

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MELISSA GUTIERREZ AND FRANCISCO )  
SANTIAGO, on behalf of and as )  
parents and natural guardians )  
of ISAIAH SANTIAGO, a minor, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 09-6867N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
ADVENTIST HEALTHCARE )  
SYSTEMS/SUNBELT, INC., d/b/a )  
FLORIDA HOSPITAL CELEBRATION, )  
 )  
Intervenor. )  
\_\_\_\_\_ )

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon Plaintiffs Motion for Summary Final Judgment Regarding NICA Compensability [sic], filed May 31, 2010, and Respondent's Motion for Summary Final Order, served and filed June 1, 2010.

STATEMENT OF THE CASE

1. On December 17, 2009, Melissa Gutierrez and Francisco Santiago, as parents and natural guardians of Isaiah Santiago, a minor, filed a Petition (claim) with the

Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan), for injuries allegedly associated with Isaiah's birth on July 15, 2007.

2. DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on December 22, 2009, and served Florida Hospital Celebration and David Marcantel, M.D., each on December 21, 2009. These are the only hospital and/or medical personnel named in the Petition as present at, or associated with, Isaiah's birth. Because of ambiguities in the return of service from Dr. Marcantel, he was served once again as of February 24, 2010. Only Adventist Healthcare Systems/Sunbelt, Inc., d/b/a Florida Hospital Celebration moved to intervene, and its intervention was authorized by an Order entered May 24, 2010.

3. On March 17, 2010, following several extensions of time in which to do so, Respondent NICA served its Response to the Petition and gave notice that it was of the view that Isaiah did not suffer a "birth-related neurological injury" as defined in Section 766.302(2), Florida Statutes, which renders an infant "permanently and substantially impaired," per Section 766.302(3), Florida Statutes. NICA's Response requested that a hearing be scheduled to resolve the issue of compensability.

Such a hearing was scheduled for August 11, 2010, but has since been cancelled.

4. On May 28, 2010, Petitioners served their Motion for Summary Judgment Regarding NICA Compensability,<sup>1</sup> and on June 1, 2010, Respondent served its Motion for Summary Final Order,<sup>2</sup> attaching as support, the affidavit and medical report of Donald C. Willis, M.D., and reciting that Petitioners did not oppose the motion.

5. Within the time period provided by Florida Administrative Code Rules 28-106.103 and 28-106.204, Intervenor served, on June 7, 2010, a Motion for Extension of Time Within Which to Respond to the Petitioners' Motion for Summary Judgment Regarding NICA Compensability. A case management conference was held on August 5, 2010, and an Order, entered August 6, 2010, established a schedule for further discovery and trial preparation, and granted additional time for consideration of the pending motions.

6. On August 12, 2010, Respondent NICA filed the report of Michael R. Duchowny, M.D., dated July 21, 2010. On September 1, 2010, Respondent filed an affidavit by Dr. Duchowny adopting Dr. Duchowny's July 21, 2010 report.<sup>3</sup>

7. On August 24, 2010, Intervenor filed a Notice Concerning the Expert Report of Dr. Duchowny and Summary Order Disposition, whereby Intervenor stated, in pertinent part,

"Florida Hospital hereby provides notice that . . . although it does not voluntarily concede the result, [it] will not object to the Court proceeding with summary final disposition of this matter as the Court deems proper."

8. Dr. Duchowny is a Florida-licensed medical physician, Director of the EEG Laboratories and Seizure Unit at the University of Miami School of Medicine, and a clinical professor of neurology in pediatric neurology. He is also board-certified in pediatrics, psychology and neurology with a special competence in child neurology, electroencephalography and clinical neurosurgery.

