

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

KATRINA NORTHUP AND RICHARD )  
NORTHUP, on behalf of and as )  
parents and natural guardians )  
of EVERETT LUIS NORTHUP, a )  
minor child, )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 11-3965N  
 )  
FLORIDA BIRTH-RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
GALENCARE, INC., d/b/a BRANDON )  
REGIONAL HOSPITAL, )  
 )  
Intervenor. )  
\_\_\_\_\_ )

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on December 13, 2012, by video teleconference in Tampa and Tallahassee, Florida, before Susan Belyeu Kirkland, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Henry Valenzuela, Esquire  
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For Respondent: Robert J. Grace, Esquire  
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For Intervenor: Tracey M. Falkowitz, Esquire  
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STATEMENT OF THE ISSUE

The issue in this case is whether Everett Luis Northup sustained a birth-related neurological injury.

PRELIMINARY STATEMENT

On August 4, 2011, Petitioners, Katrina Northup and Richard Northup, on behalf of and as parents and natural guardians of Everett Luis Northup (Everett), a minor child, filed a Petition for Benefits Pursuant to Florida Statute Section 766.305 et seq. (Petition) with the Division of Administrative Hearings (DOAH). Petitioners allege that Everett "suffered a neurological brain damage as a result of a combination of prolonged repetitive and persistent head-banging during labor and multiple vacuum extraction attempts at delivery."

The case was originally assigned to Administrative Law Judge Ella Jane P. Davis, but due to the retirement of Administrative Law Judge Davis, the case was reassigned to Administrative Law Judge Susan Belyeu Kirkland.

The Petition alleged that Wayne S. Blocker, M.D., provided obstetric services at the birth of Everett, and that Everett was born at Brandon Regional Hospital in Tampa, Florida. DOAH served the Birth-Related Neurological Injury Compensation Association (Association), Dr. Blocker, and Brandon Regional Hospital with copies of the Petition.

On October 29, 2012, Galencare, Inc., d/b/a Brandon Regional Hospital filed a Petition for Leave to Intervene by Galencare, Inc., d/b/a Brandon Regional Hospital. The petition for leave to intervene was granted by Order dated November 14, 2012. Dr. Brock did not petition to intervene in this proceeding.

The parties filed a Pre-Hearing Stipulation, in which they stipulated to certain facts contained in paragraph (e) of the Pre-Hearing Stipulation. Those facts have been incorporated into this Final Order.

At the final hearing, Petitioners called Stephen Tolman Glass, M.D., and Jeffrey B. Koren, M.D., as expert witnesses. Respondent did not call any live witnesses, but presented the deposition testimony of Michael Duchowny, M.D., and

Donald Willis, M.D., as its expert witnesses. Intervenor did not call any witnesses. Petitioners' Exhibits 1 through 17 were admitted in evidence. Respondent's Exhibits 1 through 3 were admitted in evidence. Intervenor did not submit any exhibits for introduction in evidence.

The one-volume Transcript was filed on January 17, 2013. At the final hearing, the parties agreed to file their proposed final orders within 20 days of the filing of the Transcript. On January 25, 2013, Petitioners filed Petitioners' Unopposed Motion for Mutual Extension of Time to Submit Proposed Final Orders, requesting that the time for filing be extended to March 5, 2013. The motion was granted by Order dated January 28, 2013.

Petitioners and Respondent filed their proposed final orders on March 5, 2013. Intervenor did not file a proposed final order. The proposed final orders have been considered in the drafting of this Final Order.

#### FINDINGS OF FACT

1. Katrina Northup (formerly Katrina McGuff) and Richard Northup are the natural parents of Everett Luis Northup.

2. At all times material to this proceeding, Katrina Northup was an obstetrical patient of Wayne Blocker, M.D., and Dr. Blocker was a "participating physician" as defined in section 766.302(7), Florida Statutes. Dr. Blocker provided

obstetrical services in the course of labor and delivery at the birth of Everett.

3. Ms. Northup did not experience any significant problems during her prenatal course. On August 21, 2009, she presented to Brandon Regional Hospital, which is a licensed Florida hospital. She was 34.1 weeks pregnant.

