

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SENBOYA SUTTON, as mother and)
natural guardian of JAEL)
SUTTON, A MINOR, AND JULIE M.)
GODDARD as legal guardian of)
the property of JAEL SUTTON, a)
minor,)
)
Petitioners,)
)
vs.) Case No. 09-5432N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
ST. JOSEPH'S HOSPITAL, INC.,)
d/b/a ST. JOSEPH'S WOMEN'S)
HOSPITAL; UNIVERSITY COMMUNITY)
HOSPITAL, INC.; MARK DAVIS,)
M.D.; MARK DAVIS, M.D., P.A.;)
UNIVERSITY OF SOUTH FLORIDA)
BOARD OF TRUSTEES; KENNETH J.)
SOLOMON, M.D.; AND NNEKA)
AMAIZU, M.D.,)
)
Intervenors.)
)
_____)

FINAL ORDER

Upon due notice, a final hearing was held on December 3, 2010, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings, via video teleconference with sites in Tallahassee and Tampa, Florida.

APPEARANCES

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For Intervenor Kenneth J. Solomon, M.D., and Nneka Amaizu, M.D.:

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STATEMENT OF THE ISSUE

Whether Jael Sutton, a minor, qualifies for benefits under Florida's Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On October 5, 2009, Petitioner Senboya Sutton, as mother and natural guardian of Jael Sutton, and Julie M Goddard, as legal guardian of the property of Jael Sutton, a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH). Named in the petition as involved in Jael's birth were Mark Davis, M.D., Nneka Symphorosa Amaizu, M.D., and St. Joseph's Women's Hospital.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA), Dr. Davis, Dr. Amaizu, and St. Joseph's Women's Hospital, with their respective copies of

the petition/claim on October 8, 2009. By Order entered October 23, 2009, St. Joseph's Hospital, Inc., d/b/a St. Joseph's Women's Hospital (St. Joseph's) was granted Intervenor status. Without timely objection to motions to intervene and by Order entered October 27, 2009, University Community Hospital, Inc., Mark Davis, M.D., and Mark Davis, M.D., P.A., were granted Intervenor status; by Order entered October 29, 2009, University of South Florida Board of Trustees was granted Intervenor status; and by Order of November 4, 2009, Kenneth J. Solomon, M.D., and Nneka Amaizu, M.D., were granted Intervenor status.

Following several extensions of time in which to do so, on April 30, 2010, NICA filed the Response to Petition required by section 766.305(4), Florida Statutes, suggesting that Jael did not suffer a "birth-related neurological injury" as defined in section 766.302(2), and requested that a hearing be scheduled to resolve whether the claim was compensable. Discovery ensued, and final hearing was held on December 3, 2010, in accord with the parties' Pre-Hearing Stipulation, which had been filed November 19, 2010.

Either pursuant to the parties' written or oral stipulations, or pursuant to oral rulings on the record, the following items were admitted in evidence, some of which are composites and some of which are duplicative: Joint Exhibits 1-

8, 9, 9A, 10, 10A, 11, 11A, 12, 12A, 13, and 14; Petitioners' Exhibits 1 and 2; Respondent NICA's Exhibit 3; Intervenor St. Joseph's Exhibit 1; and Intervenor University Community Hospital's (UCH's) Exhibit 1. There also were two after-filed exhibits, which the undersigned has marked as Petitioners' Exhibit 3 and UCH Exhibit 2, respectively.¹

No oral testimony was presented. Petitioners, Respondent, and Intervenor (collectively) were accorded time to state their respective positions. (TR 27-72).

The Transcript (TR) was filed on January 7, 2011, and the parties were accorded 30 days thereafter in which to file their proposed final orders. Upon an agreed motion, filed February 3, 2011, an Order was entered on February 4, 2011, extending the filing of the parties' respective proposals to February 11, 2011. All parties filed their respective proposals on time. Intervenor filed a single, integrated proposal. All proposals have been considered.

FINDINGS OF FACT

1. Petitioner, Senboya Sutton, is the natural parent of Jael Sutton (Jael).

2. At all times material, Senboya Sutton was an obstetric patient of Intervenor, Mark Davis, M.D., who was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by section

766.302(7). Dr. Davis provided obstetrical services "in the course of labor, delivery and resuscitation in the immediate postdelivery period in a hospital," as related to this case.

