

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GABRIELA LORA AND MIKE LORA, on )  
behalf of and as parents and )  
natural guardians of ALEXANDRA )  
LORA, a minor, )  
 )  
 )  
Petitioners, )  
 )  
vs. ) Case No. 11-6263N  
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 )  
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) on May 1, 2012.

STATEMENT OF THE CASE

On December 12, 2011, Petitioners, Gabriela Lora and Mike Lora, on behalf of and as parents and natural guardians of Alexandra Lora (Alexandra), 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 Joseph Gauta (Dr. Gauta) and North Collier Hospital.

DOAH served NICA with a copy of the Petition on December 15, 2011. DOAH served Dr. Gauta and North Collier Hospital with a copy of the Petition on December 16, 2011.

On May 1, 2012, NICA filed a Motion for Summary Final Order, asserting that Alexandra 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 May 16, 2012, an Order to Show Cause was entered requiring Petitioners to show cause in writing on or before May 25, 2012, why the motion should not be granted and a summary final order be entered finding that Petitioners' claim is not compensable. To date no response has been filed to the Order to Show Cause.

#### FINDINGS OF FACT

1. Alexandra Lora was born on June 20, 2007, at North Collier Hospital in Naples, Florida. She weighed 2,950 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records of Alexandra and her mother Gabriela Lora. In an affidavit dated April 26, 2012, Dr. Willis opined as follows:

I have reviewed the records for the above individuals [Alexandra and Gabriela Lora]. The mother Gabriela Lora was a 23 year old G3 P2002 with Gestational Diabetes. She was admitted to the hospital at 36 to 37 weeks gestational age in early labor.

The fetal heart rate (FHR) tracing during labor is reactive and does not suggest fetal distress. Delivery was by repeat Cesarean section. Birth weight was 2,950 grams or 6 lbs. 8 oz. Amniotic fluid was clear at time of delivery.

The newborn was not depressed. Apgar scores were 8/9. No resuscitation was required. Slight nasal flaring was noted at birth as well as some facial bruising. The newborn admission history and physical exam describes a normal baby girl. Routine care was recommended. Some jaundice was present, but otherwise the newborn hospital course was uncomplicated. By two years of age, the child was diagnosed with Cerebral Palsy and developmental delay.

In summary, the FHR monitor during labor did not suggest fetal distress. Delivery was by repeat Cesarean section with normal Apgar scores. The baby did not require resuscitation and had an essentially normal newborn hospital course.

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.

3. On February 22, 2012, Michael S. Duchowny

(Dr. Duchowny) evaluated Alexandra at Miami Children's hospital.

His examination revealed the following:

Physical Examination reveals an alert, well-developed and cooperative appropriately

proportioned 4-year-old girl. Alexandra is a left-hander. The skin is warm and moist and there are no neurocutaneous stigmata or dysmorphic features. No craniofacial anomalies are noted. Head circumference measures 50.4 cm which is within standard percentiles for her age. The anterior and posterior fontanelles are closed. There are no digital skeletal or palmar abnormalities. The spine is straight and there is no dysmorphism. The neck is supple without masses thyromegaly or adenopathy. The heart sounds are strong and the chest is clear. There is no palpable abdominal organomegaly. Peripheral pulses are 2+ and symmetric. Alexandra wears bilateral AFOs and a right rubber support wrist splint.

Neurological examination reveals a child who is fully intact and appropriate. She is socially engaging and easily examined. She displays an age-appropriate level of curiosity and her attention span and concentration are age-appropriate as well. Her speech is fluent and well articulated and there are no labial lingual or guttural dysarthric sounds. She could name body parts and colors without difficulty and followed complex commands accurately.