4. Beginning at 8:58 a.m., Ms. Northup was started on Pitocin. By 2:23 p.m., the baby's station was -1. At 3:50 p.m., Ms. Northup's membranes ruptured. At 4:41 p.m., the baby was experiencing increasing fetal tachycardia, and the mother's efforts at pushing were nonproductive. A decision was made to use vacuum extraction to facilitate the delivery.

5. Dr. Blocker applied a KIWI vacuum extractor to the baby's head, but a seal could not be achieved. A soft cup vacuum extractor was used to deliver the baby's head to the perineum so that Ms. Northup could push the baby out. Four pulls, two of which were pop offs, were used. Ms. Northup was able to push the baby out after the use of the vacuum extractor.

6. The baby experienced shoulder dystocia during delivery. This means that there was a delay in descent because the baby's shoulder was impinged on the mother's pubic bone. The shoulder dystocia was corrected using a MacRoberts maneuver, which is flexing the mother's hips to give more room in the pelvis. The

shoulder dystocia did not require additional force from the vacuum extractor.

7. Everett was born live on August 21, 2009, at 4:45 p.m. He weighed 3,875 grams at birth. Everett was large for his gestational age.

8. The hospital's admission summary for Everett described his condition at time of delivery as follows:

Infant was delivered pale, floppy, and with a poor respiratory effort. Infant was suctioned PO and nasally and stimulated . The initial HR was <100 but exceeded 100 by 1 minute of age. Respirations became more regular and color became ruddy with a rapid HR. Tone remained poor and there was bruising of the left arm and ballotable fluid in the scalp.

9. After delivery, Everett's mouth, nose and pharynx were suctioned and he was given blow-by oxygen for two minutes.

10. Everett's Apgar score at one minute of age was recorded as seven and, at five minutes of age, was eight. Apgar scores are designed to define a baby's responsiveness and cover five different categories: heart rate, respiration, color, reflex activity or reflex responsiveness, and muscle tone. Each of the categories can be scored a zero, a one, or a two.

11. At one minute of life, Everett's heart rate was greater than 100 beats per minute; he had a good cry; there was some flexion of the extremities; he had a grimace; and his body was pink and extremities were blue. At five minutes of life,

Everett's heart rate was greater than 100 beats per minute; he had a good cry; he had active motion; he had a cry or active withdrawal; and he was blue/pale.

12. Everett's initial blood gases were recorded as a pH of 7.20, which is considered a mild to moderate metabolic acidosis.

13. Everett was admitted to the Neonatal Intensive Care Unit (NICU). His admission summary describes the findings of the admission physical examination as follows:

CONDITION: Pink, quiet and responsive.  
HEENT: Anterior fontanelle soft, open, and flat, red reflexes present bilaterally, subgaleal bleed with ballotable fluid, nares patent and palate intact.  
CARDIAC: Normal sinus rhythm with tachypnea, weak pulses and poor perfusion, CRT -5 seconds, precordium quiet and no murmur.  
Abdomen: Soft and nondistended abdomen, good bowel sounds, 3-vessel cord and liver edge palpable at the costal margin.  
GU: Normal male features for gestational age, testes descended bilaterally and patent anus.  
NEUROLOGIC: Quiet and responsive with fair muscle tone and reflexes for age.  
SPINE: Neck supple without masses, spine straight and intact, no sacral dimple noted and no clavicular fracture palpated bilaterally.  
EXTREMITIES: Symmetrical movements and no hip clicks.  
SKIN: Bruising over left arm.

14. Everett's heart rate was recorded on August 21, 2009, as 208 at 5:00 p.m., 166 at 5:30 p.m., 172 at 6:00 p.m., and 168

at 8:30 p.m. Blood pressures taken at the same time intervals were 55/20, 48/20, 45/28, and 70/47.

15. The initial glucose level for Everett was 29. This hypoglycemia was corrected with a D10W bolus of 3 ml/kg. Everett had a respiratory distress syndrome, which was attributed to his premature lungs. This syndrome was corrected with intubation and the use of surfactant. He was intubated for approximately nine hours and then placed on room air.

