

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

YOLANDA RIOS AND RENE RIOS, on)
behalf of and parents and)
natural guardians of)
CHRISTOPHER NOEL RIOS, a minor,)
)
Petitioners,)
)
vs.) Case No. 10-0048N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
BAYFRONT MEDICAL CENTER, INC.,)
AND RAUL MONTENEGRO, M.D.,)
)
Intervenors.)
_____)

FINAL ORDER

Upon due notice, this cause came on for final hearing before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings, on June 25, 2010, by video teleconference with sites in St. Petersburg and Tallahassee.

APPEARANCES

For Petitioners: Yolanda Rios, pro se
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For Respondent: Robert J. Grace, Jr., Esquire
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STATEMENT OF THE ISSUE

Whether Christopher Noel Rios, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On January 6, 2010, Yolanda Rios and Rene Rios (parents), on behalf of Christopher Noel Rios (Chris)¹ filed a petition (claim) with the Division of Administrative Hearings (DOAH) to resolve whether Chris qualifies for coverage under the Plan.

The petition included the following allegation:

4. It is alleged that Christopher Noel Rios suffered brain damage as a result of a birth-related neurological injury.^[2]

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on January 7, 2010. By an Order entered February 17, 2010, Bayfront Medical Center (the hospital) was granted Intervenor status, and by an Order entered March 4, 2010, Raul Montenegro, M.D. (participating physician), was granted Intervenor status.

On March 26, 2010, following two extensions of time within which to do so, NICA responded to the petition and gave notice that it was of the view the claim was not compensable because the injury did not meet the definition of a "birth-related neurological injury as defined in Section 766.302(2)."

Given that Petitioners were of the view that the child had suffered a "birth-related neurological injury," and that the Administrative Law Judge had received the parties' advice concerning scheduling, a Notice of Hearing by Video Teleconference, listing "compensability" as the sole issue, and an Order of Pre-hearing Instructions were mailed on April 22, 2010. Left to resolve in a subsequent proceeding were issues related to an award of benefits. See §§ 766.309(4), 766.31, Fla. Stat.

The parties filed their Prehearing Stipulation on June 9, 2010, and a telephonic prehearing conference was held on June 17, 2010.³

At final hearing on June 25, 2010, Petitioners orally raised, for the first time, an issue of "lack of notice." Upon an oral ruling that a motion to amend the petition in that regard might be considered if made at a later date, and a denial of Petitioners' oral motion to admit, over objection, an exhibit on the issue of "lack of notice," the hearing proceeded upon "compensability," the sole issue which had been pled in the

Petition; the sole issue acknowledged in the Prehearing Stipulation; and the sole issue acknowledged at the prehearing conference.

At final hearing, Joint Exhibit A (the Prehearing Stipulation in duplicate original form), Petitioners' Exhibits 1, 2A and 2B, and 3,⁴ and Respondent NICA's Exhibits 1, 2, and 3,⁵ were admitted in evidence. Petitioners also presented the oral testimony of Yolanda Rios. Intervenor presented neither witnesses nor exhibits.

A Transcript of the hearing was filed with DOAH on July 12, 2010. Respondent's Proposed Final Order was timely filed and has been considered. By stipulation at hearing, a letter from Mrs. Rios faxed to DOAH the night before hearing has been considered as her proposed final order. (TR-35) Intervenors filed no proposal and no objection to Respondent's proposal.

FINDINGS OF FACT

1. Petitioners Yolanda Rios and Rene Rios are Chris' (Christopher Noel Rios') natural parents.
2. At all times material, Yolanda Rios was an obstetrical patient of Intervenor Raul Montenegro, M.D. Raul Montenegro, M.D., the delivering obstetrician, was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes, who delivered obstetrical services in the course of

labor, delivery and resuscitation in the immediate postdelivery period related to Chris. Although the parties stipulated to the foregoing language, the evidence as a whole shows that no need to "resuscitate" Chris ever arose. (See Findings of Fact 12 and 14.)

3. Chris was born on January 11, 2005.

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

5. Chris was born at Bayfront Medical Center.

6. Bayfront Medical Center is a licensed Florida hospital located in St. Petersburg, Florida.

7. 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.

