

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION, AND
IF FILED, DISPOSED OF

ORLANDO REGIONAL HEALTH CARE SYSTEM, INC., ETC.,

Appellant,

v.

Case No. 5D07-1806

FLORIDA BIRTH-RELATED NEUROLOGICAL, ETC.,

Appellee.

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DIVISION OF
ADMINISTRATIVE
HEARINGS

Opinion filed October 31, 2008

Administrative Appeal from the Division of
Administrative Hearings.

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Wilbur E. Brewton, Kelly B. Plante and
Tana D. Storey, of Brewton Plante, P.A.,
Tallahassee, and Robert J. Grace, Jr., of
Stiles, Taylor & Grace, P.A., Tampa, for
Appellee, Florida Birth Related
Neurological Injury Compensation
Association.

HUDSON, M., Associate Judge.

Orlando Regional Healthcare System d/b/a Orlando Regional South Seminole Hospital ("ORHS") appeals a final administrative order dismissing with prejudice a claim for compensation under the Florida Birth-Related Neurological Injury Compensation Plan ("the Plan"), sections 766.301-.316, Florida Statutes (2004). The claim was filed by the survivors of Harper Dean Stever, who died six days after birth. In a final order,

flow oxygen. However, he was not breathing spontaneously, and his heart rate rapidly slowed to 60, requiring an Ambu bag and mask, and chest compressions.

At 12:50 p.m., with Harper's heart rate still 60 beats per minute and his color noted as bluish, a neonatal code was called. During the code, Harper was intubated to provide ventilation, and chest compressions were initiated to establish a sustainable heart rate. His heart rate rose to the 160s and had declined to the 140s by the time the code concluded fifteen minutes later at 1:05 p.m. Manual ventilation continued throughout because Harper was never able to breathe on his own. Harper's Apgar scores¹ were noted as one at one minute, five at five minutes, and as seven at ten minutes. He was hypoglycemic, had a pale pink color, hypotonic tone, depressed activity, and no cry.

At 1:05 p.m., Harper was transferred to the special care nursery. At the special care nursery, resuscitation efforts continued and Harper was assessed and placed on a ventilator, and an umbilical line was started by a pediatrician. The progress notes revealed that while on the ventilator, Harper had oxygen saturations above 95 percent, pale pink color and responses to tactile stimulation. However, due to his acute respiratory failure, it was decided that Harper would be transferred to the neonatal intensive care unit at Arnold Palmer Hospital for Children and Women for continued aggressive resuscitation.

¹ An Apgar score is a numerical expression of the condition of the newborn and reflects the sum total of points gained on an assessment of heart rate, respiratory effort, muscle tone, reflex irritability and color. Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 813 So. 2d 155, 159 n.1 (Fla. 4th DCA 2002) (citing Dorland's Illustrated Medical Dictionary 1498 (27th ed. 1988)). The scores help the physician decide what resuscitative efforts may be required for the newborn.

ECMO bypass and died shortly thereafter. The autopsy revealed injury in Harper's brain and lungs.

Harper's mother, as personal representative of Harper's estate, filed a petition with the Division of Administrative Hearings ("DOAH") to determine compensability under the Plan. The DOAH served the Florida Birth-Related Neurological Injury Compensation Association ("NICA") with a copy of the petition. As a party having a substantial interest in the outcome of the proceeding, ORHS was allowed to intervene in this action. Thereafter, NICA responded to the petition, reporting that it had retained Dr. Donald C. Willis to opine whether Harper's claim was compensable under the Plan. According to NICA, Dr. Willis noted that "a fetal infection developed during labor and resulted in respiratory distress and resulting demise," and opined that "[Harper's] intracranial hemorrhage and resulting death were not the result of brain injury that occurred during labor and delivery." At that time, Dr. Willis did not offer any opinion as to whether a brain injury occurred during "resuscitation in the immediate postdelivery period." Based on Dr. Willis's opinion, NICA determined that the claim was not compensable as the injury did not meet the definition of a "birth-related neurological injury," as defined in section 766.302(2), Florida Statutes. As a result, NICA requested a hearing to resolve the issue.

While a hearing was held before the ALJ to determine whether the claim was compensable under the Plan, no live testimony was heard. Instead, the deposition transcripts of Dr. Willis, as well as those of ORHS's experts, Dr. William Rhine and Dr. Charles Brill, were received into evidence. In addition, Harper's and Mrs. Stever's

2d 188, 191 (Fla. 1st DCA 2002); Fluet v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 788 So. 2d 1010 (Fla. 2d DCA 2001).

