

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHELLE TAYLOR AND DENNIS)
TAYLOR, JR., ON BEHALF OF AND)
AS PARENTS AND NATURAL)
GUARDIANS OF NATALIE TAYLOR, A)
MINOR,)
)
Petitioners,)
)
vs.) Case No. 07-3629N
)
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 hearing in the above-styled case on March 18, 2008, in St. Augustine, Florida.

APPEARANCES

For Petitioners: Dennis Taylor, Jr., pro se
Michelle Taylor, pro se
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For Respondent: Tana D. Storey, Esquire
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STATEMENT OF THE ISSUE

At issue is whether Natalie Taylor (Natalie), a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On August 13, 2007, Michelle Taylor and Dennis Taylor, Jr., on behalf of and as parents and natural guardians of Natalie Taylor, a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for compensation under the Plan.

DOAH served the Florida Birth-Related Injury Compensation Association (NICA) with a copy of the petition on August 14, 2007, and on October 31, 2007, following an extension of time within which to do so, NICA responded to the petition and gave notice that it was of the view that Natalie did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, and requested that a hearing be scheduled to resolve the issue. Such a hearing was held March 18, 2008.

At hearing, Michelle Taylor and Dennis Taylor, Jr., testified on their own behalf, and called Lillian Taylor, Mary Hall, and Amnath Kirdnual, M.D., as witnesses. Petitioners' Exhibit 1 (Dr. Kirdnual's records relating to Mrs. Taylor's prenatal care and Natalie's birth), and

Respondent's Exhibit 1 (the deposition of Donald Willis, M.D.), Exhibit 2 (the deposition of Michael Duchowny, M.D.), Exhibit 3 (Flagler Hospital medical records for Mrs. Taylor's admission of August 14, 2002, as well as Natalie's birth and immediate newborn course), and Exhibit 4 (medical records related to Natalie's subsequent development) were received into evidence.

The transcript of the hearing was filed April 10, 2008, 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.

Stipulated facts

1. Michelle Taylor and Dennis Taylor, Jr., are the natural parents and guardians of Natalie Taylor, a minor. Natalie was born a live infant on August 14, 2002, at Flagler Hospital, a hospital located in St. Augustine, Florida, and her birth weight exceeded 2,500 grams.

2. Obstetrical services were delivered at Natalie's birth by Amnath Kirdnual, 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 . . . 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, it is undisputed that Natalie is permanently and substantially mentally and physically impaired. (Respondent's Exhibit 2, page 9; Respondent's Exhibit 4). What must be resolved is whether the proof supports the conclusion that, more likely than not, Natalie's impairments resulted from an "injury to the brain . . . caused by oxygen deprivation . . . occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period," as required for coverage under the Plan. On that issue, Petitioners are of the view that Natalie suffered such an injury. In contrast, NICA is of the view that the cause of Natalie's impairments was most likely developmentally based, as opposed to birth related.

Natalie's birth and immediate newborn course

5. At or about 1:26 p.m., August 14, 2002, Mrs. Taylor, with an estimated delivery date of August 12, 2002, and the fetus at 40 2/7 weeks' gestation, presented to Flagler Hospital in early labor. At the time, the membranes were noted as intact; vaginal examination revealed the cervix at 2 centimeters

dilation, 70 percent effacement, and the fetus at -3 station; and fetal monitoring was reassuring for fetal well-being, with a fetal heart rate in the 140-beat per minute range.

6. Following admission at 2:30 p.m., an IV was started; at 3:30 p.m., pitocin drip was started; and at 3:50 p.m., the membranes were ruptured. At that time, vaginal examination revealed the cervix at 3 centimeters dilation, 80 percent effacement, and the fetus at -1 station.

