

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

TYLER DYAL, individually and as  
parent of OLIVER BENDER, a  
minor,

Petitioner,

vs.

Case No. 12-1534N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

ORANGE PARK MEDICAL CENTER,  
INC., ERIC EDELENBOS, D.O., AND  
NORTH FLORIDA OB/GYN,

Intervenors.

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FINAL ORDER

Pursuant to notice, a final hearing was held in this case on  
January 16, 2014, in Jacksonville, Florida, before Susan Belyeu  
Kirkland, an Administrative Law Judge of the Division of  
Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Vaness Brice, Esquire  
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For Respondent: M. Mark Bajalia, Esquire  
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For Intervenor Orange Park Medical Center, Inc.:

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For Intervenor Eric Edelenbos, D.O., and North Florida  
OB/GYN:

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STATEMENT OF THE ISSUE

The issue in this case is whether Oliver Bender has suffered an injury for which compensation should be awarded under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

PRELIMINARY STATEMENT

On May 15, 2012, Tyler Dyal, individually and as parent of Oliver Bender (Oliver), a minor, filed a Petition for Determination of Compensability Pursuant to Florida Statute Section 766.301-766.316 (Petition) with DOAH. The Petition alleged that Oliver suffered permanent and substantial physical

and mental impairment due to lack of oxygen resulting in a birth-related neurological injury.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the Petition on June 1, 2012; served Orange Park Medical Center on June 4, 2012; and served Eric Edelenbos, D.O., on June 4, 2012. The case was placed in abeyance.

On November 14, 2012, NICA filed a response to the Petition, giving notice that the alleged injury did not "meet the definition of a 'birth-related neurological injury' as defined in section 766.3021(2), Florida Statutes, which specifically requires that the injury render 'the infant permanently and substantially mentally and physically impaired.'" NICA requested that a hearing be scheduled to resolve whether the claim was compensable.

On February 1, 2013, Orange Park Medical Center filed Orange Park Medical Center, Inc.'s Petition for Leave to Intervene, which was granted by Order dated February 11, 2013. On March 25, 2013, Dr. Eric Edelenbos and North Florida OB/GYN filed their Petition for Leave to Intervene, which was granted by Order dated April 2, 2013.

On October 1, 2013, Interveners, Dr. Edelenbos and North Florida OB/GYN filed a Motion for Partial Summary Judgment on the issue of whether Dr. Edelenbos and North Florida OB/GYN gave notice pursuant to section 766.316. On November 13, 2013, a

Partial Summary Final Order on Notice was entered, finding that Dr. Edelenbos and North Florida OB/GYN provided sufficient notice. Jurisdiction was retained to determine whether statutory notice was provided by Orange Park Medical Center and whether Oliver sustained permanent and substantial mental and physical impairments. The parties agreed that Oliver had suffered a brain injury as a result of oxygen deprivation during labor and delivery, and continuing into the immediate post-delivery period.

On January 9, 2014, the parties filed a Joint Pre-hearing Stipulation, in which they agreed to certain facts as set forth in section D of the Joint Pre-hearing Stipulation. These facts have been incorporated into this Final Order.

At the final hearing, the parties agreed that the only issue to be determined was whether Oliver's injury resulted in a substantial and permanent mental and physical impairment.

At the final hearing, Joint Exhibits A through DD were admitted in evidence. Neither Petitioner nor Respondent called any live witnesses. Intervenors called Trevor Resnick, M.D., and James B. Ball, M.D., as witnesses.

The Transcript of the final hearing was filed on January 30, 2014. On February 10, 2014, the parties filed their proposed final orders, which have been carefully considered in the drafting of this Final Order.

FINDINGS OF FACT

1. Tyler Dyal is the natural mother of Oliver Bender.

2. Oliver was born a live infant at Orange Park Medical Center in Orange Park, Florida, on September 26, 2011. Orange Park Medical Center was a hospital licensed in Florida on September 26, 2011.

3. The physician providing obstetrical services at the time of Oliver's birth was Dr. Edelenbos. At all material times, Dr. Eric Edelenbos, North Florida Obstetrical and Gynecological Associates, P.A., was a participating physician in the Plan.

4. Oliver weighed in excess of 2,500 grams at birth.

5. None of the parties dispute that Oliver sustained an injury to the brain caused by oxygen deprivation during resuscitation in the immediate post-delivery period. Donald C. Willis, M.D., NICA's expert, opined:

In summary, labor was complicated by an abnormal FHR pattern and resulted in a depressed newborn. Umbilical cord blood gas was consistent with birth hypoxic with a pH of 6.87. The newborn hospital course was complicated by respiratory depression, apnea episodes and seizures. MRI identified hypoxic ischemic encephalopathy.

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. The oxygen deprivation resulted in brain injury. I am not able to comment about the extent of the brain injury.

6. At the time of Oliver's birth, his Apgar scores were 3 at one minute, 6 at five minutes, and 8 at ten minutes, and he required resuscitation in the delivery room. His arterial cord gas pH was 6.872 with a base deficit of over 20, indicating that he had metabolic acidosis and had experienced hypoxia during labor and delivery. Intubation was attempted but was not successful; however, Oliver improved and did not require intubation thereafter.

7. Oliver began having dusky spells around 24 hours of age with reported "staring" and tight tone. He also demonstrated jitteriness and irritability.