16. On August 27, 2009, Everett was discharged from the NICU.

17. When Everett was 11 months old, his parents expressed concerns to his pediatrician that Everett was not meeting his developmental milestones. The pediatrician referred Everett to a pediatric neurology specialist, who prescribed an MRI.

18. The MRI showed a "symmetric increased T2 signal within the periventricular white matter with associated atrophy of the corpus callosum, likely related to leukomalacia secondary to prematurity." On February 1, 2012, pediatric neurologist, Francis Filloux, M.D., notes her diagnostic impressions:

1. Cerebral palsy with a spastic diplegia pattern or possible spastic triplegia, with the best function in the left upper extremity.
2. Periventricular leukomalacia, by report from the prior MRI scan.
3. Associated neurodevelopmental impairments.
4. History of very mild prematurity.



19. Everett is permanently and substantially mentally and physically impaired.

20. Everett did not suffer an injury to the brain during resuscitation in the immediate post delivery period in a hospital.

21. Petitioners retained Jeffrey Koren, M.D., and Stephen Glass, M.D., as expert witnesses. Respondent retained Donald Willis, M.D., and Michael Duchowny, M.D., as its expert witnesses.

22. Dr. Glass is board-certified in neurology with a special competence in child neurology, and he is board-certified in pediatrics. He has been practicing as a pediatric neurologist for 32 years. Dr. Glass is currently an associate professor of neurology and pediatrics at the University of Washington.

23. Dr. Glass opined that Everett sustained an injury to the brain caused by mechanical injury, due to the multiple vacuum extractions which occurred in the course of labor which rendered Everett permanently and substantially physically and mentally impaired. He believes that the injury to the brain caused by the use of the vacuum extraction device used during the delivery process caused a reduction of blood flow to the

periventricular areas of the brain which caused periventricular leukomalacia (PVL), which led to cerebral palsy.

24. Dr. Koren is board-certified in gynecology and has been practicing obstetrics and gynecology for over 30 years. He opined that the use of the vacuum extraction caused a traumatic injury to the scalp of Everett causing a subgaleal bleed and a diminished blood flow to the periventricular areas of the brain, which caused the PVL.

25. Dr. Willis is fellowship trained in maternal fetal medicine and board-certified in obstetrics and gynecology and maternal fetal medicine. He began in private practice in 1980 and has taught at several universities. Since 2000, he has been doing consultations in maternal fetal medicine.

26. Dr. Willis is of the opinion that Everett did not suffer a brain injury which was mechanical or due to oxygen deprivation during labor and delivery. Based on his readings of Everett's fetal heart-rate monitor, there was no evidence of fetal distress. Everett's Apgar scores were normal with a score of seven at one minute and eight at five minutes. The umbilical cord pH was not consistent with acidosis or hypoxia that would be significant enough to cause significant brain injury. The subgaleal hematoma caused by the use of the vacuum extractor was not clinically significant. Everett did not require a transfusion, and he was not anemic. By the second day of

Everett's life, he had a hematocrit of 53, which is normal for a newborn.

27. Dr. Duchowny is a pediatric neurologist who directs the neurology training program at Miami Children's Hospital. He is a professor of neurology and pediatrics at the University of Miami School of Medicine and is a full professor at the Florida International University School of Medicine. His clinical practice is based out of Miami Children's Hospital.

Dr. Duchowny is board-certified in pediatrics, neurology with special qualification in child neurology, and clinical neurophysiology. He performed an independent medical examination of Everett on December 12, 2011.

28. Dr. Duchowny opined that Everett did not suffer a brain or spinal cord injury caused by oxygen deprivation or mechanical injury during the course of labor, delivery or resuscitation in the immediate post delivery period. He explained the basis for his opinion as follows:

[A]lthough Everett's neurological problems were substantial in both, the mental and motor domains, a review of his medical records did not support the belief that these abnormalities were, in fact, acquired during the labor or delivery. Everett was a pre-term infant. He was large for gestational age, but he was born at 34 weeks gestation, but if you look through the neonatal course, it's clear that his was relatively benign.

For example, Everett's Apgar scores seven and eight at one and five minutes of life. These scores were quite good. His cord blood gases also were mildly abnormal, but really very little evidence of any significant problem. His cord pH was 7.18. He had a base excess of minus 10.3, and these are mild findings, and consistent with his overall neonatal course, during which he actually did very well.