7. Mrs. Taylor's labor slowly progressed, and at 7:45 p.m., dilation and effacement were noted as complete, Mrs. Taylor began pushing, and at 8:15 p.m., Natalie was delivered. At delivery, "one true knot" was noted in the cord.¹

8. According to the Delivery Record, Natalie was bulb-suctioned at delivery, but required no resuscitation; no abnormalities or injuries were apparent; and Apgar scores were recorded as 9 and 9, at one and five minutes, respectively. Although not noted on the Delivery Record, Petitioners offered testimony at hearing that Natalie was given oxygen following delivery.

9. The Apgar scores assigned to Natalie are a numerical expression of the condition of a newborn infant, and reflect the sum points gained on assessment of heart rate, respiratory rate, muscle tone, response to stimulation, and color, with each category being assigned a score ranging from the lowest score of

0 through a maximum score of 2. See Petitioners' Exhibit 1, Delivery Record; and Dorland's Illustrated Medical Dictionary, 28th Edition, 1994. As noted, Natalie's one minute and five minute Apgar score was 9, with heart rate (above 100 beats per minute), respiratory rate (good with strong cry), muscle tone (well flexed), and response to stimulation (cry) being graded at 2 each, and color (body pink/extremities blue) being graded at 1.

10. At or about 8:30 p.m., Natalie was transferred to the newborn nursery. There, the Newborn Admission Record and the Transitional Care-First Six Hours record reveal a normal newborn examination and normal presentation, with the exception of slight peripheral cyanosis noted at 9:00 p.m., and feeding difficulties initially noted at 10:30 p.m. (Respondent's Exhibit 3). According to the Nursery Daily Care Flow Sheet, Natalie's feeding difficulties persisted until 6:00 p.m., August 15, 2002, when they resolved. (Respondent's Exhibit 3). At hearing, Petitioners offered testimony that those feeding difficulties included problems with sucking the bottle. Otherwise, Natalie's newborn course was apparently uneventful, and she was discharged with her mother on August 16, 2002.

Natalie's subsequent development

11. At some time after November 13, 2002, when Natalie was a three-month-old infant, but before May 2, 2003, when she was a

seven-month-old infant, Natalie began to evidence developmental delays in her motor and sensory skills.² By her most recent neurological evaluation of record, dated September 26, 2007, "Natalie's neurologic examination [now] reveals evidence of global delay and is characterized by a virtual absence of motor developmental milestones, generalized hypotonia and a choreoathetotic movement disorder. She additionally shows no evidence of verbal or nonverbal communication." (Respondent's Exhibit 2).

12. To date, Natalie has had a very extensive diagnostic workup, including central nervous system imaging, metabolic and genetic screening, and neurologic and other consultations. However, to date her treating physicians and consultants have not identified a likely cause for Natalie's impairments. (Respondent's Exhibit 4). Of note, several MRI scans of the brain done in March 2003, December 2003, and May 2006, were unremarkable (without evidence of brain injury).

The likely cause of Natalie's impairments

13. With regard to the likely cause of Natalie's impairments, Petitioners were of the view that her impairments were the result of a brain injury caused by oxygen deprivation Natalie suffered during labor, delivery, or resuscitation. However, as previously noted, Natalie's treating physicians and consultants have not expressed such an opinion, and Petitioners

offered no expert medical evidence to support such a conclusion. Ackley v. General Parcel Services, 646 So. 2d 242, 245 (Fla. 1st DCA 1994)("The determination of the cause of a non-observable medical condition, such as a psychiatric illness, is essentially a medical question."); Broadfoot v. Albert Hugo Association, Inc., 478 So. 2d 863, 865 (Fla. 1st DCA 1985)("[L]ay testimony cannot be used to establish causal relationship within reasonable medical probability as to conditions and symptoms that are not readily observable.") In contrast, NICA offered the opinions of Michael Duchowny, M.D. and Donald Willis, M.D., to support their view that the cause of Natalie's impairments was most likely developmentally based, as opposed to birth related. (Respondent's Exhibits 1 and 2).