8. Herein, there is no dispute that Chris suffers from some neurologic or brain impairment(s), but Petitioners claimed that his problem resulted from a birth-related neurological injury, and NICA was of the view that the record failed to support the conclusion that Chris' brain was injured by "oxygen deprivation or mechanical injury occurring in the course of

labor, delivery or resuscitation in the immediate postdelivery period" as required by the statute for a finding of compensability. Intervenors expressed no position on the issue of compensability.

9. On January 11, 2005, Mrs. Rios was admitted to Bayfront Medical Center. Her fetus was estimated to be at 38-1/2 weeks' gestational age with intrauterine growth restrictions. The baby's head had been smaller than expected, but within normal limits, as of her last previous ultrasound. Mrs. Rios was noted to have a non-reactive, non-stress test with spontaneous decelerations and a biophysical profile 4/8 with oligohydramnios. A fetal cardiac abnormality was also reported. As a result of suspected fetal distress, Mrs. Rios underwent a primary low transverse caesarian section at 5:03 a.m., on January 11, 2005.

10. Following delivery, Chris had Apgar scores of 8 and 9 at one and five minutes respectively.⁶

11. Mrs. Rios claimed that, based on recorded times on various medical/hospital records, it is questionable whether cord blood gas testing was done. Indeed, it is unclear whether such testing was done. However, a letter dated September 17, 2008, from Maria Watts, Bayfront Medical Center Director of Health Information Management, to Mrs. Rios states, in pertinent part, "Although Dr. Boren's operative note pertaining to the c-

section delivery of your son Christopher states that Cord gas and PH were sent, there are no laboratory results in either his or your medical record."

12. The stipulated medical and hospital records reveal, among other notations, that Chris was administered "blow by" oxygen for approximately four minutes ("whiffs" of oxygen as opposed to bag oxygen), shortly after birth. However, he never had to be intubated. Because he was noted to be microcephalic and had a heart murmur, Chris was transferred, shortly after birth on January 11, 2005, to All Children's Hospital in St. Petersburg, Florida, for further evaluation of suspected congenital heart disease and microcephaly.

13. The records further show that on January 12, 2005, Dr. Joseph Cassadonte, a pediatric neurologist, was consulted due to a CT scan of Chris' brain that showed ventriculomegaly with periventricular calcification and an abnormal scan pattern. Dr. Cassadonte recorded his impression that Chris had microcephaly with periventricular calcifications and suspected congenital infection, especially TORCH. Dr. Cassadonte wrote in his consult record that Chris' brain had probably been affected by an intrauterine (in utero or "in the uterus") infection. Due to the microcephaly, a TORCH work-up was completed.⁷

14. Chris remained hospitalized until February 8, 2005. He was able to breathe room air without assistance of any kind throughout his 28-day hospitalization.

15. With regard to infections within the TORCH spectrum and Chris' central nervous system, the Neonatal Discharge Summary stated, in pertinent part:

INFECTIONS:

* * *

Due to the microcephaly a TORCH workup was done. The IgMs were remarkable for positive Rubella and HSV2. The rest were all negative.

* * *

CENTRAL NERVOUS SYSTEM

This infant was noted to be microcephalic on admission. A CT scan was obtained on day 1 of life, which documented periventricular calcifications. An MRI was obtained on day 2 of life, which also documented multifocal areas of brain destruction consistent with scattered calcifications, which were consistent with TORCH infection. An EEG was obtained on day 16 of life and was abnormal with bilateral amplitude attenuation over the hemisphere suggestive of bilateral cerebral dysfunction. This infant has been followed by Neurology. This infant was also evaluated by developmental pediatrics. He will be followed by Neurology and Developmental Pediatrics as an outpatient.

* * *

16. On February 8, 2005, Chris was discharged from All Children's Hospital. The Neonatal Discharge Summary listed discharge diagnoses of:

1. Term male.
2. Periventricular Calcifications.
3. Hyperbilirubinemia, both direct and indirect.
4. Bilateral duplication of the collecting system.
5. Bilateral Grade 3 vesicoureteral reflux.
6. Coagulopathies.
7. Anemia.
8. Aspiration.
9. Mild arytenoids laryngomalacia.
10. Microcephaly.
11. Clinical sepsis.
12. Thrombocytopenia.
13. Patent foramen ovale.

