

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

RAIMARA PEREIRA COSTA AND )  
CLAUDIO DASILVA, as parents and )  
natural guardians of RYAN COSTA )  
DASILVA, a minor, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 04-0300N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
UNIVERSITY OF MIAMI, d/b/a )  
UNIVERSITY OF MIAMI SCHOOL OF )  
MEDICINE and PUBLIC HEALTH )  
TRUST, d/b/a JACKSON MEMORIAL )  
HOSPITAL, )  
 )  
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 November 15, 2004, by video teleconference, with sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioners: Jose F. Torres, Esquire  
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For Respondent: David W. Black, Esquire  
Frank, Weinberg & Black, P.L.  
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For Intervenor University of Miami, d/b/a University of  
Miami School of Medicine:

James D. DeChurch, Esquire  
Marc J. Schleier, Esquire  
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For Intervenor Public Health Trust, d/b/a Jackson Memorial  
Hospital:

Stephen J. Keating, Esquire  
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STATEMENT OF THE ISSUE

At issue is whether Ryan Costa DaSilva, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On January 26, 2004, Ryan Costa DaSilva, a minor, by and through Raimara Pereira Costa and Claudio DaSilva, as parents and natural guardians, 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 27, 2004, and on June 10, 2004, following a number of extensions of time within which to do so, NICA filed its response to the petition for benefits and gave notice that it was of the view that the infant did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes. In the interim, the University of Miami, d/b/a University of Miami School of Medicine, and the Public Health Trust, d/b/a Jackson Memorial Hospital, requested and were accorded leave to intervene.

At the hearing held on November 15, 2004, Petitioners offered no evidence; Respondent's Exhibit 1 (the deposition of Donald Willis, M.D.) and Exhibit 2 (the deposition of Michael Duchowny, M.D.) were received into evidence; and University of Miami Exhibit 1 (the hospital records of Raimara Costa), Exhibit 2 (the hospital records of Ryan Costa), Exhibit 3 (University of Miami's discovery requests and Petitioners' responses) and Exhibit 4 (affidavits of Doctors Willis and Duchowny, with attached medical reports) were

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

The transcript of the hearing was filed December 3, 2004, and the parties were accorded 10 days from that date to file proposed orders. Respondent and Intervenors elected to file such proposals, and they have been duly considered.

#### FINDINGS OF FACT

##### Preliminary findings

1. Raimara Pereira Costa and Claudio DaSilva are the parents and natural guardians of Ryan Costa DaSilva, a minor. Ryan was born a live infant at 10:15 p.m., December 10, 2001, at Jackson North Maternity Center (also referred to as JNMC or Jackson North), Dade County, Florida, and on December 11, 2001, following the onset of seizure activity, he was transported by ambulance to Jackson Memorial Hospital, where he was admitted to the Neonatal Intensive Care Unit (NICU) at or about 8:44 a.m. At birth, Ryan's weight exceeded 2,500 grams.

2. Among the physicians who provided obstetrical services at Ryan's birth was Nahida H. Chakhtoura, 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.

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, while the uncontroverted proof demonstrated that Ryan suffered an injury to the brain which rendered him permanently and substantially mentally and physically impaired, it also demonstrated that his brain injury was caused by an overwhelming infection (sepsis), that occurred well prior to the onset of labor, as opposed to having been caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation, as required for coverage under the Plan.<sup>1</sup>

CONCLUSIONS OF LAW

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

6. 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.

7. 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.

8. 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.

9. 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.

10. 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 for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 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.

11. As the proponents of the issue, the burden rested on Petitioners or Intervenors to demonstrate that Ryan 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.").

12. Here, the proof failed to support the conclusion that, more likely than not, Ryan 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 . . . which render[ed] . . . [him] permanently and substantially mentally and physically impaired." Consequently, the record



developed in this case failed to demonstrate that Ryan 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. See also Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 5th DCA 1995)("[B]ecause the Plan . . . is a statutory substitute for common law rights and liabilities, it should be strictly constructed to include only those subjects clearly embraced within its terms."), approved, Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).

13. 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 the claim for compensation filed by Raimara Pereira Costa and Claudio DaSilva, as parents and natural guardians of Ryan Costa DaSilva, a minor, is dismissed with prejudice.

DONE AND ORDERED this 6th day of January, 2005, in Tallahassee, Leon County, Florida.



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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 6th day of January, 2005.

ENDNOTE

1/ To address the cause and timing of Ryan's brain injury, NICA offered the deposition of Donald Willis, M.D., a physician board-certified in obstetrics and gynecology, as well as maternal-fetal medicine (Respondent's Exhibit 1); and the deposition of Michael Duchowny, M.D., a physician board-certified in pediatrics, pediatric neurology, and clinical neurophysiology (Respondent's Exhibit 2). Additionally, Intervenor University of Miami (UM) offered the hospital records of Raimara Costa pertinent to Ryan's birth (UM Exhibit 1); the hospital records of Ryan's birth at Jackson North and postnatal course at Jackson Memorial Hospital (UM Exhibit 2); University of Miami's discovery requests to Petitioners and Petitioners' responses (UM Exhibit 3); and affidavits of Doctors Willis and Duchowny, with attached reports (UM Exhibit 4). Notably, Dr. Willis reviewed the medical records related to Ryan's birth and immediate postnatal course and was of the opinion that the records failed to reveal any evidence of trauma or oxygen

deprivation during labor, delivery, or resuscitation, to support a conclusion that Ryan suffered a "birth-related neurological injury." Further, Dr. Duchowny reviewed a videotape of Ryan, to assess his degree of impairment, as well as the medical records related to Ryan's birth and postnatal course, and was of the opinion that, while Ryan suffered an injury to the brain that rendered him permanently and substantially mentally and physically impaired, his brain injury was caused by an overwhelming infection (sepsis), that occurred well prior to the onset of labor, and was not the result of oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation. Importantly, the opinions of Doctors Willis and Duchowny are consistent with the medical records, and otherwise uncontroverted. Consequently, the proof fails to support the conclusion that Ryan'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. Rather, the uncontroverted proof demonstrates that Ryan's brain injury was caused by an overwhelming infection, that occurred prior to the onset of labor. See Wausau Insurance Company v. Tillman, 765 So. 2d 123 (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."); Ackley v. General Parcel Service, 646 So. 2d 242 (Fla. 1st DCA 1995)(determining cause of psychiatric illness is essentially a medical question, requiring expert medical evidence); 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.").

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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.