3. Jael was born on November 28, 2006.

4. At birth, Jael weighed in excess of 2,500 grams.

5. Jael was a single gestation.

6. Jael was born live at St. Joseph's.

7. St. Joseph's is a licensed hospital located in Tampa, Florida.

8. The parties stipulated that all notice requirements of the statute have been met and that the notice requirement of section 766.316, is not at issue herein.²

9. 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." § 766.302(2), Fla. Stat. See also §§ 766.309 and 766.31, Fla. Stat.³

10. Herein, it is undisputed that Jael is "permanently and substantially mentally and physically impaired." Also, as described more fully hereafter, all the testifying experts concur that Jael's underlying brain damage did not result from a

mechanical injury, but did result from sepsis and/or meningitis. However, it remains for determination whether or not Jael's brain injury and permanent and substantial mental and physical impairment occurred in the course of "labor, delivery, or resuscitation in the immediate postdelivery period," hereafter referred to as "the statutory period."⁴

11. The following terms were defined within this record: "Hypoxia" means "not enough oxygen." "Cerebral ischemia" means "not enough blood is getting to the brain." "Perfusion," for purposes of the instant case, means "to pass blood through the brain to ensure adequate oxygen."

12. For her pregnancy with Jael, Ms. Sutton was first seen by Dr. Davis on August 17, 2006. Her delivery date was estimated as January 25, 2007.

13. On November 17, 2006, a vaginal culture was taken of Ms. Sutton. On November 25, 2006, it was reported as "positive" for Group B streptococcus (Group B-strep), a genus of bacteria that causes life-threatening infections in newborn infants.⁵ Dr. Chalhub testified that intrauterine infections are the leading cause of cerebral palsy in term infants. Jael was not a term infant, but cerebral palsy is one of the conditions with which he has been diagnosed.

14. On November 27, 2006, at approximately noon,⁶ Ms. Sutton presented to St. Joseph's. She complained of a

single episode of leaking fluid at 1:02 p.m. Hospital records characterized this as the onset of labor, despite Ms. Sutton's denial of contractions. The plan of treatment was to rule out spontaneous rupture of the membranes. A nitrazine test was performed to identify amniotic fluid outside the amniotic sac, and was negative. Dr. Davis was present and ordered a non-stress test. At 1:34 p.m., Ms. Sutton again complained of leaking fluid and mucus discharge was noted. At 1:58 p.m., Dr. Davis reviewed the fetal monitor strip and discharged Ms. Sutton.

15. At approximately 5:50 p.m., on November 27, 2006, Ms. Sutton presented to UCH. Her membranes were noted as possibly ruptured, and she complained of small gushes of fluid since noon. Again, a nitrazine test was performed and was negative. A speculum vaginal examination was performed; fetal heart rate was monitored; and a non-stress test was performed. She was discharged home upon phone orders of the "on-call" physician and advised to follow up with her obstetrician.

16. The next morning, before 10:00 a.m., Dr. Davis did an ultrasound in his office. The ultrasound showed what was believed to be decreased amniotic fluid; a 34-week, four day gestation; and ruptured membranes. Due to the Group B strep and the gestation in excess of 34 weeks, Dr. Davis initiated a plan of care to induce labor and perform a vaginal delivery.

17. Later on November 28, 2006, Ms. Sutton was admitted to St. Joseph's. Examination by speculum showed positive nitrazine and a copious amount of fluid in the vaginal vault, which, in hindsight after Jael's birth, Dr. Davis recorded as "probably a high leak to begin with." A fern test for nitrazine was positive. The cervix was 2-3 centimeters dilated. Labor steadily progressed. At 11:32 a.m., a nurse noted a non-reassuring fetal heart rate. At 11:47 a.m., Dr. Davis reviewed fetal heart rate tracings from his office. These were better, without decelerations. Ms. Sutton was placed in a left lateral position and continuous face mask oxygen was maintained.

18. At 11:49 a.m., another sterile vaginal exam was performed. The amniotic fluid was noted to be clear and of normal quantity. At 11:54 a.m., due to a non-reassuring fetal heartbeat, Dr. Davis called for an immediate Caesarean section. Jael's fetal heart rate was 160, just prior to the C-section.

19. A low transverse uterine incision was performed at 12:16 p.m., and Jael was delivered. Throughout the C-section, under general anesthesia, Ms. Sutton's oxygen saturation levels remained at 100.

20. There is no record of trauma or of mechanical injury to Jael during labor or delivery. Indeed, the parties agree that there was no mechanical injury to Jael during labor or delivery. See infra.

21. The delivery record does not show checks or fill-ins for the following, but the following is printed or typed in on the delivery room record form: "suction bulb, suction catheter, tactile stimulation, oxygen/PPV^[7], intubated, neonatologist present."

