

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NATALIE ANN GREENOUGH, on)
behalf of and as parent and)
natural guardian of AIDEN)
CURTIS GORDON MORRIS, a minor,)
)
Petitioner,)
)
vs.) Case No. 11-4993N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent.)
_____)

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon a Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA) October 24, 2012.

STATEMENT OF THE CASE

On September 23, 2011, Petitioner, Natalie Ann Greenough, on behalf of and as parent and natural guardian of Aiden Curtis Gordon Morris (Aiden), a minor, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301 et seq. (Petition) with the Division of Administrative Hearings (DOAH) for compensation under the Florida Birth-Related Neurological Injury

Compensation Plan (Plan). The Petition named Dean E. Altenhofen, M.D. (Dr. Altenhofen), and Sacred Heart Hospital.

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

DOAH served NICA and Dr. Altenhofen with copies of the Petition on September 28, 2011. On February 6, 2012, DOAH served Sacred Heart Hospital with a copy of the Petition. As of the date of this Summary Final Order, neither Sacred Heart Hospital nor Dr. Altenhofen has petitioned to intervene in this proceeding.

On October 24, 2012, NICA filed a Motion for Summary Final Order, asserting that Aiden did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. No response was filed to the motion.

On November 14, 2012, an Order to Show Cause, was issued. Petitioner was ordered to show cause on or before November 30, 2012, why Respondent's Motion for Summary Final Order should not be granted. To date, Petitioner has filed no response.

The two-day final hearing is scheduled to commence on December 17, 2012, in Pensacola, Florida.

FINDINGS OF FACT

1. Aiden Curtis Gordon Morris was born on September 15, 2011, at Sacred Heart Hospital in Pensacola, Florida. He weighed 3,300 grams at birth.

2. NICA requested that Donald Willis, M.D., an obstetrician specializing in maternal-fetal medicine to review the medical records of Ms. Greenough and Aiden. The purpose of his review was to determine whether an injury occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital due to oxygen deprivation or mechanical injury. Dr. Willis reviewed the records and made the following findings, which he set forth in an affidavit attached to the Motion for Summary Final Order.

According to the medical records, the mother Natalie Greenough was a 16 year old G1. She presented to the hospital at 38 weeks gestational age in labor. Her cervix was dilated 5 to 6 cms on admission. Amniotic membranes were ruptured with clear fluid.

The fetal heart rate (FHR) monitor on admission shows a reactive heart rate pattern with a normal baseline rate of 120 to 130 bpm. Some variable FHR decelerations and episodes of reduced FHR variability are noted during labor. An abnormal FHR pattern with reduced heart rate variability and variable decelerations continued for about 90 minutes prior to delivery. Severe variable decelerations with a drop in FHR to <60 bpm occurred about 40 minutes before delivery.

Cesarean delivery was done for the non-reassuring FHR pattern. Birth weight was 3,300 grams. The newborn was depressed with Apgar scores of 1/4/6. Umbilical cord blood gas was abnormal with a reported pH of 6.99. Initial resuscitation included bag and mask ventilation with a good improvement in heart rate. Despite the improvement in heart rate, poor perfusion and respiratory depression continued. Intubation for mechanical ventilation was required.

Admission physical exam in the NICU describes the baby as lethargic with poor perfusion of the extremities and on the ventilator for respiratory depression. Body cooling was initiated due to hypoxic ischemic encephalopathy (HIE).

The newborn hospital course was complicated. Multisystem failure occurred. Poor perfusion required intravenous fluid boluses. Respiratory depression was present at birth and required intubation and mechanical ventilation. Disseminated intravascular coagulation manifest with hematuria and required fresh frozen plasma. Platelet count dropped to 91,000. Seizure activity was noted on DOL 2. EEG was consistent with mild HIE. MRI on DOL 7 was reported as normal.

In summary, labor was complicated by fetal distress, requiring Cesarean delivery. The newborn was depressed. Umbilical cord blood gas showed significant acidosis with a pH of 6.99. The baby was lethargic, had poor perfusion and respiratory depression at birth. Hospital course was complicated by multisystem organ failure. Although the MRI on DOL 7 was reported as normal, EEG was consistent with HIE.

3. Dr. Willis opined that there was an apparent obstetrical event that resulted in loss of oxygen to the baby's

brain during labor, delivery, and continuing into the immediate post delivery period, which resulted in brain injury. He could not opine on the severity of the injury.

4. NICA requested Raymond J. Fernandez, M.D. (Dr. Fernandez), a pediatric neurologist, to review the medical records for Aiden and to conduct an independent medical examination of Aiden. Dr. Fernandez examined Aiden on August 8, 2012. He made the following findings, which he set forth in an affidavit attached to the Motion for Summary Final Order, based on the medical records and a history from Ms. Greenough.

Aiden's mother, Ms. Natalie Greenough, was admitted to the hospital on September 15, 2011, in active labor. The expected date of delivery was September 24, 2011. She received adequate prenatal care and the pregnancy was uncomplicated. Mrs. Greenough was 16 years old during the pregnancy. Her blood pressure on admission was 110/50 and pulse rate was 80. There was arrest of descent during labor and a nonreassuring fetal heartrate with bradycardia detected, requiring delivery by Cesarean section. The Apgar scores were 1, 4, and 6 and the umbilical artery cord blood pH was 6.9. Aiden required intubation in the delivery room. In the initial newborn examination he was described as having decreased movement and tone, poor perfusion and apnea.

