

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AIMEE REDWINE, ON BEHALF OF AND)
AS PARENT AND NATURAL GUARDIAN)
OF ELIANA REDWINE, A MINOR,)
)
Petitioner,)
)
vs.) Case No. 08-2167N
)
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 May 28, 2009, by video teleconference, with sites in Tallahassee and Gainesville, Florida.

APPEARANCES

For Petitioner: Michael K. Bailey, Esquire
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Maitland, Florida 32751

For Respondent: David W. Black, Esquire
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On May 2, 2008, Aimee Redwine, on behalf of and as parent and natural guardian of Eliana Redwine (Eliana), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH) for benefits under the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on May 5, 2008, and on October 20, 2008, 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 Eliana did not suffer a "birth-related neurological injury," as defined by the Plan, and requested that a hearing be scheduled to resolve the issue.

At hearing, Cynthia Van and Aimee Redwine testified on behalf of Petitioner, and Joint Exhibits 1A and 1B, Petitioner's Exhibits 1-3, and Respondent's Exhibits 1-4 were received into evidence. No other witnesses were called and no further exhibits were offered.

The transcript of the hearing was filed June 19, 2009, 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

Stipulated facts¹

1. Petitioner, Aimee Redwine, is a parent and natural guardian of Eliana Redwine. Eliana was born a live infant on October 10, 2006, at Shands at AGH, a licensed Florida hospital located in Gainesville, Florida, and her birth weight exceeded 2,500 grams.

2. Obstetrical services were delivered at Eliana's birth by George Buchanan, 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."² § 766.302(2), Fla. Stat. See also §§ 766.309 and 766.31, Fla. Stat.

4. Here, it is undisputed that Eliana suffered a brain-damaging event, which rendered her permanently and substantially mentally and physically impaired. What must be resolved is whether the record supports the conclusion that, more likely than not, such injury was "caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period" in the hospital, as required for coverage under the Plan.

§ 766.302(2), Fla. Stat.; Nagy v. Florida Birth-Related Neurological Injury Compensation Association, 813 So. 2d 155, 160 (Fla. 4th DCA 2002) ("According to the plain meaning of the words as written, the oxygen deprivation or mechanical injury to the brain must take place during labor or delivery, or immediately afterward.").

Eliana's birth and immediate newborn course

5. At or about 11:43 a.m., October 10, 2006, Mrs. Redwine, with an estimated delivery date of October 17, 2006, and the fetus at 39 3/7 weeks' gestation by ultrasound (US), was admitted to Shands at AGH for induction of labor due to preeclampsia. There, fetal monitoring revealed an overall reassuring fetal heart rate in the 140 beat per minute range, and vaginal examination revealed the cervix at 2-3 centimeters dilation, effacement at 50 percent, and the fetus high.

6. Mrs. Redwine was induced with Petocin, starting at 2:36 p.m.; progressed to complete dilation by 9:58 p.m.; and at 10:05 p.m., Eliana was born by spontaneous vaginal delivery. In the interim, at 6:16 p.m., Mrs. Redwine's membranes were artificially ruptured, with clear fluid noted, and fetal monitoring remained reassuring. At delivery, a single nuchal cord was noted, and relieved.

7. According to the medical records, Eliana cried spontaneously following delivery; was bulb-suctioned, dried, and stimulated; and was assigned Apgar scores of 8 and 8, at one and five minutes, respectively. However, Eliana subsequently showed evidence of respiratory distress (retractions and grunting)³ and, at or about 10:20 p.m., a Neonatal Intensive Care Nurse (NICU) nurse (Melissa Decker, R.N.) was called to observe her. (Joint Exhibit 1B, Tab 14, Bate Stamp p. 408).

8. The NICU nurse arrived at labor and delivery when Eliana was 20 minutes of age (10:25 p.m.), and noted moderate subcostal retractions, with grunting; some central cyanosis; significant facial bruising; and oxygen being provided via blow-by. Eliana was suctioned by catheter, with a copious amount of thick mucous returned, and transported to the neonatal intensive care unit for continued care via transport isolette, with blow-by oxygen provided during transport. (Joint Exhibit 1B, Tab 14, Bate Stamp p. 408).

9. Eliana was received in the neonatal intensive care unit at or about 10:35 p.m., and placed on a radiant warmer (RW) bed. Oxygen saturation was noted as 92% with blow-by.

10. Eliana was placed under an oxyhood, with oxygen started at 90%, and a decrease in cyanosis was noted. By 12:15 a.m., October 11, 2006, no further grunting or retractions were noted, oxygen saturation was noted as 100%, and Eliana was described as pink and well-perfused. Orders were received to begin weaning, and by 1:30 a.m., Eliana was weaned to room air, with oxygen saturation noted as 98%. Eliana experienced no further respiratory difficulties, and was discharged with her mother on October 13, 2006.