Cranial nerve examination reveals full visual fields to direct confrontation testing. There is blink to threat from all directions. Pupils are 3 mm and react briskly to direct and consensually presented light. Funduscopic examination reveals sharply demarcated optic disc margins without pallor and no abnormal retinal findings. Extraocular movements are full and [sic] conjugate without nystagmus. There is a slight right facial asymmetry characterized by decreased movement of the lower facial muscles on voluntary expression. Pharyngeal folds are symmetric and the uvula is midline the tongue movements are full and conjugate.

Motor examination reveals evidence of a mild right hemiparesis involving arm and leg. There is full range of motion and no contractures. There is virtually no spasticity but a very slight degree of dystonia is noted. Alexandra tends to posture the right hand particularly while walking and there is a slight decrease in right arm swing. Remarkably to she [sic] has preserved individual finger dexterity of both hands indicating preserved fine motor coordination. Alexandra grasped with either hand although she tends to transfer to the left. There are no fasciculations and no focal weakness or atrophy.

4. Dr. Duchowny opined that:

Alexandra's general physical and neurological examinations reveal evidence of a mild right hemiparesis without prominent spasticity and with well-preserved cognitive abilities including expressive and receptive language skills. These finding indicate that Alexandra has neither a substantial motor nor mental impairment. In all likelihood, she will continue to improve in the future. A review of her medical records sent on February 6th further indicates that there were no complications of labor or delivery to suggest that Alexandra's deficit was acquired intrapartum.

Based on the foregoing, I believe that Alexandra should not be considered for compensation within the NICA statute.

5. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinions of either Dr. Willis or Dr. Duchowny. The opinions of Dr. Willis and Dr. Duchowny that Alexandra did not suffer a neurological injury due to oxygen deprivation or mechanical

injury during labor, delivery, or immediate post-delivery period are credited. Additionally, Dr. Duchowny's opinion that Alexandra has neither a substantial mental or motor impairment is also credited.

#### CONCLUSIONS OF LAW

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

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. The evidence, which is not refuted, established that Alexandra did not sustain an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a hospital, which renders her substantially and permanently physically and mentally impaired. Therefore, Alexandra is not eligible for benefits under the Plan.

#### CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the petition for benefits filed by Gabriela Lora and Mike Lora, on behalf of and as parents and



natural guardians of Alexandra Lora, is dismissed with prejudice.

DONE AND ORDERED this 5th day of June, 2012, in Tallahassee, Leon County, Florida.

*Susan Belyeu Kirkland*

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SUSAN BELYEU KIRKLAND  
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 5th day of June, 2012.

COPIES FURNISHED:  
(Via Certified Mail)

Kenney Shipley, Executive Director  
Florida Birth Related Neurological  
Injury Compensation Association  
2360 Christopher Place, Suite 1  
Tallahassee, Florida 32308  
(Certified Mail No. 7011 1570 0001 1540 6229)

Gabriela Lora  
Mike Lora  
3730 14th Avenue Southeast  
Naples, Florida 34117  
(Certified Mail No. 7011 1570 0001 1540 6236)

Martin P. McDonnell, Esquire  
Rutledge, Ecenia, and Purnell, P.A.  
119 South Monroe Street, Suite 202  
Post Office Box 551  
Tallahassee, Florida 32301  
(Certified Mail No. 7011 1570 0001 1540 6243)

North Collier Hospital  
11190 Healthpark Boulevard  
Naples, Florida 33941-3010  
(Certified Mail No. 7011 1570 0001 1540 6250)

Joseph Gauta, M.D.  
1890 Southwest Health Parkway, Suite 205  
Naples, Florida 34109-0473  
(Certified Mail No. 7011 1570 0001 1540 6267)

Amie Rice, Investigation Manager  
Consumer Services Unit  
Department of Health  
4052 Bald Cypress Way, Bin C-75  
Tallahassee, Florida 32399-3275  
(Certified Mail No. 7011 1570 0001 1540 6274)

Elizabeth Dudek, Secretary  
Health Quality Assurance  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308  
(Certified Mail No. 7011 1570 0001 1540 6281)

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).