22. Apgar scores were taken at one and five minutes after Jael's birth.⁸

23. Jael's one minute Apgar score showed:

Heart rate	2 > 100
Respiratory effort	0 none
Muscle tone	1 some flexion
Activity	0 none
Color	0 blue/pale
<hr/> Total	<hr/> 3

24. Jael's five minute Apgar score showed:

Heart rate	2 > 100
Respiratory effort	2 good cry
Muscle tone	1 some flexion
Activity	1 grimace
Color	1 extremities blue
<hr/> Total	<hr/> 7

25. It is a point of contention among the parties as to whether Jael was intubated in the delivery room or in the Neonatal Intensive Care Unit (NICU). It is more likely that intubation and administration of nitrous oxide began after he was stabilized, as evidenced by the good Apgar score at five minutes after birth.

26. The "good cry" recorded at five minutes of life (12:21 p.m.) suggests that Jael was breathing on his own at that

point, had stabilized, and was not intubated before his admission to the NICU at 12:40 p.m.

27. Jael's cord blood gas was collected at ten minutes after birth at 12:26 p.m. Its pH measured 7.206. A cord blood of 7.2 or higher suggests absence of metabolic acidosis. Metabolic acidosis is a sign of a pathological condition, not of a mechanical injury or of oxygen deprivation.⁹

28. At 12:32 p.m., Jael was transferred by isolette from the delivery/operating room to NICU due to "post C-section respiratory status." It would be fair to say that, at this point, if not sooner, Jael's care passed from the NICA participating physician, who provided obstetrical services to the mother, to other health care professionals in the NICU.

29. At 12:40 p.m., on November 28, 2006, Jael was admitted to the NICU. The records show that ventilation support was given, and Jael was intubated. No physician associated with Jael's delivery or NICU care testified. However, Dr. Katz, a pediatric neurologist, opined without refutation that intubation at that stage might have been for ventilation, but could as easily have been to keep Jael's airway open because he was born prematurely. The reasons that were contemporaneously documented for Jael's admission to NICU were "premi, 34 weeks, R/O sepsis." This notation most probably means, "34 week gestational, premature infant; rule out sepsis."

30. "'Sepsis' refers to the presence in the blood or other tissues of pathogenic microorganisms or their toxins; the condition associated with such presence."¹⁰

31. As described more fully hereafter, all testifying medical experts, regardless of specialty, agreed that in the NICU, Jael suffered from vascular inflammation, decreased blood pressure, and diminished perfusion caused by infection. Where they disagree is whether it was sepsis or meningitis which was ultimately responsible for Jael's diminished blood supply to the brain.

32. "'Meningitis' is an inflammation of the meninges, usually by either a bacterium (bacterial meningitis) or a virus (viral meningitis)."¹¹

33. Upon admission to the NICU at 12:40 p.m., Jael's oxygen saturation levels were at 93 per cent, and despite continuing very low blood pressures, his oxygen saturation levels remained in the 80's and 90's until 6:40 p.m., that evening.

34. Jael was not assessed again after NICU admission until 1:20 p.m. At that time, a nurse noted that she was unable to obtain his blood pressure in either leg, although no reason was given. Dr. Katz testified that this could mean anything, up to and including an ill-fitting blood pressure cuff. Jael's

bedside glucose (BSG) was recorded as 10, and 50cc of D10 bolus were ordered.

35. At 1:44 p.m., on November 28, 2006, the BSG was recorded as 43 and another bolus was administered.

36. At 1:58 p.m., November 28, 2006, a blood culture was drawn which was not reported back until the next day, but when it was reported back, the blood culture was read as positive for Group B strep.

37. At 2:00 p.m. and 2:05 p.m., on November 28, 2006, boluses and antibiotics were ordered, but one or more antibiotics were not administered to Jael for the first time until considerably later.

38. At 2:05 p.m., on November 28, 2006, orders were written for survantia and dopamine. Dr. Katz opined that Jael was in septic shock at this time.

39. At 2:16 p.m. on November 28, 2006, Neonatologist Dr. Amaizu entered an NICU admission note that Jael was lethargic with decreased reactions to stimuli. Capillary reflex was > 2 sec. Jael had decreased tone and activity. Although perfusion was decreased, his skin was pink. The active diagnosis at that point was "hypoglycemia, prematurity, respiratory distress syndrome, R/O sepsis newborn."

40. At 2:25 p.m., an NICU nursing assessment was done. Jael was described as withdrawn, flaccid, lethargic with absent

reflexes (suck, rooting, moro, and grasp). Central cyanosis (blueness in the torso) was observed. At 3:07 p.m., dopamine was administered.

41. On the following day, November 29, 2006, Terry Declue, M.D., performed an endocrinology consult on Jael, who was on nitrous oxide via an oscillatory ventilator. He noted hypoglycemia. Perfusion was noted as good with capillary refill one second. The chest appeared clear, and Jael moved spontaneously. Dr. Declue's diagnosis was:

1. Severe metabolic acidosis
2. Lactic acidosis
3. Respiratory failure
4. Gram positive cocci sepsis
5. Pulmonary hypertension

42. On December 1, 2006, three days post-birth, a cranial neuro-sonogram was performed. At that time, hospital Radiologists Steen Mandel, M.D., and John Rasmussen, M.D., read the sonogram as normal.