Eliana's subsequent development

11. On April 5, 2007, Eliana was seen by Myra Alfino, M.D., a pediatrician associated with the University of Florida, for developmental delay. Dr. Alfino noted a number of abnormalities, including microcephaly (37.8 cm), eyes not tracking, and hypotonia, and ordered a brain MRI. The MRI, done April 11, 2007, was reported, as follows:

Findings: This study is abnormal. There is advanced global atrophy. There is diffuse leukomalacia of the white matter of the cerebrum and of the dentate nuclei of the cerebellum and Wallerian degeneration in long tracks. Patient motion precludes evaluation of the optic nerve size. There is compensatory extra-axial fluid. There is a focal intradural blood collection of acute

to subacute nature along the posterior falx. The corpus callosum is small. The paranasal sinuses and oto-mastoid air cells are normally developed and aerated without evidence of acute or chronic mucoperiosteal thickening or intrasinus fluid.

IMPRESSION:

1. Post anoxic brain damage producing microcephaly and extensive leukomalacia.
2. Small subacute intradural hemorrhage as above.

12. Following the MRI, Eliana was seen by Dr. Omid Rabbani, a resident doing a 3-month rotation in pediatric neurology, and Dr. Edgar Andrade, a physician board-certified in neurology with special competence in child neurology, and Assistant Professor in the College of Medicine, Department of Pediatrics, Division of Pediatric Neurology, who was Dr. Rabbani's attending (supervising) physician. Dr. Andrade included the following attending attestation to Dr. Rabbani's report:

I have spoke with the caregivers and have examined the patient and have formulated a join[t] history, physical assessment and plan of care, as Dr. Rabbani has documented it. The patient reportedly suffered anoxic brain injury at the time of birth.[⁴] Neurological exam was significant for poor head control, diffuse hypotonia, hyperreflexia and a brisk Moro response. Brain MRI supports the notion of post anoxic brain damage. I have educated the family about potential complications of such findings included but not limited to cerebral palsy and developmental delay. I

have recommended enrolling the patient in a comprehensive multidisciplinary program where she can receive physical, occupational and speech therapy. Follow up in the clinic in 3-4 months.

Notably, neither Dr. Rabbani nor Dr. Andrade expressed an opinion regarding the cause or timing of Eliana's brain injury. (Petitioner's Exhibit 1; Respondent's Exhibit 3).

The likely cause and timing of Eliana's brain injury

13. To address the likely etiology of Eliana's brain injury, NICA offered the deposition testimony of Donald Willis, M.D., a physician board-certified in obstetrics and gynecology, and maternal-fetal medicine, and Raymond Fernandez, M.D., a pediatric neurologist.

14. Dr. Willis reviewed the medical records associated with Eliana's birth and newborn course and concluded that, more likely than not, Eliana did not suffer a brain injury caused by oxygen deprivation or mechanical injury during labor, delivery, or resuscitation in the immediate postdelivery period.⁵ In so concluding, Dr. Willis observed that fetal monitoring during labor was reassuring; the baby's Apgar scores were good (8 at one and five minutes); the baby did not require any significant resuscitation at birth; and there was no clinical evidence of an acute brain injury during Eliana's immediate newborn course. (Respondent's Exhibit 4).

15. Dr. Fernandez evaluated Eliana on October 1, 2008. Based on that evaluation, as well as his review of the medical records, Dr. Fernandez was of the opinion that Eliana was permanently and substantially mentally and physically impaired, and that the cause of such neurologic impairment was the brain damaging event revealed by the MRI scan of April 11, 2007. As for the etiology of the brain injury, Dr. Fernandez was of the opinion that, while its cause could not be identified,⁶ the injury most likely occurred in utero, weeks or months before the onset of labor, and not during labor, delivery, or resuscitation in the immediate postdelivery period. (Respondent's Exhibit 2).

16. In expressing, his opinion, Dr. Fernandez noted that, at birth, Eliana presented with a congenital microcephaly, a head circumference of 30.5 centimeters (cm) that was way below the third percentile for age matched controls; that such condition is consistent with long-standing growth retardation of the brain during the course of pregnancy; and that when he examined Dr. Eliana, at almost two years of age, her head circumference, at 39.5 cm, was still well below the third percentile. Moreover, Dr. Fernandez, like Dr. Willis, was of the opinion that there was no clinical evidence to support the conclusions that, more likely than not, Eliana suffered a significant brain injury during labor, delivery, or immediately thereafter. (Respondent's Exhibit 2).

