

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIGUEL HERNANDEZ AND LYNN)
HERNANDEZ, ON BEHALF OF AND)
NATURAL GUARDIANS OF CHRISTIAN)
M. HERNANDEZ, A MINOR,)
)
Petitioners,)
)
vs.) Case No. 08-3097N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
MOUNT SINAI MEDICAL CENTER OF)
FLORIDA, INC., and IGNACIO A.)
ZABALETA, M.D.,)
)
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 January 20, 2009, by video teleconference, with sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioners: Natasha Cortes, Esquire
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For Respondent: David W. Black, Esquire
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For Intervenors: Scott E. Solomon, Esquire
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On June 24, 2008, Miguel Hernandez and Lynn Hernandez, on behalf of and as natural guardians of Christian M. Hernandez (Christian), a minor, filed a petition with the Division of Administrative Hearings (DOAH) to resolve whether Christian qualified for coverage under the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on June 25, 2008, and on September 26, 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 Christian did not suffer a "birth-related neurological injury," as defined by Section 766.301(2), Florida Statutes, and requested that a hearing be scheduled to resolve the issue. In the interim,

Mount Sinai Medical Center of Florida, Inc. (Mount Sinai Medical Center), and Ignacio A. Zabaleta, M.D., were accorded leave to intervene.

At hearing, Joint Exhibits 1-5, and Intervenors' Exhibits 1 and 2 were received into evidence. No witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed January 29, 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

Preliminary findings related to compensability

1. Miguel Hernandez and Lynn Hernandez, are the parents and natural guardians of Christian M. Hernandez, a minor. Christian was born a live infant on March 28, 2005, at Mount Sinai Medical Center, a hospital located in Miami Beach, Florida, and his birth weight exceeded 2,500 grams.

2. Obstetrical services were delivered at Christian's birth by Melvin E. Castillo, 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."¹ § 766.302(2), Fla. Stat. See also §§ 766.309 and 766.31, Fla. Stat.

4. Here, Petitioners and NICA are of the view that Christian did not suffer such an injury, whereas Intervenors hold a contrary view.

Whether Christian suffered a "birth-related neurological injury"

5. To address whether Christian suffered a "birth-related neurological injury," the parties offered the Mount Sinai Medical Center records associated with Christian's birth and immediate newborn course, March 28, 2005, to April 2, 2005 (Joint Exhibits 1 and 2), as well as the Miami Children's Hospital medical records associated with his subsequent care, April 2, 2005, to May 11, 2005 (Joint Exhibit 3). The parties also offered the deposition testimony of Donald Willis, M.D., a physician board-certified in obstetrics and gynecology, and maternal-fetal medicine, and Michael Duchowny, M.D., a physician

board-certified in pediatrics, neurology with special competence in child neurology, electroencephalography, and neurophysiology. (Joint Exhibits 4 and 5).

6. Dr. Willis reviewed the medical records related to Christian's birth and subsequent development, and accurately summarized his history, as follows:

. . . The mother, Lynn Hernandez, was a 36 year old G3 P2 admitted at term in early labor. Her cervix was dilated 2 cms. She was taking Synthroid for hypothyroidism and had a previous Cesarean delivery. Meconium was identified with rupture of the membranes. Ampicillin was given during labor.

The fetal heart rate pattern on admission had a normal baseline and was reactive. Variable decelerations, to about 90 bpm, developed during the second stage of labor and vacuum assisted delivery was done for this indication. Vacuum was applied and the baby was delivered on the first pull. Delivery was complicated by a tight nuchal cord and mild shoulder dystocia. McRoberts maneuver was required for delivery of the shoulders. Birth weight was 4,180 grams or 9 lbs 3 ozs. No meconium was identified below the vocal cords by neonatal evaluation.

Apgar scores were 7/9/9. The baby was floppy at birth, but responded to resuscitation. From the delivery room, the baby was taken to the NICU for possible sepsis and respiratory distress. Retractions and a rapid respiratory rate were present. Neurologic exam was normal. Oxygen saturation was in the 90's on admission, but the baby was unable to maintain adequate oxygenation with hood oxygen. Oxygen saturation dropped to the

50's and intubation and mechanical ventilation was required shortly after being admitted to the NICU (about one hour). Respiratory distress continued with progressively increasing ventilator settings required to maintain adequate oxygenation. The baby was transferred to Miami Children's Hospital for possible ECMO.