9. Dr. Duchowny's Affidavit supports the pending motions for summary final order as follows:

It is my opinion within a reasonable degree of medical probability that:

Isaiah's NEUROLOGICAL EXAMINATION reveals him to be alert, cooperative with fluent speech. He does have prominent labial dysarthria with a hypernasal speech pattern. He is somewhat overactive and inattentive. He does answer questions directly and can identify some colors and pictures of animals. He identified body parts quite well. The cranial nerve examination reveals full visual fields to direct confrontation testing. The pupils are 3 mm and react briskly to direct and consensually presented light. A brief funduscopic examination demonstrates well-demarcated optic disc margins without retinopathy. The extraocular movements are full and conjugate. There are no facial asymmetries. The tongue is midline and moves in all

planes. The uvula is midline. The pharyngeal folds are symmetric. Motor examination reveals evidence of an asymmetry of the upper extremity. The rights [sic] shoulder appears higher than the left and there is prominent scapular winging. There is hollowing of the mesial scapular border. There is no atrophy of the biceps or brachial radialis musculature. Isaiah is able to extend both arms but cannot fully extend the right elbow to 180 degrees. Similarly, he can raise both arms above his head but does not have full elbow extension. Supination is clearly diminished on the right side, although he does have individual finger movement and his grip strength is fairly symmetric. There is full ROM at the wrist and finger joints. There is no demonstrable sensory abnormality. There are no fasciculations or focal atrophy. Deep tendon reflexes are 1+ in the left upper extremity but 0 at the biceps and brachial radialis on the right. Triceps reflex is trace on the right. Knee and ankle jerks are 2+ and both plantar responses are downgoing. Isaiah walked in a coordinated fashion and his arm swing was relatively symmetric. He could build a tower of six cubes and had individual finger dexterity which was superior on the left compared to the right. He also demonstrated a clear left hand preference but would work with the right hand when prompted. He transferred well. Isaiah could stand from a sitting position with good balance without holding on. Neurovascular examination reveals no cervical, cranial or ocular bruits and no temperature or pulse asymmetries.

In SUMMARY, Isaiah's neurological examination today is significant for findings of a right Erb's palsy suggesting compromise of the upper brachial plexus<sup>[4]</sup> including C5 and C6 distributions. In contrast, there is no evidence of central nervous system damage of either the brain or spinal cord; and for this reason, I do not

believe that Isaiah is eligible for compensation within the NICA program.

10. Dr. Duchowny's affidavit adopts and incorporates his four-page July 21, 2010 Independent Medical Examination Report.

11. Donald C. Willis, M.D., is a Florida-licensed medical doctor who is board-certified in obstetrics and gynecology and maternal-fetal medicine. His affidavit, attached to Respondent's Motion for Summary Final Order, states that he reviewed the medical records of Isaiah Santiago; that on February 15, 2010, he prepared the one-page report attached to the affidavit; and that the report accurately reflects his opinions.

12. Dr. Willis' affidavit goes on to state that, within reasonable medical probability,

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor, delivery or the immediate post delivery period. The baby did suffer a right brachial plexus injury at birth.

13. Dr. Willis' report, adopted by his affidavit, states, in pertinent part:

. . . Overall there was no significant fetal distress. Amniotic fluid is clear with rupture of the membranes during labor. . . . The newborn was not depressed. Apgar scores were 7/8. A right brachial plexus injury occurred at birth. . . . There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to

the baby's brain during labor, delivery or the immediate post-delivery period.

14. Given the record, Petitioners' and Respondent's concurrence, and the absence of any opposition from the sole Intervenor, it is undisputed that Santiago's problems do not result from a loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery or resuscitation in the immediate post-delivery period in a hospital. Consequently, for reasons appearing more fully in the Conclusions of Law, NICA's Motion for Summary Final Order is well-founded.<sup>5</sup>

15. In light of there being no dispute on the issue of non-compensability, it is not necessary for this Summary Final Order to address any issue of notice.

#### CONCLUSIONS OF LAW

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

17. 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.

18. 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), 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.

19. 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.

20. 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.

21. 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.

22. Here, indisputably, Isaiah's neurologic problems were not "caused by an injury to the brain or spinal cord . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation." Consequently, given the provisions of Section 766.302(2), Florida Statutes, Isaiah does not qualify for coverage under the Plan. See also Humana of Fla., 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, Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).