17. Notably, when a medical condition is not readily observable, issues of causation are essentially medical questions, requiring expert medical evidence. 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."); Ackley v. General Parcel Service, 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."); 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 obligated to present expert medical evidence establishing that causal connection."). Here, Petitioner offered no expert testimony to support a finding regarding the cause or timing of Eliana's brain injury, and the opinions of Doctors Willis and Duchowny were logical, consistent with the record, not controverted, and not shown to lack credibility. Consequently, it must be resolved that Eliana's brain injury represents a congenital abnormality, that predated the onset of labor, as opposed to a "birth-related neurological injury." 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

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

19. 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.

20. 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 within five years of the infant's birth. §§ 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.

21. 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. However, if a dispute exists, as it does 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.

22. 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.

23. 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.

24. As the proponent of the issue, the burden rested on Petitioner to demonstrate that Eliana suffered a "birth-related neurological injury." See § 766.309(1)(a), Fla. Stat. 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 of an issue before an administrative tribunal.").

25. Here, the proof failed to demonstrate that Eliana's impairments were, more likely than not, caused 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 in a hospital." Indeed, the more compelling proof established that the cause of Eliana's neurologic impairments was most likely a congenital brain injury, that predated the onset of labor. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Eliana does not qualify for coverage under the Plan. See also 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 construed 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).

26. 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 Aimee Redwine, on behalf of and as parent and natural guardian of Eliana Redwine, is dismissed with prejudice.

DONE AND ORDERED this 11th day of August, 2009, in Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of August, 2009.

ENDNOTES

1/ Joint Pre-Hearing Stipulation; Transcript, p. 3.

2/ In its entirety, Section 766.302(2), Florida Statutes, provides:

(2) Birth-related neurological injury means 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.

Here, there is no suggestion or proof to support a conclusion that Eliana suffered an injury to the spinal cord. Consequently, that alternative need not be addressed.

3/ Karen Dees, an advanced registered nurse practitioner (ARNP) characterized Eliana's respiratory distress as mild. (Joint Exhibit 1A, Tab 5, Bate Stamp page 7).

4/ The source of this information was Eliana's mother, Mrs. Redwine.

5/ In enacting the Florida Birth-Related Neurological Injury Compensation Plan, the Legislature expressed its intent, as follows:

It is the intent of the Legislature to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation. This plan shall apply only to birth-related neurological injuries.

§ 766.301(2), Fla. Stat.

In defining "birth-related neurological injury," the Legislature chose to limit coverage to brain injuries that occurred during "labor, delivery, or resuscitation in the immediate postdelivery period." § 766.302(2), Fla. Stat. However, the Legislature did not define "resuscitation in the immediate postdelivery period."

When not defined, "the plain and ordinary meaning of words in a statute can be ascertained by reference to a dictionary." Seagrave v. State, 802 So. 2d 281, 286 (Fla. 2001). "Resuscitate" is commonly understood to mean "[t]o return to life or consciousness; revive." The American Heritage Dictionary of the English Language, New College Edition, 1979. Dorland's Illustrated Medical Dictionary, 28th Edition, 1994, defines "resuscitation" as "the restoration to life or consciousness of one apparently dead; it includes such measures as artificial respiration and cardiac massage." "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 of the English Language, New College Edition, 1979. Finally, "period" is commonly understood to mean "[a]n interval of time characterized by the occurrence of certain conditions or events." The American Heritage Dictionary of the English Language, New College Edition, 1979.

Under the statutory scheme then, the brain injury must occur during labor, delivery, or immediately thereafter. Nagy v. Florida Birth-Related Neurological Injury Compensation Association, 813 So. 2d 155, 160 (Fla. 4th DCA 2002)("According to the plain meaning of the words as written, the oxygen deprivation or mechanical injury to the brain must take place during labor, or delivery, or immediately afterward."). Such conclusion is also consistent with "the requirement that statutes which are in derogation of the common law be strictly construed and narrowly applied." Nagy, 813 So. 2d at 159; Humana of Florida, Inc. v. McKaughn, 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 construed to include only those subjects clearly embraced within its terms."), approved, Florida Birth-Related Neurological Injury Compensation Association v. McKaughn, 668 So. 2d 974, 979 (Fla. 1996).

Under the facts of this case, resuscitation in the immediate postdelivery period ended not later than 1:30 a.m., October 11, 2006, by which time Eliana had been weaned to room air. Thereafter, Eliana required no further intervention.

6/ According to Dr. Fernandez, such injury could be associated with reduced blood flow, reduced oxygen, infection, and some metabolic diseases. (Respondent's Exhibit 2, p. 19).

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.