43. On December 4, 2006, four days post-birth, Jael underwent a lumbar puncture. His cerebrospinal fluid showed a white blood count of 185, reference 0-5. The consulting neurologist diagnosed Strep Group B sepsis and meningitis.

44. On December 10, 2006, a second cranial ultrasound was done. This second sonogram was read by Michael Shaw, M.D. He recorded that ventricular size and configuration was normal, with no evidence of germinal matrix or inter-ventricular bleed,

but the ventricles appeared slightly (not significantly) more prominent than the prior December 1, 2006, study.

45. On December 15, 2006, an MRI was performed and interpreted by radiologist Elaine Engleman, M.D. Her impression was:

Extensive cystic encephalomalacia^[12] involving both cerebral hemispheres throughout all vascular territories. There is slightly less extensive involvement in the posterior cerebral artery territories. There is preservation of parenchyma involving the basal ganglia, thalami and brainstem.

46. Jael was discharged from St. Joseph's on January 5, 2007, with a diagnosis of:

- 1) Prematurity at 34 weeks gestational age
- 2) Respiratory distress syndrome
- 3) Neonatal depression
- 4) Severe metabolic acidosis
- 5) Patent ductus arteriosus
- 6) Cholestasis
- 7) Lactic acidosis
- 8) Respiratory failure
- 9) Meningitis that was treated for three weeks and supraventricular tachycardia

47. On August 1, 2007, another MRI was performed on Jael's brain and interpreted by Radiologist, James Hanner, M.D. His report opined:

FINDINGS:
There is extensive cystic encephalomalacia seen throughout in the frontal, temporal, and parieto-occipital lobes associated with significant ex vacuo enlargement of the occipital horns, bilaterally, left greater than right. There is some sparing of the

medial frontal accident, hemorrhage, or extra-axial fluid collection is identified. The hindbrain structures are normal without developmental anomaly. There is wallerian degeneration of the cerebral peduncles bilaterally.

IMPRESSION:

Extensive supratentorial systic encephalomalacia associated with ex vacuo enlargement of the lateral ventricles and occipital horns, left greater than right. The volume loss has progressed when compared to the earlier examination.

48. Despite some variant medical testimony, across all experts, to the effect that Jael was probably infected with Group B-strep from his mother before labor, during labor, or during delivery, Intervenors collectively submit that, ". . . Jael Sutton did not suffer from oxygen deprivation during labor or delivery . . ." (proposed finding of fact 54 of Intervenors' proposed final order). Due to this admission and the other parties' similar positions, it is not necessary for the undersigned to resolve when labor began; when "active" labor began; when the amniotic fluid began to leak; or even whether Jael's delivery by C-section undermines any medical opinions rendered herein in terms of acquisition of bacterial infection during Jael's passage through the birth canal.

49. Therefore, the issue is further narrowed to whether or not Jael suffered from oxygen deprivation "occurring in the course of . . . resuscitation in the immediate postdelivery

period . . . which render[ed] the infant permanently and substantially mentally and physically impaired."

50. The parties presented medical experts in a variety of fields who offered their opinions, within reasonable medical probability, as to what happened to Jael and within which periods of time. All experts testified by deposition, but the undersigned has had the benefit of viewing DVDs of the depositions of Dr. Robert Zimmerman and Dr. Mary K. Edwards-Brown.

51. Michael Duchowny, M.D., a Florida-licensed physician, is a professor of neurology at the University of Miami Leonard Miller School of Medicine; a clinical professor of neurology at Florida International University College of Medicine; and senior attending physician at Miami Children's Hospital. He is board-certified in pediatric neurology, with special competence in child neurology, clinical neurology, and clinical neurophysiology. He performed a medical examination of Jael on February 17, 2010, and reviewed the mother's and the child's medical records, including the ultrasound study of December 1, 2006, and the MRI scans of December 15, 2006, and August 1, 2007. He did not read the December 10, 2006, ultrasound.

52. Dr. Duchowny's testimony confirmed, without equivocation, that Jael is tragically and profoundly permanently and substantially mentally and physically impaired. It was his

ultimate opinion that Jael did not suffer a birth-related neurological injury due either to mechanical injury or deprivation of oxygen supply or blood flow to the brain within the statutory period. He reached this conclusion because, in his expert opinion, no impairment occurred during the statutory period.