Diagnoses included meconium aspiration syndrome, suspected viral pneumonia and significant pulmonary hypertension. Chest tubes were placed for pneumothorax. Respiratory distress worsened and ECMO was started. Head ultrasound was done before ECMO and was normal. The baby suffered an intracranial hemorrhage while on ECMO, which required discontinuation of ECMO. The baby was on ECMO for 32 hours. Serial CT scans showed an evolving intracranial hemorrhage with eventual development of a porencephalic cyst. The baby was discharged home on day 43 of life.

(Joint Exhibit 4; See also Joint Exhibit 1; Joint Exhibit 2, Discharge Summary; Joint Exhibit 3, Discharge Summary).

7. Based on his evaluation of the medical records, it was Dr. Willis' opinion that Christian did not suffer a brain injury caused by oxygen deprivation or mechanical injury during labor, delivery, or resuscitation in the immediate postdelivery period, and that the intracranial hemorrhage he suffered while on ECMO, was a complication of the blood thinner (anti-coagulant) required for ECMO therapy.² (Joint Exhibit 4, pp. 13, 14, and 22). Compare, Orlando Regional Health Care System, Inc. v. Florida Birth-Related Neurological Injury Compensation Association, 33 Fla. L. Weekly D2563 (Fla. 5th DCA 2008)(Where

infant found to have suffered a "birth-related neurological injury" when it was shown that the infant required active resuscitation from birth until he was placed on ECMO bypass hours after his birth, and that the infant suffered a brain injury caused by oxygen deprivation, which rendered him permanently and substantially mentally and physically impaired, between the time of birth and the time of being placed on ECMO.). Notably, it was not shown through Dr. Willis' testimony or otherwise that Christian's intracranial hemorrhage was caused by oxygen deprivation or mechanical injury, and Dr. Willis offered no opinion regarding the significance of, or any sequelae caused by, the brain injury Christian suffered while on ECMO. (Joint Exhibit 4, p. 14).

8. Dr. Duchowny evaluated Christian on September 28, 2007. Based on his evaluation, as well as his review of the medical records, Dr. Duchowny was of the opinion that Christian's impairments were, more likely than not, the result of a developmentally based brain disorder, as opposed to a brain injury. Dr. Duchowny was also of the opinion that Christian does not have a substantial physical impairment. Rather his motor function is essentially appropriate for age and he does not currently demonstrate, and is unlikely to demonstrate in the future, a substantial mental impairment. (Joint Exhibit 5).

9. When, as here, the 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, the opinions of Doctors Willis and Duchowny were not controverted or shown to lack credibility. Consequently, it must be resolved that the cause of Christian's impairments was most likely a developmentally based brain abnormality, as opposed to a "birth-related neurological injury," and, regardless of the etiology of his impairments, he is not permanently and substantially mentally and physically impaired. 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

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

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. As the proponents of the issue, the burden rested on Intervenors to demonstrate that Christian suffered a "birth-related neurological injury." See 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 issue before an administrative tribunal."); Galen of Florida, Inc. v. Braniff,

696 So. 2d 308, 311 (Fla. 1997)("[T]he assertion of NICA exclusivity is an affirmative defense."); Tabb v. Florida Birth-Related Neurological Injury Compensation Association, 880 So. 2d 1253, 1260 (Fla. 1st DCA 2004)("As the proponent of the issue, the burden rested on the health care providers to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied.").

17. Here, indisputably, Christian's neurologic impairments were not "caused by an injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation" and, regardless of the etiology of his problems, Christian is not permanently and substantially mentally and physically impaired. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Christian 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); Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administrative Hearings, 686 So. 2d 1349 (Fla. 1997)(The Plan is

written in the conjunctive and can only be interpreted to require both substantial mental and substantial physical impairment.).

18. 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 Miguel Hernandez and Lynn Hernandez, on behalf of and as natural guardians of Christian M. Hernandez, a minor, is dismissed with prejudice.

DONE AND ORDERED this 17th day of March, 2009, in
Tallahassee, Leon County, Florida.



WILLIAM J. KENDRICK
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of March, 2009.

ENDNOTES

1/ 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 Christian suffered an injury to the spinal cord. Consequently, that alternative need not be addressed.

2/ The use of a blood thinner (anti-coagulant) required for ECMO therapy significantly increases the risk that any hemorrhage will be clinically significant. (Joint Exhibit 4, p. 22).

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.