

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ROGER AND SARA HUBMANN, ON )  
BEHALF OF AND AS PARENTS AND )  
NATURAL GUARDIANS OF MAXWELL )  
HUBMANN, A MINOR, )  
 )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 08-5637N  
 )  
 )  
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 June 2, 2009, by video teleconference, with sites in Tallahassee and Pensacola, Florida.

APPEARANCES

For Petitioners: Roger Hubmann, pro se  
Sara Hubmann, pro se  
6052 Antelope Street  
Milton, Florida 32570

For Respondent: Ronald A. Labasky, Esquire  
Young Van Assenderp, P. A.  
Gallie's Hall  
225 South Adams Street, Suite 200  
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

On November 10, 2008, Roger and Sara Hubmann, on behalf of and as parents and natural guardians of Maxwell Hubmann (Maxwell), a minor, filed a petition (claim) with the Division of Administrative Hearings for compensation under the Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the petition on November 12, 2008, and on February 9, 2009, 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, although Maxwell did suffer a traumatic brain injury at birth, he did not suffer a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes, because he was not rendered permanently and substantially mentally and physically impaired. Accordingly, NICA requested that a hearing be scheduled to resolve the issue of compensability.

At hearing, Respondent's Exhibits 1-4 were received into evidence.<sup>1</sup> No witnesses were called and no further exhibits were offered.

The transcript of the hearing was filed June 16, 2009, and the parties were accorded 10 days from that date to file proposed orders. However, no proposed orders were filed.

FINDINGS OF FACT

Stipulated facts related to compensability

1. Petitioners, Roger and Sara Hubmann, are the parents of Maxwell Hubmann, a minor. Maxwell was born a live infant on March 25, 2008, at Sacred Heart Hospital, a hospital located in Pensacola, Florida, and his birth weight exceeded 2,500 grams.

2. Obstetrical services were delivered at Maxwell's birth by Brian Sontag, 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 . . . 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, the parties have stipulated, and the proof is otherwise compelling, that Maxwell suffered a traumatic brain injury during the delivery process. (Transcript, pp. 9 and 10; Respondent's Exhibits 1-4). What remains to resolve is whether such injury rendered Maxwell permanently and substantially mentally and physically impaired.

5. To address the nature and significance of Maxwell's injury, NICA offered the affidavit and report of Michael Duchowny, M.D., a physician board-certified in pediatrics, neurology with special competence in child neurology, and clinical neurophysiology, who evaluated Maxwell on January 28, 2009. Based on his evaluation, as well as his review of the medical records, Dr. Duchowny was of the opinion that while Maxwell suffered a traumatic brain injury during delivery, his mental function was normal and his motor deficit was quite mild. In so concluding, Dr. Duchowny documented the results of his examination, as well as his conclusions, as follows:

PHYSICAL EXAMINATION today reveals an alert, well-developed and cooperative, well-nourished 10-month-old infant. Maxwell weighs 24 pounds and is 30 inches in height. The skin is warm and moist. There are no neurocutaneous stigmata. The hair is blond and of normal texture. The spine is straight without dysraphism. The head circumference measures 46.1 centimeters which is within standard percentiles. The anterior and posterior fontanelles are patent

and flat. There are no cranial or facial anomalies or asymmetries. The tongue and palate are moist. The neck is supple without masses, thyromegaly or adenopathy. The cardiovascular, respiratory, and abdominal examinations are unremarkable.

Maxwell's NEUROLOGICAL EXAMINATION reveals him to be alert, cooperative and fully attentive. He is quite sociable and maintains an age appropriate stream of attention. He has good central gaze fixation with conjugate following movements. The pupils are 3 mm and react briskly to direct and consensually presented light. Funduscopic examination revealed no abnormal retinal findings. There are no significant facial asymmetries of movement. The uvula is midline and the pharyngeal folds are symmetric. Tongue movements are full in all planes. Motor examination reveals an asymmetry of movement with relatively greater movement on the right side. The left upper extremity has mild stiffness but has full range of motor. There is fine motor dexterity of both hands but Maxwell demonstrates a right arm preference and will preferentially reach for an object with the right hand. When an object is moved to the left, he will ultimately offer the left and readily transfers between hands. He has symmetrical movement of both legs. He has well-developed traction and grasp responses and good head control for age. The deep tendon reflexes are slightly exaggerated being 3+ at the knees and biceps. There are no pathologic reflexes. Plantar responses are downgoing. He can stand and bear weight with good axial tone and support does not take steps independently. He has good sitting balance as well. Sensory examination is intact to withdrawal of all extremities to stimulation. Neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Maxwell's neurological examination reveals that his motor developmental milestones are on time despite a very mild asymmetry of movement and muscle tone in the upper extremities. He is preferentially a right hander due to the motoric asymmetry. In other respects, Maxwell's neurologic status is quite good and his overall level of mental functioning appears to be on target at age level.

I have had an opportunity to fully review the medical records which were mailed on January 12, 2009. The records indicate that Maxwell's neurologic problems at birth were the result of mechanical injury acquired during the delivery process. However, he has made remarkable progress and his mental function is normal and his motor deficit is quite mild . . . . (Respondent's Exhibits 3 and 4).

6. Here, the opinions of Dr. Duchowny were logical, consistent with the record, not controverted, and not shown to lack credibility. Consequently, it must be resolved that Maxwell's brain injury did not render him 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

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

8. 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.

9. 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.

10. 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.

11. 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.



12. 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.

13. As the proponents of the issue, the burden rested on Petitioners to demonstrate that Maxwell 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 issue before an administrative tribunal.").

14. Here, the proof failed to demonstrate that Maxwell was "permanently and substantially mentally and physically impaired." Consequently, given the provisions of Section 766.302(2), Florida Statutes, Maxwell 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.).

15. 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 Roger and Sara Hubmann, on behalf of and as parents and natural guardians of Maxwell Hubmann, a minor, is dismissed with prejudice.

DONE AND ORDERED this 30th day of June, 2009, 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 30th day of June, 2009.

ENDNOTE

1/ Respondent's Exhibit 2 (a report by Donald Willis, M.D., summarizing his review of the medical records related to Maxwell's birth, and opinion regarding the cause of his brain injury), and Respondent's Exhibit 3 (a report by Michael Duchowny, M.D., summarizing the results of his neurological evaluation of Maxwell, and opinion regarding the cause of his brain injury and the significance of his impairments) were received into evidence with the understanding that, if called to testify, Doctors Willis and Duchowny would testify consistent with their reports. (Transcript, p. 8).

COPIES FURNISHED:  
(Via Certified Mail)

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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.