53. Dr. Duchowny did not see, on the films he reviewed, any sign of damage during the statutory period. He diagnosed the cause of Jael's multiple problems as meningitis, and opined, in pertinent part, as follows:

Q: . . . Do you have an opinion, within a reasonable degree of medical probability, whether or not he had an impairment that was acquired during labor, delivery or post-delivery? . . .

A: If we're going to define it as impairment, I would say, no.

Q: So what you're saying is that no damage was done, even if he had the infection, right?

A: I am saying that, because I don't see any indication of damage at that time.

Q: . . . You don't find him -- you don't find that he had a mechanical injury; is that right?

A: That's correct.

Q: And you don't find that there was deprivation of blood flow or oxygen, correct?

A: That's correct. (Depo. 33-34).

54. Dr. Duchowny testified concerning the meningitis diagnosis as follows:

A. . . . Meningitis means -- it specifically refers to a bacterial infection of the membranes covering the brain. These are anatomically called the meninges, so that in its strictest sense, a meningitis is an infection and an inflammation of the membranes covering the brain, but, in point of fact, it spreads from the membranes usually directly to the brain itself, and that's where the problems come in. . . .

* * *

I don't believe that Jael's brain damage was due to either a mechanical injury or oxygen-deprivation of oxygen supply or blood flow to the brain. I think that Jael's brain damage is primarily due to the effects of meningitis.

* * *

. . . the MRI findings are consistent with severe bacterial meningitis, in this case, Group B strep meningitis. The findings, also, to me, are supported by the fact that if one looks at the clinical course of Jael, there really is no specific hypoxic or ischemic event that would be in the records to explain the findings on neuroimaging and the neurologic outcome. . . . So although one can see findings on MRI that are consistent with hypoxic and ischemic damage, for example, cystic encephalomalacia, if one looks at the totality of the picture, meaning, put the clinical events together with the neuroimaging findings and the neurologic examination, I think that this pattern of evidence all supports the fact that Jael's neurologic damage is primarily due to bacterial meningitis. (Depo. 20-26).

55. Michael Katz, M.D., is a pediatric neurologist, and board-certified in pediatrics, pediatric neurology, and neurodevelopmental disabilities. He is based at Hackensack University Medical Center, New Jersey. He examined Jael on September 14, 2009, and testified on behalf of Petitioners by a November 19, 2010, deposition. He considered the "resuscitative period" in Jael's case to be "until the Apgar is normalized at five minutes when the Apgar was seven," and opined that the injury to Jael's brain did not take place in that period. He concluded that the cause of Jael's permanent and substantial mental and physical impairment was a "strep B meningitis."

56. More specifically, Dr. Katz testified:

Q: In your opinion within a reasonable degree of medical probability, was there any injury to Jael Sutton's brain caused by oxygen deprivation occurring during labor or delivery or resuscitation in the immediate postdelivery period?

A: No.

* * *

Q: What significant history did you elicit that leads you to reach that diagnosis and opinion of causation?

* * *

A: . . . First is that Mom was group B strep positive. The second was that mom had premature ruptured membranes. . . . Jael had a clinical deterioration, essentially went into shock and required pressors and resuscitation. And the ultimate, and

probably most important fact, is when he was finally clinically stable, we were able to do a lumbar puncture, and we drew out group B strep spinal bacteria in his spinal fluid, along with a diagnosis of group B strep meningitis. (Depo. 11-12).

57. Robert Zimmerman, M.D., is a professor of radiology of the division of neurosurgery at Children's Hospital of Pennsylvania. He has been chief of pediatric neurology there since 1989. He is licensed to practice medicine in Pennsylvania, New Jersey, and Israel, and has been board-certified in diagnostic radiology and neuroradiology.

58. In Dr. Zimmerman's opinion, after having read the two ultrasounds (December 1, 2006 and December 10, 2006) and the two MRIs (December 15, 2006 and August 1, 2007) performed on Jael, the first ultrasound was abnormal and clearly showed decreased oxygen (hypoxia) and decreased blood flow (ischemia), and the remaining studies showed advancing stages of brain injury (the brain turning to "swiss cheese") due to lack of oxygen and lack of blood flow. This was cystic encephalomalacia. He acknowledged that a hypoglycemic event could possibly have contributed to the situation, but he perceived no traumatic event and no mechanical injury.

59. As to timing, Dr. Zimmerman indicated that the progression of the ischemia possibly started intrauterine, even before delivery, but the best he could place a point of injury

was, "in and around the time that the kid was being delivered, the day of birth or a little earlier, or perhaps right after birth, but somewhere in that vicinity Sometime around the 28th." He believed that hypoxic ischemia caused the holes in Jael's brain, and that the condition first began to develop more than 1-6 days before the first ultrasound of December 1, 2006. He indicated that sepsis was probably the cause of the oxygen insufficiency and ruled out bacterial meningitis, but he ultimately conceded he would defer those decisions to a clinician, such as a pediatric neurologist.