17. Following discharge from All Children's Hospital, Chris developed seizures at three months of age, and in December 2005, Dr. Cassadonte ordered an EEG which was interpreted as "markedly abnormal because of severe disorganization of the background as well as multifocal spike and sharp waves, maximum in the posterior regions." The EEG was consistent with a modified hypsarrhythmic pattern, and it was noted that during the study, Chris had multiple clinical events which appeared to be epileptic spasms unassociated with any electrographic changes during the events. Since that time, Chris has continued to experience multiple daily seizures and has made little motor developmental progress, being unable to roll over or sit up on his own. He also has cortical visual

impairment. He receives physical, occupational and speech therapy. A G-tube was placed at 2-1/2 years of age and he is on a keogenic diet.

18. Donald Willis, M.D., testified by deposition. Dr. Willis is a physician who is board-certified in obstetrics and gynecology and in maternal-fetal medicine. Based on his evaluation of the medical records, Dr. Willis opined that the medical records reflect that Mrs. Rios was not in labor when Chris was delivered by caesarian section and that Chris did not suffer oxygen deprivation or mechanical injury occurring during delivery or resuscitation in the immediate postdelivery period. More specifically, he testified:

Q: Dr. Willis, let me ask you this: Did Christopher Rios suffer oxygen deprivation or mechanical injury occurring during delivery or resuscitation in the immediate postdelivery period?

A: No.

Q: And is that opinion within a reasonable degree of medical probability?

A: Yes.

Q: Would you explain to us - and I understand you may be repeating some of your opinions, but explain to us the basis for that opinion.

A: Right. If the baby suffered oxygen deprivation during the time of delivery, then the baby would be depressed at birth and would have low Apgar scores, would require resuscitation, positive pressure

ventilation, intubation with oxygen, would be acidotic and my [sic] require intervenous [sic] drip for bicarbonate to correct the acidosis, and would require, you know, care in the neonatal intensive care nursery for newborn depression.

Now, also the babies often have seizures within the first 24 to 48 hours, renal failure. Many of the organ [sic] can be affected. Often feeding difficulties can occur. But primarily, you know, it have - the baby would have to be significantly depressed at birth. And this baby was really not depressed at birth.

19. Dr. Willis stated that the absence of cord gas results did not change his ultimate opinion in the case. (See Finding of Fact 11.) He noted that many people would not have a cord blood gas test done when Apgar scores are normal and the baby does not require resuscitation, as was the situation with Chris. He noted that microcephaly as recognized at birth happens over a longer period of time as opposed to being the consequence of some intrapartum (during birth or delivery) event.

20. Specifically with regard to the role a fetal infection may have played in Chris' condition, Dr. Willis testified:

Q: And I think you said that the early ultrasound suggestive of microscopically^[8] [sic] suggests to you that the infection, perhaps, or whatever insult on the fetus that caused these problems occurred sometime much earlier in pregnancy; is that correct?

A: That's correct.

Q: All right. And under those circumstances, would it be uncommon for the

TORCH titers and the other cultures to be negative at birth if, in fact, the infection had happened long enough ago to have created or caused some microcephaly that was noted early on in the ultrasound?

A: Well - that's right. I mean, those titers can revert to negative over time. And if they occur early enough in pregnancy, they may be too early for the baby to have an IGG - IGM immune response, which is the one that - or an IGG response. So, you know, that could be, or it could be that there was some viral infection that was not included in the TORCH titers, it could be some other virus that's less well-known.

Q: All right. And so is it true, Doctor, we don't know exactly what kind of intrauterine viral infection may have impacted Christopher, you are still of the impression or opinion that it was a viral infection of some sort that explains his current problems?

A: Yes. I agree that the findings are most consistent with an in utero viral infection, but the exact virus - I don't know the virus that caused this.

