr. Lopez's opinion that Kevin's deficits were related to an incident, albeit of unknown etiology, that occurred during labor and delivery is rejected as without an accurate or adequate foundation, and contrary to the more persuasive proof.

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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 the original of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 766.311, 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.