60. Dr. Zimmerman's opinion is diminished by his vacillations on placing the time of injury and his disclaimers, and by there being no indication he reviewed any medical information on Jael other than the four films.

61. Mary K. Edwards-Brown M.D., is a neuro-radiologist with a subspecialty interest in pediatric neuroradiology. She is board-certified in radiology and in neuroradiology. She is also a full professor of radiology at Indiana University and practices at Riley Children's Hospital, Riley, Indiana. She also teaches medical professionals at many levels, including preparation for specialty boards.

62. Dr. Edwards-Brown also reviewed the history and all four of Jael's films (December 1, 2006; December 10, 2006; December 15, 2006, and August 1, 2007). She, unlike

Dr. Zimmerman, considered the first ultrasound to be normal. In the December 10, 2006, MRI, she found non-specific brain damage by tissue destruction. In the December 15, 2006, MRI, she, like Dr. Zimmerman, found massive brain damage and diffused cystic encephalomalacia, which she also considered non-specific. According to Dr. Edwards-Brown, the most common cause for this condition is that insufficient oxygen was getting to the brain, which can occur by not enough oxygen being present, by infection, or by trauma.

63. Dr. Edwards-Brown ultimately opined that:

. . . [Jael] was suffering from a profound meningitis, which caused the pattern of hypoxic-ischemic encephalitis -- encephalomalacia. And it was a mechanism of meningitis that induced hypoglycemia and brain injury that happened after this child was born.

* * *

Given that Jael was born with Apgars of 3 and 7, and a pH of 7.2, those are signs that -- most children who have those Apgars and that non-acidotic pH at birth generally do very well, and certainly don't have a pattern of injury as we've seen here.

And given the fact that the ultrasound of December 1st looks normal to me it is my opinion that this injury occurred after the time of birth [November 28, 2006]. And most likely, the bulk of the injury occurred after December 1st, that first ultrasound that looks so very normal.

64. Doctors Duchowny, Katz, and Edwards-Brown concurred, in varying terminology, that Jael's situation was a slow-evolving brain injury not consistent with a sentinel hypoxic insult occurring during resuscitation in the immediate postdelivery period. Dr. Zimmerman also could not point to any specific sentinel event.

65. Elias Chalhub, M.D., testified by a deposition taken November 26, 2010. Dr. Chalhub is board-certified in pediatrics, psychiatry, and neurology, but he has not done research or published in over 20 years. Based on a records review, and without examining Jael, he testified that Jael's Group B strep sepsis occurred within an hour and a half of birth when the child was in the NICU in septic shock. He noted the records of Jael's pale, blue color (cyanosis) but also agreed that the baby had reasonably good Apgars and normal cord gas before transfer to the NICU. He stated Jael deteriorated rapidly after the good Apgars, which, in his opinion, is consistent with septic shock.

66. However, Dr. Chalhub conceded that the baby was stable at five minutes after birth; that there was nothing in the nursing notes at 1:00 p.m., on December 28, 2006, that alerted to a problem; that there was no indication about an inability to get blood pressures before 1:20 p.m.; that thereafter, the baby

became hypotensive, and that the first abnormal blood pressure reading was at 1:52 p.m., an hour and 36 minutes after birth.

67. Dr. Chalhub opined that between birth at 12:16 p.m. and 2:00 p.m., on November 28, 2006, there was sepsis and decreased perfusion that resulted in Jael's injury. He was satisfied that the Group B-strep, which may have been acquired before labor or during birth, resulted in sepsis and that the brain injury occurred before the sepsis became meningitis, but conceded the meningitis, which came later, could have contributed to Jael's brain damage. He stated he did not believe that hypoglycemia, detected at 1:20 p.m., contributed to the brain damage.

68. That said, Dr. Chalhub, in asserting compensability, also set the "immediate postdelivery period in a hospital" at an arbitrary "six hours from birth," without even relating the six hour period to acts of "resuscitation" or to the facts of this case. He claimed "six hours" would be what neonatologists would say constituted the "immediate post-resuscitative period," but he quoted no neonatal authority for the proposition. Clearly, his arbitrary concept is not the understanding of the greater medical community as evidenced by the other testifying physicians, nor is it the status of Florida law.¹³ Accordingly, I have discounted his opinion that the oxygen deprivation occurred during the statutory period.