23. Where, as here, the administrative law judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . she or he shall enter an order [to such effect] and shall 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 Statement of the Case and Conclusions of Law, it is

ORDERED that Respondent Florida Birth-Related Neurological Injury Compensation Association's Motion for Summary Final Order is granted, and the Petition for Compensation filed by Melissa Gutierrez and Francisco Santiago, on behalf of and as parents of Isaiah Santiago, a minor, be and the same is dismissed with prejudice.

DONE AND ORDERED this 10th day of September, 2010, in Tallahassee, Leon County, Florida.



---

ELLA JANE P. DAVIS  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 10th day of September, 2010.

ENDNOTES

1/ This pleading was later supplemented and has been treated as a motion for summary final order. A medical report of Ronald G. Davis, M.D., was filed June 22, 2010, in support thereof, but without affidavit. Due to dismissal upon Respondent's Motion for Summary Final Order, this pleading need not be addressed.

2/ Section 120.57(1)(h), Florida Statutes (2008), provides:

(h) Any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order.

3/ See, e.g., Vero Beach Care Center v. Ricks, 476 So. 2d 262, 264 (Fla. 1st DCA 1985)("Lay testimony is legally insufficient to support a finding of causation where the medical condition involved is not readily observable."); Ackley v. General Parcel Services, 646 So. 2d 242, 245 (Fla. 1st DCA 1994)("The determination of the cause of a non-observable medical condition, such as a psychiatric illness, is essentially a medical question."); 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.").

4/ A brachial plexus injury is defined in the 28th Edition of Dorland's Illustrated Medical Dictionary © 1994, as: plexus: a network or tangle; a general term for a network of lymphatic vessels, nerves or veins. Brachial plexus: a plexus originating from the ventral branches of the last four cervical spinal nerves and most of the ventral branch of the first thoracic spinal nerves. Situated partly in the neck and partly in the axilla . . . .

5/ When, as here, the "moving party presents evidence to support the claimed non-existence of a material issue, he . . . .

[is] entitled to a summary judgment unless the opposing party comes forward with some evidence which will change that result; that is, evidence to generate an issue of a material fact. It is not sufficient for an opposing party merely to assert that an issue does exist." Turner Produce Company, Inc. v. Lake Shore Growers Cooperative Association, 217 So. 2d 856, 861 (Fla. 4th DCA 1969). Accord, Roberts v. Stokley, 388 So. 2d 1267 (Fla. 2d DCA 1980); Perry v. Langstaff, 383 So. 2d 1104 (Fla. 5th DCA 1980).

COPIES FURNISHED:

Kenney Shipley, Executive Director  
Florida Birth Related Neurological  
Injury Compensation Association  
2360 Christopher Place, Suite 1  
Tallahassee, Florida 32308  
(Certified Mail No. 7010 0290 0001 2352 0857)

Maria D. Tejedor, Esquire  
Diez-Arguelles & Tejedor, P.A.  
505 North Mills Avenue  
Orlando, Florida 32803  
(Certified Mail No. 7010 0290 0001 2352 0864)

Robert J. Grace, Jr., Esquire  
Stiles, Taylor & Grace, P.A.  
Post Office Box 460  
Tampa, Florida 33601  
(Certified Mail No. 7010 0290 0001 2352 0871)

Charles Thomas Shad, Esquire  
Saalfeld, Shad, Jay & Stokes  
50 North Laura Street, Suite 2950  
Jacksonville, Florida 32202  
(Certified Mail No. 7010 0290 0001 2352 0888)

David A. Marcantel, M.D.  
Celebration Obstetrics & Gynecology  
410 Celebration Place, Suite 208  
Celebration, Florida 34747  
(Certified Mail No. 7010 0290 0001 2352 0895)

Amy Rice, Acting Investigation Manager  
Consumer Services Unit  
Department of Health  
4052 Bald Cypress Way, Bin C-75  
Tallahassee, Florida 32399-3275  
(Certified Mail No. 7010 0290 0001 2352 0901)

Elizabeth Dudek, Deputy Secretary  
Health Quality Assurance  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308  
(Certified Mail No. 7010 0290 0001 2352 0918)

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.