21. Michael Duchowny, M.D., a medical physician board-certified in pediatrics and neurology, with special competence in child neurology and clinical neurophysiology, particularly the sub-specialty of pediatric epilepsy, also testified by deposition. He evaluated Chris on March 10, 2010. Based upon his evaluation of Chris, and his review of the medical records, Dr. Duchowny concluded that Chris did, in fact, evidence findings consistent with a substantial neurological impairment, involving both mental and motor functioning, that was in all

likelihood permanent. He further opined that the evidence compellingly suggested that Chris' permanent and substantial mental and physical neurological impairment(s) are the result of an infection acquired in utero, rather than being the result of intrapartum (during birth) oxygen deprivation or mechanical injury.

22. More specifically, Dr. Duchowny testified:

Q: And with regard to your opinion, Doctor, what do you look at to give support for it?

A: I think the support for that comes from several sources. To begin with, Christopher's post - his perinatal course was inconsistent with oxygen deprivation or mechanical delivery. Specifically, he was born with good Apgar scores. His condition, at birth, was sufficiently stable, so that his physicians chose not to order either umbilical cord or arterial blood gases. He did not have multi-organ failure, as would be expected in a baby who was hypoxic, and he did not have a need for prolonged intubation and medical ventilation.

On the other hand, he did suffer from thrombocytopenia or low platelet count, which is more consistent with an infection. He had elevation of bilirubin, which I also think was consistent with a - some type of infectious process.

Furthermore, his neuroimaging studies, both, the MRI and the CT Scan, suggest both, an intrauterine acquisition of the brain damage and an infectious basis, and this is based on the fact that his MRI Scan, obtained on the second day of life, was already evidencing multi-focal damage, which suggested that it had been acquired a long time prior to the MRI, in order to produce

that picture, and the multi-focal damage was most consistent with some type of intrauterine infection.

Consistent with this hypothesis, were the findings on the CT Scan which demonstrated calcified areas surrounding the ventricles or the cavities of the brain. This finding is typically seen in patients who have an intrauterine acquired viral infection with one of several agents.

Lastly, Christopher's examination revealed evidence of congenital anomalies of his face and head, and these findings, obviously, reflected abnormalities acquired in the intrauterine environment during the time when the - when these structures were being formed.

So I think the weight of the evidence - and I would lastly say that Christopher was born with low birth weight, suggesting intrauterine growth retardation, and was congenitally microcephalic, with a head circumference of 30 centimeters.

I think, putting all of this evidence together, it strongly suggests that Christopher's neurologic impairment was acquired prenatally during intrauterine life, and resulted from an intrauterine viral infection.

23. Mrs. Rios testified that she believed the hospital's determination of viral infection had to be in error because infections always progress but Chris' condition is not progressing and his CAT scans have remained consistent. However, no medical verification for this theory was presented. Additionally, Dr. Willis and Dr. Duchowny effectively refuted it, as both physicians testified that it is common to be unable

to identify a specific viral infection and that the infection of concern would have affected Chris in the uterus, as opposed to after birth.⁹

24. Mrs. Rios testified that, in her opinion, she had experienced a normal pregnancy except for narrowing of the PDA, which was "followed" throughout her pregnancy. She had no explanation for what caused Chris's neurologic problems, but testified from personal observation that he was dusky and blue with eyes swollen shut and facial bruising when he was first shown to her over the drape for the caesarian section. She inferred an oxygen deprivation or mechanical injury from these signs. Chris' newborn photographs, the Newborn Assessment, and some nurses' notes in evidence do show these conditions and some nurses' notes assume them to be traumatic in origin, but Dr. Duchowny offered contrary, but reasonable, medical explanations.

25. Dr. Duchowny stated, in response to questions by Mrs. Rios, at his deposition:

Q: (Mrs. Rios) Okay. Because I don't know if you read in the reports that, actually, he had extensive bruising in his - and his eye was swollen shut, and it states that on the report, and we also have photographs pertaining to that, that when Chris - after he was born, the nurse took a photograph, that she submitted to me, and there was extensive bruising on Christopher's face, pertaining to - right a little bit above the eyebrow. It was in the area. It went from

one end of the eyebrow to the other end, and his eyes were actually swollen shut. They were also bruised, and he had a hemorrhage in one of his eyes.

Dr. Duchowny: Well, again. I would - and it's not to take anything away from the difficulties associated with the delivery, but there was no evidence on either of the scans, either the CT or the MRI of a traumatic brain injury. So that although there were facial or cranial areas that were bruised, it does not appear that there was any traumatic injury to the brain.