69. It might have been helpful to have heard testimony from a perfusionist or neonatologist, but herein radiologists' opinions have been compared with each other and neurologists' opinions have been compared with those of other neurologists. Dr. Chalhub's opinion is less persuasive than some other witnesses for the reasons related supra. The opinions of the physicians who actually examined Jael are more persuasive than those of physicians who only did a records review. Finally, the logic and reasoning of all experts have been compared and weighed and one common theme appears: whether characterized as "sepsis" or "meningitis," the Group B-strep resulted in a plethora of diagnoses, culminating in ultimate brain cell death.

70. Within these parameters, and upon the credible evidence as a whole, it is found that more likely than not, Jael did not suffer brain injury due to oxygen deprivation that occurred during labor, delivery or resuscitation in the immediate postdelivery period in a hospital. Rather, it is more likely than not that Jael suffered brain damage after he was initially stabilized and after he was removed to the NICU due to his premature birth status.

71. Based on the credible evidence as a whole, it appears that wherever and whenever Jael was intubated, he probably was not intubated until after the Apgars and after the immediate resuscitative period ended. Due to Jael's "good cry"

immediately after delivery, the increasingly good Apgars, the good cord blood report, and the fact that there was no indication of oxygen deprivation to the brain at least until the first ultrasound of December 1, 2006, three days after delivery, the more compelling evidence supports a finding that Jael did not suffer from oxygen deprivation during labor or delivery and did not suffer injury to the brain during that period, either. As to his intubation in NICU, it is as likely that his airway was being protected by intubation as it is that he suffered any problem breathing or any oxygen deprivation before 2:00 p.m., on November 28, 2006, when he went into shock. Accordingly, the record fails to support a finding that there was an hypoxic or ischemic event during the statutory period (labor, delivery, or resuscitation in the immediate postdelivery period in a hospital).

72. Alternatively, it is conceivable, but not proven, that Jael suffered oxygen deprivation at some unspecified point in time which occurred after 2:00 p.m., on December 28, 2006, and after he had arrived in NICU, which still is not within the statutory period. Since both the oxygen deprivation and the injury cannot be placed in the statutory period, Petitioners cannot prevail.

CONCLUSIONS OF LAW

73. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this cause. §§ 766.301-766.316, Fla. Stat.

74. 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 after January 1, 1989. § 766.303(1), Fla. Stat.

75. 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 submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." § 766.305(4), Fla. Stat.

76. 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.

77. In discharging this responsibility, the Administrative Law Judge must make the following determination based upon 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.

78. Pertinent to this case "birth-related neurological injury" is defined by § 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 an 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.

79. Petitioners, who have asserted from the start that Jael did not suffer from oxygen deprivation in the statutory period, but suffered from meningitis that manifested after birth, did not assert the statutory presumption of section 766.309 (1)(a). Rather, in reliance upon St. Vincent's Medical Center, Inc. v. Bennett, 27 So. 3d 65, (Fla. 1st DCA 2009), Intervenor's have invoked the presumption. That case is currently before the Florida Supreme Court, but the First District Court of Appeal's holding is binding here. Nevertheless, the presumption having been applied in Intervenor's favor, the presumption has been fully rebutted by Petitioners and Respondent.

80. Consequently, given the provisions of section 766.302(2), Jael does not qualify for coverage under the Plan. See also §§ 766.309(1) and 766.31(1), Fla. Stat.; Humana of Fla., Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 5th 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, Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan, 668 So. 2d 974,979 (Fla. 1996).

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED:

The claim for compensation filed by Senboya Sutton, as mother and natural guardian of Jael Sutton, a minor, and Julie Goddard, as legal guardian of the property of Jael Sutton, a minor, is dismissed with prejudice.

DONE AND ORDERED this 25th day of March, 2011, in
Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of March, 2011.

ENDNOTES

1/ The filed Transcript is accurate; its table of contents is not.

Jt. Ex. 1 is Dr. Davis' office records; Jt. Ex. 2 is UCH's medical records (Bates 001-023); Jt. Ex. 3 is UCH's medical records (Bates 024-057); Jt. Ex. 4 is UCH's medical records (Bates 058-067; Jt. Ex. 5 is St. Joseph's medical records (Bates SJH 1-5); Jt. Ex 6 is St. Joseph's medical records (Bates 185-201) [Some other items are mixed in.]; Jt. Ex. 7 is St. Joseph's medical records (Bates 208-328); Jt. Ex. 8 is St. Joseph's medical records (Bates 329-1126); Jt. Ex. 9 is Jael Sutton's ultrasound report dated 12/1/06 (pg 968); Jt. Ex. 10 is Jael Sutton's ultrasound report dated 12/10/06 (page 958); Jt. Ex. 11 is Jael Sutton's MRI report dated 12/15/06 (pages 949 A and B); Jt. Ex. 12 is Jael Sutton's MRI report dated 8/1/07 (J. Sutton 001-002); Jt. Ex. 13 is the report of Michael Duchowny, M.D. (pages 1-4); Jt. Ex. 14 is the report of Michael Duchowny, M.D. (pages 5-6); Jt. Exs. 9A, 10A, 11A, and 12A are the actual films on CD corresponding to the reports labeled "Jt. Exs. 9, 10, 11, and 12," respectively.