14. Dr. Duchowny is a physician board-certified in pediatrics, neurology with special competence in child neurology, electroencephalography, and clinical neurophysiology. Based on his review of the medical records, as well as his evaluation of Natalie on September 26, 2007, Dr. Duchowny was of the opinion that Natalie's neurologic impairments were most likely developmentally based, as opposed to birth-related. Dr. Duchowny expressed the bases for his opinion, as follows:

Q. . . . What is your expert medical opinion as to whether Natalie Taylor suffers a permanent, substantial mental and physical injury or impairment?

A. I believe that Natalie does have a substantial mental and physical impairment. But in my opinion, her impairment was most likely acquired prenatally, rather than in the course of labor and delivery.

Q. What makes you think that?

A. Natalie's examination reveals findings that, in my view, support a prenatal acquisition rather than intrapartum.

For example, she has multiple dysmorphic features, which are noted in my report, that include an abnormality of her midfacial region, abnormality of her philtrum and her lips. Her eyelid has a pseudoptosis, meaning that it is droopy. And she also has a slight scoliotic curvature.

The neurological examination demonstrates significant decrease in muscle tone, so severe that, for example, Natalie didn't show evidence of any weightbearing abilities. She had trouble keeping her head up, or showing any support for her posture. There were no -- she also had frequent involuntary movements that were uncoordinated, so-called choreoathetotic movements.

There were no focal findings on examination to suggest a localized structural brain lesion. She also demonstrated no evidence of meaningful verbal or non-verbal communication. These findings are much more likely to be attributable to a problem in the way the brain developed prenatally rather than damage acquired by either oxygen deprivation or mechanical injury in the course of labor and delivery.

Furthermore, Natalie's MRI scan of the brain, which was performed on May 16th, 2006 was normal. A finding which is consistent with the belief that Natalie's brain problems are developmentally based and

inconsistent with brain injury acquired in the course of oxygen deprivation or mechanical injury during labor or on delivery.

Q. Okay. And is that opinion rendered based on a reasonable degree of medical probability?

A. Yes.

(Respondent's Exhibit 2, pages 9-11). As for Petitioners' concern about oxygen deprivation during Natalie's birth, Dr. Duchowny noted:

. . . [I]f Natalie's injuries were the result of that period at birth when the cord was around her neck, where I know that you [Mrs. Taylor] have a concern that her brain didn't get enough oxygen, that lack of oxygen would lead to brain damage, it would kill brain cells and Natalie's examination would look very different, that's one thing.

And secondly, the MRI scan of the brain, Ms. Taylor, would in fact show that tissue was damaged by the lack of oxygen. So, if you think about it, although you might think that Natalie's brain didn't get oxygen at that time, certainly there's no evidence of that from the MRI scan of the brain.

In fact, the MRI suggested that the brain is entirely normal. And, really, Ms. Taylor, that's inconsistent with Natalie being asphyxiated at birth.

(Respondent's Exhibit 2, pages 12 and 13).

15. Dr. Willis is a physician board-certified in obstetrics and gynecology, and maternal-fetal medicine. Based on his review of the medical records, Dr. Willis was of the opinion the records failed to support a conclusion that Natalie

suffered a brain injury caused by oxygen deprivation or trauma during labor, delivery, or resuscitation. Dr. Willis expressed the bases for his opinion, as follows:

Q. After reviewing the records in this case, what is your opinion concerning whether there was an injury to Natalie's brain or spinal cord caused by oxygen deprivation or mechanical injury?

A. After reviewing the records, I don't think that Natalie's injury was a result of oxygen deprivation or trauma at the time of labor or delivery.