26. Dr. Duchowny also testified, concerning his 2010 examination of Chris, as follows:

Q: And in Christopher's case, what dysmorphic features or dysmorphisms did you observe?

A: Well, the shape of his forehead, I thought, was abnormal. He had some abnormalities of the mid facial region, including his nasal bridge. There was - I thought that there was kind of what we call a mid facial compression. In other words, the distance from the eyes down to the mouth was less than it should be. The eyes had a slant to it. I also recall that the ears were slightly low set, as well. I'm not sure -

Q: And what did those dysmorphic features suggest to you, as a pediatric neurologist, if anything?

A: These types of abnormalities occur due to some problem that occurs during the time that they are forming. So this malformation suggests not that anything was destroyed or altered, after it was formed, but, rather, it did not form correctly.

So it places the timing, you know, quite far back during intrauterine life, either the first or perhaps early second trimester, but I don't think we can date it more than that.

27. Dr. Duchowny also opined:

. . . I can say that children - newborns oftentimes appear dusty, because they are peripherally vasoconstricted . It's not uncommon for babies to appear blue or dusty in the delivery room, and to remain that way while they vasoconstrict, just to shunt blood to the core, including the vital organs and the brain.

That actually does not mean that there is a neurologic impairment or that the baby is having any problems with oxygen. It's just simply a physiologic adjustment that shunts blood centrally. It's a reflex. It's normal, and it doesn't suggest that there's any type of oxygen deprivation at that time.

28. Dr. Duchowny also was asked hypothetically to assume cord blood gas testing had been done and to assume the PH thereof was at or below seven and whether this set of hypothetical facts would impact his opinions:

Q: Dr. Duchowny, I would like you to assume that the cord blood gases in this particular case were done and were, hypothetically, reported as below - or with a PH at or below seven. Would that, in any way, impact your opinions you've expressed today regarding the etiology of Christopher's neurological problems?

A: It would not.

Q: Why not?

A: Again, I think the overwhelming evidence suggests that Christopher's neurologic impairment was acquired remotely in intrauterine life, and if there is a cord PH that was low, it still wouldn't make me believe that Christopher had a significant intrapartum event. Furthermore, his post-natal course was inconsistent with it, as well.

So I recognize that you're putting that out as a hypothetical situation, but even in that hypothetical situation, I could not understand how Christopher's damage would be acquired during labor and delivery.

Q: And how is his neonatal course or how was his neonatal course inconsistent with an abnormally low PH, if it was?

A: Well, I discussed that previously, but the findings that one would expect to see were not there, including intubation, prolonged mechanical ventilation, multi-organ failure, cardiovascular instability, and, in fact, what did transpire, which was thrombocytopenia, is probably more consistent with some type of infection, rather than intrapartum hypoxia or mechanical injury.

29. As previously noted, Mrs. Rios provided lay testimony questioning the expert medical opinions and assailing the veracity of certain medical records, most notably the failure to perform a cord blood test or the absence of a record of the cord blood test if such a test had been done. (See Finding of Fact 11.) Her testimony was, however, lay testimony without any other substantiating lay or expert medical evidence, and the expert medical opinions herein were not dependent on the

presence or absence of cord blood testing. Where a medical condition is not readily observable, issues of causation are essentially medical questions, requiring expert medical evidence. See, e.g., Vero Beach Care Ctr. 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 is not readily observable."); Ackley v. Gen. Parcel Serv., 646 So. 2d 242, 245 (Fla. 1st DCA 1991)("The determination of the cause of a non-observable medical condition, such as a psychiatric illness, is essentially a medical question."); Wausau Ins. Co. v. Tillman, 766 So. 2d 123, 124 (Fla. 1st DCA 2000)("Because the medical conditions which the claimant alleged resulted from the workplace incident were not readily observable, he was obligated to present expert medical evidence establishing that causal connection.").

30. Herein, the opinions of Doctors Willis and Duchowny are clearly "expert." Moreover, they are logical, consistent with the record, not controverted by other competent medical opinion, and not shown to lack credibility. 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.") Accordingly, the weight of their expert evidence is more persuasive than Petitioners' lay testimony.