Upon admission to the Neonatal Intensive Care Unit, birth weight was 3,300 grams, length 52 centimeters, head circumference 36 centimeters, temperature 101, heart rate 154 and blood pressure was 55/22. He was lethargic and movement was reduced. He aroused during the examination. The Moro

reflex was present. Sucking reflex was present, but diminished. Gag reflex was present as were plantar and palmar grasping reflexes. He was intubated and receiving assisted ventilation. He met clinical and neurological criteria for whole body cooling, which was initiated promptly (criteria for whole body cooling included periodic hypotonia, decreased activity and lethargy).

There was reduced urine output and hematuria due to urethral trauma during insertion of a Foley catheter. Seizures were a concern on September 16th, treated with Phenobarbital. There was seizure recurrence on September 18th and Phenobarbital was continued. On September 21, 2011, muscle tone and activity were decreased, but improving. Body rewarming began on September 21, 2011. Cranial ultrasound on September 15th was normal and MRI of the brain on September 21, 2011 was normal also. Specifically, there were no areas of restricted diffusion. An EEG on September 20, 2011, was abnormal due to a somewhat poorly organized background, consistent with a mild encephalopathy, but no seizures. In the discharge summary dated September 25, 2011, it was stated that muscle tone and activity were normal.

MRI of the brain at four months of age was reportedly normal.

* * *

Following discharge, he was healthy. He displayed some periodic eye rolling movements for which he was examined by his Neurologist who performed a brain scan and an EEG that he stated were normal. These episodes have not recurred and he has not required antiepileptic drug treatment since he was in the nursery.

Initially, it was felt that Aiden had mild cerebral palsy because of tightness in his arms, but this has resolved. His neurologist in the Pensacola area thought that his development and his physical examination were normal at the time of the last visit and he did not feel that a return appointment was necessary.

Aiden was evaluated by the Early Steps Development Program and he has been enrolled in physical therapy. He has been able to shift himself to the sitting position for several weeks. He crawls or creeps and about a month ago began pulling himself to the standing position. He is able to stand for a few seconds independently, but does not yet take independent steps. He cruises along furniture. Aiden was described as being alert, attentive, and inquisitive. He babbles, imitates sound, says "ma-ma" and "da-da" meaningfully and says and waves "bye-bye" meaningfully. He plays pat-a-cake. He uses both hands well. Picks up small objects with thumb and index finger, feeds himself and claps his hands in play.

5. After performing a physical examination on Aiden on August 8, 2012, Dr. Fernandez made the following findings:

PHYSICAL EXAMINATION: Head circumference 47 centimeters (50th percentile). Weight last week was 20 pounds 13 ounces. No dysmorphic features. No skin abnormalities of neurological significance. Funduscopic examination was limited, but grossly normal. Heart, lung and abdomen were normal. No orthopedic abnormalities. Skull was symmetric. There were no abnormalities over the spine.

Aiden was alert. Attentive and inquisitive. He played appropriately with toys and spinning and rotating parts that he manipulated well. He consistently turned when his name was called. He babbled and

said and waved "bye-bye" when leaving the room. Vision and hearing were grossly normal. Eyes were well aligned and eye movement was full, horizontally and vertically, without significant nystagmus. There was no drooling.

Muscle tone was normal, proximally and distally. He shifted himself to sitting and crawling positions and pulled to stand. He cruised along furniture and took steps with hands held. He had good sitting balance and shifted position quickly and in well coordinated fashion. He moved about either in the crawling or sitting position by pushing with his arms or either leg. He did not yet crawl in reciprocal fashion. Muscle tone was normal and he moved all limbs well. There were no focal or lateralized motor abnormalities. No tremor or involuntary movement. He had well-coordinated pincer grasp, bilaterally, and transferred smoothly from hand to hand. He held one block in each hand and banged them together. He stretched his arms and leaned forward for toys that were otherwise out of reach. He looked for objects that were hidden from view. Deep tendon reflexes were 2+. There were no pathological reflexes elicited.

6. Based on his review of the medical records, discussions with Ms. Greenough, and a physical examination of Aiden, Dr. Fernandez opined that there was no evidence of brain injury due to oxygen deprivation during labor and delivery resulting in substantial and permanent mental or motor impairment. He felt that Aiden should continue to improve in all areas and did not anticipate that in the future that there would be evidence of substantial mental and motor impairment due to oxygen deprivation during labor and delivery.

7. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinion of Dr. Fernandez. The opinion of Dr. Fernandez that Aiden is not substantially and permanently mentally and physically impaired is credited.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. §§ 766.301-766.316, Fla. Stat.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. The evidence, which is not refuted, established that Aiden is not permanently and substantially mentally and physically impaired. Therefore, Aiden is not eligible for benefits under the Plan.

CONCLUSION

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

1. The Petition filed by Natalie Ann Greenough, on behalf of and as parent and natural guardian of, Aiden Curtis Gordon Morris is dismissed with prejudice.

2. The final hearing scheduled for December 17 and 18, 2012, is cancelled.

DONE AND ORDERED this 6th day of December, 2012, in Tallahassee, Leon County, Florida.

Susan Belyeu Kirkland

SUSAN BELYEU KIRKLAND
Administrative Law Judge
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Filed with the Clerk of the
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COPIES FURNISHED:

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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).