Here, the ALJ was required to determine whether Harper suffered a brain injury due to oxygen deprivation or mechanical injury “in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital” that rendered him permanently and substantially mentally and physically impaired. § 766.302(2), Fla. Stat. (2004) (emphasis supplied). On this issue, NICA argued below and on appeal that while Harper required continuous respiratory support since birth, his brain injury postdated the “immediate postdelivery period,” and therefore, does not qualify for coverage. NICA relied on the deposition of Dr. Willis, a physician board-certified in obstetrics, gynecology, and maternal-fetal medicine to support this conclusion. ORHS takes the opposite view, arguing that Harper’s brain injury occurred “in the immediate postdelivery period” since Harper required continuous respiratory support since birth. In support of its position, ORHS relied on the deposition testimony of Dr. Rhine, a physician board-certified in pediatrics and neonatal-perinatal medicine, and Dr. Brill, a physician board-certified in pediatrics and neurology with special competence in child neurology. Both doctors testified that Harper sustained a brain injury during resuscitation efforts in the immediate postdelivery period, thereby, meeting the statutory definition of a “birth-related neurological injury.”

This case hinges on the statutory phrase “resuscitation in the immediate postdelivery period.” More importantly, the definition of the term “immediate” is critical in interpreting this phrase. The ALJ found that while Harper had continuous respiratory support throughout his six days of life, his injury did not occur during the “resuscitation

law, in applying the language of the statute to exclude Harper's injury from the resuscitation that took place in the "immediate postdelivery period."

Under the Plan, the terms "resuscitation" and "immediate" are important qualifiers to determining the compensability of a claim. However, those terms are not defined by the statute. When a term is not defined within a statute, a fundamental construction tool requires giving a statutory term its "plain and ordinary meaning." Green v. State, 604 So. 2d 471, 473 (Fla. 1992); Dianderas v. Fla. Birth-Related Neurological, 973 So. 2d 523, 527 (Fla. 5th DCA 2007). When necessary, the plain and ordinary meaning can be ascertained by reference to a dictionary. Green, 604 So. 2d at 473; see also L.B. v. State, 700 So. 2d 370, 372 (Fla. 1997) (explaining that "court may refer to a dictionary to ascertain the plain and ordinary meaning"). This Court has previously utilized references to dictionaries and medical references to interpret other provisions of the statute. See, e.g., Dianderas, 973 So. 2d at 527.

The American Heritage Dictionary defines the term "resuscitate" as "[t]o return to consciousness, vigor or life; revive." The American Heritage Dictionary 1054 (2d ed. 1985). Dorland's Illustrated Medical Dictionary similarly defines "resuscitation" as "the restoration to life or consciousness of one apparently dead; it includes such measures as artificial respiration and cardiac massage." Dorland's Illustrated Medical Dictionary 1145 (26th ed. 1981). Further, "immediate" is commonly understood to mean "[n]ext in line or relation[;] . . . [o]ccurring without delay[;] [o]f or near the present time[;] . . . [c]lose at hand; near." The American Heritage Dictionary 643 (2d ed. 1985); see Merriam-

DCA 1990). In this case, the expert witnesses' testimony was limited to matters of fact, as distinguished from matters of law, and therefore, the ALJ should have considered the experts' analysis of what "immediate" meant in this case.

“resuscitation in the immediate postdelivery period” to include the period that Harper needed ongoing and active resuscitation efforts continuously after his birth, the ALJ’s findings of fact excluding Harper’s neurological injury from the Plan cannot be supported by competent, substantial evidence. The presumption that Harper’s injury is a birth-related neurological injury cannot be rebutted based on the record.

The undisputed facts, expert testimony, and medical records support a finding that Harper’s brain injury occurred as a result of oxygen deprivation between the time of birth and the time of being placed on the ECMO bypass. The testimony of Dr. Rhine, upon which the ALJ primarily relied, established that Harper began to suffer hypoxic ischemic brain damage due to low oxygen saturation levels and low blood pressure from the time of the initial resuscitation effort following his birth and the attempted period of stabilization, including ongoing resuscitation due to Harper’s respiratory failure, up until the point he was placed on the ECMO bypass. While Dr. Rhine opined that Harper did not suffer a brain injury during the actual labor and delivery, it was his opinion that Harper did suffer a brain injury in the period from the resuscitation effort initiated after his birth until he was placed on the ECMO bypass. Having found that this period was within the “immediate postdelivery period,” there can be no other conclusion than the claim is compensable under the Plan.

Accordingly, we reverse the determination of the ALJ, and remand for entry of an order finding that the claim filed by Harper’s estate is subject to compensation under the Plan.

REVERSED and REMANDED.

LAWSON and COHEN, JJ., concur.