31. Therefore, it is found that Chris' physical and mental problems, substantial though they may be, most likely resulted from an intrauterine-acquired infection, as opposed to being caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this cause. §§ 766.301-316, Fla. Stat.

33. The 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.

34. 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 child'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.

35. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the claimant(s), 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.

36. In discharging this responsibility, the Administrative Law Judge must make the following determination based on 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. 766.302(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 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.

37. "Birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, to mean:

. . . injury to the brain or spinal cord of a live infant weighing at least 2,500 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.

38. As the claimants, Petitioners bear the burden of proof to demonstrate entitlement to compensation under the Plan. See § 766.309(1)(a), Fla. Stat.; see also Balino v. Dep't of Health and Rehabilitative Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.").

39. Here, although there is no doubt that Chris is "permanently and substantially mentally and physically impaired," the proof failed to demonstrate that Chris suffered "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."

40. Consequently, given the provisions of Section 766.302(2), Florida Statutes, Chris 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 liability, 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. Fla. Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997).

41. Where, as here, the Administrative Law Judge determines that "the injury alleged is not a birth-related neurological injury . . . she . . . [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.

42. Compensability having not been proven, any issue with regard to notice or lack thereof by the hospital or any physician and/or any issue with regard to the type and amount of benefits which Petitioners might have been entitled to receive from NICA had they prevailed on the issue of compensability are rendered moot, and this case must be dismissed without leave to amend as to notice and without any further hearing as to amount and type of benefits.

CONCLUSION

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

The claim for compensability filed by Yolanda Rios and Rene Rios on behalf of, and as parents and natural guardians of, Christopher Noel Rios is dismissed with prejudice.

DONE AND ORDERED this 10th day of August, 2010, 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 10th day of August, 2010.

ENDNOTES

1/ All records and witnesses/depositions referred to "Christopher," except in one instance, a doctor misspelled the child's name as "Christian." However, it is noted that Mrs. Rios, the mother, frequently referred to her son as "Chris," and this Final Order will respect her preference.

2/ The Claim/Petition did not raise any issue of "lack of notice" by the hospital or any physician.

3/ As part of the telephonic pre-hearing conference, Petitioner Mrs. Rios orally stipulated on behalf of Petitioners to admission of all of NICA's proposed exhibits, including both of NICA's physicians' depositions without further qualifying them by deponent's and court reporter's signatures; agreed to forward a signed duplicate of the Prehearing Stipulation previously signed by the other two parties (which she did file); and noted that the parent-Petitioners were without an attorney, but she also stated that she wanted to proceed to hearing on June 25, 2010, and raised neither an issue of lack of notice or that she would be submitting any new or different exhibits not included in NICA Exhibit 1.

4/ Exhibit P-1 is seven pages of medical records, mostly duplicates of NICA Exhibit 1, and discussed at the prehearing conference. Exhibits P-2A and 2B are newborn photographs of Chris, also discussed at the prehearing conference. Exhibit P-3 is a vaccination record showing Mrs. Rios consented to receive, and did receive, a Rubella vaccination before hospital discharge, but the remainder of a group of items Petitioners FAXED to DOAH the night before final hearing (including a NICA notice form) were not admitted over objection.

5/ NICA's Exhibit 1 is a composite exhibit, of over 600 pages, in notebook form, of Chris' medical records. NICA Exhibit 2 is the deposition of Dr. Duchowny. NICA Exhibit 3 is the deposition of Dr. Willis.

6/ An Apgar score is a numerical expression of the condition of a newborn infant, and reflects the sum 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 0 to a maximum of 2. Dorland's Illustrated Medical Dictionary, 28th ed. 1994.

7/ "TORCH" refers to screening for five common infections or the five infections themselves.

8/ Presumably, this was a mis-transcription of the word, "microcephaly" as used hereafter in the same answer by the deponent physician.

9/ Although the Neonatal Discharge Summary (see Finding of Fact 15) clearly stated positive findings for two types of infection, the actual test results in the file appear borderline or equivocal. Therefore, either physicians' seeming to assume that the type of intrauterine infection that affected Chris was never identified is, if anything, more persuasive, that some type of undefined in utero infection caused Chris' problems.

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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.