For example, there was no evidence of overall systemic involvement, apart from some transient hypoglycemia that was adequately treated, and he did not have multi-organ system failure, liver involvement, cardiovascular collapse. He certainly wasn't comatosed. He was transiently intubated but did not require a prolonged course of ventilator support.

Sepsis was suspected, and he was treated with antibiotics, but ultimately his cultures were negative, and he went home without any significant problems or complications in the newborn period.

Given the fact that his MRI scan of the brain ultimately revealed damage in the form of periventricular leukomalacia, and thinning of the corpus callosum, it would appear that his deficits could not have been acquired in the course of labor, delivery or the immediate post-partum period. Rather, I believe that Everett's brain injury was acquired prior to birth, likely as a consequence of his prematurity.

Had it been acquired during labor and delivery, I would have expected a much more severe postnatal course, given the MRI findings and his neurological examination.

29. The opinions of Dr. Willis and Dr. Duchowny are credited.

30. Everett did experience a subgaleal hematoma during the birthing process. In order for a subgaleal hematoma to cause brain damage, it would have to be a substantial loss of circulating blood volume which would lead to hypovolemic shock. Everett did not have hypovolemic shock nor did Everett experience any seizures. If the subgaleal hematoma had been clinically significant, Everett would have been given a blood transfusion. He was not given a blood transfusion and he was not anemic. The subgaleal fluid collection was small and easily reabsorbed.

31. Both Dr. Glass and Dr. Koren opined that the Apgar scores were incorrect and should have been substantially lower. However, their opinions are based on the descriptions of Everett at the time of delivery, which were pale, floppy, and with poor respiratory effort. At delivery, Everett's heart rate was less than 100 beats per minute. After he was suctioned and stimulated, Everett's heart rate was greater than 100 beats per minute and his color was ruddy. Everett had a difficult birth, which was reflected in the descriptions of him at delivery. However, within a minute of delivery he had bounced back and had a normal Apgar score.

32. The greater weight of the evidence establishes that Everett did not suffer an injury to the brain during labor and delivery due to oxygen deprivation or mechanical injury. More

likely than not the PVL and thinning of the corpus collosum are findings associated with Everett's prematurity and not a result either directly or indirectly of the vacuum extraction delivery and the resultant subgaleal hematoma.

#### CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2012).

34. The NICA 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.

35. 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 DOAH. §§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. NICA, 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(4), Fla. Stat. 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.

36. In the instant case, Petitioner filed a claim alleging that Everett did sustain a birth-related neurological injury that is compensable under the NICA Plan, and NICA has determined that the injury is not compensable under the Plan. As the proponent of the issue of compensability, the burden of proof as to compensability is upon Petitioners. See Balino v. Dep't of Health & Rehab. Servs. 348 So. 2d 349, 350 (Fla. 1st DCA 1997). Therefore, 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.

37. 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 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.

38. The term "birth-related neurological injury" is defined in section 766.302(2) as follows:

"Birth-related neurological injury" means injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired.

39. Based on the evidence presented and the parties' stipulations, the only issue is to determine whether Everett sustained an injury to the brain or spinal cord due to a mechanical injury or oxygen deprivation during labor or delivery



that resulted in Everett being permanently and substantially mentally and physically impaired. Everett's PVL, thinning of the corpus callosum, and cerebral palsy did not result from oxygen deprivation or mechanical injury during labor or delivery. It most likely is due to Everett's prematurity. Thus, Petitioners have failed to demonstrate that Everett has a birth-related neurological injury which would entitle him to benefits under the Plan.

CONCLUSION

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

The claim for compensation filed by Katrina Northup and Richard Northup on behalf of and as parents and natural guardians of Everett Luis Northup, a minor, is dismissed with prejudice.

DONE AND ORDERED this 3rd day of April, 2013, in Tallahassee, Leon County, Florida.

*Susan Belyeu Kirklund*

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NOTICE OF RIGHT TO JUDICIAL REVIEW

Review of a final order of an administrative law judge shall be by appeal to the District Court of Appeal pursuant to section 766.311(1), Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal. See § 766.311(1), Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992).