Q. Okay. Was there any resuscitation in this case?

A. No, the baby did not require any resuscitation. I looked at the fetal heart rate monitor strip, and that looked good. The baby was not in distress during labor. The baby was born by spontaneous vaginal birth. The birth weight was very appropriate, seven pounds, two ounces. There was a knot present in the umbilical cord that was recorded, but the baby did not require any resuscitation at birth. The apgar scores were nine and nine, which are perfectly normal. And, importantly, the baby had a normal newborn course. Because if a baby has oxygen deprivation during labor or delivery that is sufficient to cause brain damage, then they will -- they will have problems during the newborn hospital course, things such as seizures, feeding difficulties, abnormalities with their platelet counts, they'll be lethargic, they'll have neurologic problems. And this baby had a relatively normal newborn course.

Q. So is that the basis for you determining there is no oxygen deprivation or trauma at birth?

A. Yes.

* * *

MS. STOREY: Hello, Mrs. Taylor?

MRS. TAYLOR: Yes.

MS. STOREY: . . . Did you have a question?

MRS. TAYLOR: How he's saying that Natalie did not have oxygen, when Natalie came out, Natalie was blue and she had to have oxygen hooked up to her. She did have it hooked up, but it was not recorded.

DOCTOR WILLIS: Do you want me to answer?

MS. STOREY: Yeah, go ahead.

DOCTOR WILLIS: Okay. Ms. Taylor, let me try to answer that. First of all, I did not really say that the baby did not have some oxygen deprivation at time of labor or delivery. What I can say is . . . that the baby did not have oxygen deprivation or lack of oxygen at time of labor and delivery that would be sufficient to cause brain injury.

So I'm really not arguing the point. You know, if she looked blue at birth or required a little oxygen at birth, that's really not a point that I'm arguing. What I'm simply saying is, is that if a baby has oxygen deprivation or lack of oxygen during labor and delivery that is sufficient to cause brain injury, then those babies will have many other problems. They won't act like normal newborn babies.

And let me get any questions you have about that, or I can explain more to you about that. But when a baby has oxygen -- lack of

oxygen, enough to cause brain injury, they get brain swelling, and it really affects them dramatically in that for several days they may be very lethargic, their muscle tone is very poor, many different things that we see.

* * *

Q. . . . And have the opinions that you've rendered with respect to this case been provided within a reasonable degree of medical probability?

A. Yes.

(Respondent's Exhibit 1, pages 5-9).

16. The opinions of Doctors Duchowny and Willis regarding the likely cause of Natalie's impairments were not controverted or shown to lack credibility. Consequently, it must be resolved that the cause of Natalie's impairments was most likely developmentally based, as opposed to birth-related. See 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.").

CONCLUSIONS OF LAW

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

18. 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.

19. 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), and 766.305(1), 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(4), Fla. Stat.

20. 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(7), 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.

21. 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 postdelivery 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 postdelivery 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.

22. 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 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.

23. As the proponent of the issue, the burden rested on Petitioners to demonstrate that Natalie 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.").

24. Here, the proof failed to support the conclusion that, more likely than not, Natalie's neurologic impairments were the result of 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 postdelivery period in the hospital. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Natalie was not shown to qualify for coverage under the Plan. See also §§ 766.309(1) and 766.31(1), Fla. Stat.; Humana of Florida, Inc. v. McKaughan, 652

So. 2d 852, 859 (Fla. 2d 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).

25. Where, as here, the administrative law judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . she or 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 Michelle Taylor and Dennis Taylor, Jr., on behalf of and as parents and natural guardians of Natalie Taylor, a minor, is dismissed with prejudice.

DONE AND ORDERED this 23rd day of April, 2008, 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 23rd day of April, 2008.

ENDNOTES

1/ At hearing, Petitioners offered testimony that the umbilical cord had two knots. However, the Delivery Record and Progress Notes document "one true knot." (Petitioners' Exhibit 1).

2/ The record is not clear as to a precise date Natalie first began to evidence developmental delays. However, a History and Physical at Wolfson Children's Hospital on November 13, 2002, noted "Her developmental milestones, thus far, have been normal," and a History and Physical at Flagler Hospital on May 2, 2003, noted "She has had delayed development in her motor and sensory skills."

COPIES FURNISHED:

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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.