Petitioners' Ex. 1 is the 11/19/2010 deposition of Dr. Michael Katz, with exhibit. Petitioners' Ex. 2 is the

deposition of Dr. Mary K. Edwards-Brown with exhibits/enclosures. Petitioners' after-filed DVD of Dr. Edwards-Brown's deposition has been marked as Petitioners' Ex 3.

Respondent NICA withdrew pre-marked NICA Exs. 1 and 2 (two black notebooks). NICA Ex. 3 is the Deposition of Dr. Michael Duchowny with exhibits.

St. Joseph's Ex. 1 is the deposition of Dr. Elias G. Chalhub.

UCH's Ex. 1 is Dr. Robert Zimmerman's deposition with all exhibits. UCH's after-filed DVD of Dr. Robert Zimmerman's deposition has been marked as UCH's Ex. 2.

2/ (TR-7-8). Accordingly, if the claim is found compensable, Petitioners' only recourse is NICA, and if the claim is found not compensable, Petitioners' only recourse is a circuit court action.

3/ (TR-10,72-73). Otherwise, the parties are aligned as follows: Petitioners and Respondent NICA submit the claim is not compensable as Jael did not suffer 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 a hospital which rendered the infant permanently and substantially mentally and physically impaired." Intervenors contend that Jael suffered such an injury within the statutory period. (Prehearing Stipulation).

4/ The parties are also divided upon how the statutory presumption at section 766.309 (1) (a) is to be applied. Petitioners and NICA assert that only a "claimant," and thus, only a petitioner, may assert the presumption. Intervenors assert that they are equally entitled to assert the presumption. Intervenors have been accorded the presumption. However, by their proposed final order, Intervenors have acknowledged that Jael did not suffer oxygen deprivation during labor or delivery. See Conclusions of Law.

5/ See Dorland's Illustrated Medical Dictionary, 1588 (28th ed. 1994).

6/ All times from all medical records have been converted to standard a.m. and p.m. times.

7/ "PPV" is an abbreviation for "Positive pressure ventilation."

8/ Apgar scores are a numerical expression of the condition of a newborn infant and reflect the sum of points gained on assessment of heart rate, respiratory effort, muscle tone, reflex irritability, and color, with each category being assigned a score ranging from the lowest score of zero to a maximum of two. See Dorland's Illustrated Medical Dictionary, 1497 (28th ed. 1994).

9/ "'Acidosis' is a pathologic condition resulting from accumulation of acid or depletion of the alkaline reserve (bicarbonate content) in the blood and body tissues, and characterized by an increase in hydrogen ion concentration (decrease of pH). Metabolic acidosis is a disturbance in which the acid-base status of the body shifts toward the acid side because of loss of base or retention of noncarbonic, or fixed (nonvolatile), acids; called also *nonrespiratory acidosis*." See Dorland's Illustrated Medical Dictionary, 16 (28th ed. 1994.)

10/ See Dorland's Illustrated Medical Dictionary, 1507 (28th ed. 1994).

11/ See Dorland's Illustrated Medical Dictionary, 1011 (28th ed. 1994).

12/ "'Encephalomalacia' is softening of the brain, especially that caused by infarct." See Dorland's Illustrated Medical Dictionary, 549 (28th ed. 1994). Dr. Edwards-Brown testified that this means "the brain has diffusely deteriorated to areas of cystic change; in other words, big holes have developed throughout the brain where the brain has died."

13/ The facts of the instant case do not correlate with Orlando Regional Health Care System, Inc. v. Florida Birth-Related Neurological Injury Compensation Plan, 997 So. 2d 426 (Fla. 5th DCA 2008), where the infant was born with meconium aspiration and never had spontaneous respiration; a code was called within two minutes of birth; and there were immediate chest compressions and intubation. In the instant case, there was a significant time gap between the child being stabilized and the injury. The fact that Jael's brain injury from oxygen deprivation can be traced back to an infection does not satisfy the requirement that the oxygen deprivation occur during labor, delivery, or resuscitation in the immediate postdelivery period in a hospital. See Nagy v. Fla. Birth-Related Neurological

Injury Comp. Ass'n, 813 So. 2d 155 (Fla. 4th DCA 2002). Cf. St. Vincent's Medical Ctr, Inc. v. Bennett, supra.

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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.