8. By September 28, 2011, Oliver had begun to have seizures, which were treated with Phenobarbital. Oliver was transferred to Wolfson's Children's Hospital, where he continued to have stiffening of his extremities with arching and eye staring.

9. On September 29, 2011, Oliver had an MRI which showed the following:

FINDINGS: There are felt to be diffusion abnormalities present. These are more conspicuous on the B200 (more heavily diffusion weighted) images. These involve predominantly the gray matter involving the left frontoparietal region and the left MCA distribution. In addition there is slight restricted diffusion in the basal ganglia bilaterally. There is restricted diffusion along the calcarine fissures greater on the right than the left. There is a small amount

of restricted diffusion in the right frontal lobe along the inferior aspect of the sylvian fissure and extending slightly superiorly. There is also slight restricted diffusion bilaterally felt to localize to the gray matter along in the gray matter of the occipital tips. The cerebellum appears preserved.

These diffusion abnormalities are accompanied by subtle T2 prolongation of FLAIR images as well.

There is otherwise no space-occupying lesion, mass effect or midline shift. There is no hydrocephalus.

The corpus callosum appears well formed.

The intracerebral flow voids on the T2 cube images appear preserved and symmetric. The patient appears to have a complete circle of Willis.

#### IMPRESSION

Areas of restricted diffusion in distribution as described above. The study discussed with Dr. Driscoll and overall the findings are felt to be consistent with hypoxic ischemic encephalopathy. No obvious focal vascular abnormalities are seen on the T2 cube images. As such this is likely secondary to somewhat global ischemic etiology rather than embolic phenomenon. There is no evidence of hemorrhage.

10. Oliver was discharged from Wolfson's Children's Hospital on October 5, 2011, with no further seizure activity being noted. He was continued with Phenobarbital and still remains on the medication.

11. When Oliver was five weeks old, he was seen by Dr. Alana Salvucci at Nemours. Dr. Salvucci's assessment of Oliver revealed the following:

Since Oliver has been at home, he has made good developmental progress. He is making eye contact and tracks. He startles to loud sounds. He moves both of his extremities equally and spontaneously. He smiles. Overall, his grandmother describes him as stiff, tending to hold his hands in a fist position, but will open and grasp objects. He is on phenobarbital 2 mL twice a day, which is approximately 3.5 mg/kg per day. He has had no further events of stiffening concerning for seizure. However, he does have episodes where he stares off, typically to the right with no change in tone, lasting 1 to 2 minutes, occurs at least once a day. There are several times where caretakers can get his attention; however, most of the time, he will not respond to tactile or verbal stimuli. There are no associated oral automatisms or eye flutter.

\* \* \*

Oliver has overall been doing well with no stiffening or jerking episodes, he has been smiling, and tracking and milestones have been appropriate for his age.

12. Dr. Salvucci recommended that Oliver's mother and grandmother videotape Oliver's episodes of staring off and send the tape to Nemours for review. She arranged for a prolonged, at least four-hour, video EEG in hopes of capturing the staring episodes described by Oliver's mother and grandmother. On December 29, 2011, Oliver had a four-hour, sleep-deprived EEG, which was normal with no clinical events during the EEG



recording. No evidence was presented that established Oliver's mother followed Dr. Salvucci's recommendation to videotape one of Oliver's staring episodes.

13. On March 22, 2012, Oliver returned to Nemours and was seen by Dr. Harry Abrams. Dr. Abrams noted that Oliver had made good developmental progress since his discharge from Wolfson's Children's Hospital. Oliver had begun sitting up in a tripod position. He used both hands equally, reaching for objects and transferring objects. According to his mother, Oliver's stiffness had significantly improved, but Oliver still had tight heel cords, making him tend to stand on his toes when bearing weight. Although not babbling, Oliver was making good eye contact, smiling, and tracking. During the visit, Oliver's mother reported that at least twice a day Oliver had episodes where his arms stiffened and flexed at the elbow and that he was having jerking movements. She indicated that Oliver had been staring off, and there appeared to be transient episodes of unresponsiveness that lasted several seconds.

14. Dr. Abrams recommended that an eight-hour video EEG be done in hopes of capturing one of the events with the upper extremity jerking. This recommendation was not followed.

15. On January 17, 2013, Oliver was admitted to Wolfson's Children's Hospital for seizures accompanying a fever and cough. The seizure was a single episode in which Oliver was unresponsive

for one minute and nonresponsive to verbal or tactile stimulation. The seizure caused grogginess, and Oliver slept afterwards. The seizure was characterized as generalized and staring. The postictal symptom was confusion. His mother reported that this was the first seizure that Oliver had had since he was an infant. Oliver was treated with Klonopin and discharged the next day in stable condition.

16. Oliver visited Dr. Abrams on April 16, 2013. Dr. Abrams noted that Oliver was doing well. Oliver had no significant evidence of delay. Oliver's family advised that Oliver had done well, but at times Oliver would stare off and at other times, when he was drowsy or sleepy, he would put his fingers in his ears and shake his head back and forth. Dr. Abrams recommended that Oliver's dosage of Phenobarbital begin to be tapered.

17. In May 2013, Oliver had another seizure. Again, this seizure was accompanied by a high fever. His mother was about to give him Tylenol when Oliver suddenly stiffened and jerked for several minutes. The episode stopped spontaneously. As a result, Oliver's dosage of Phenobarbital was increased.

18. Oliver has not had another episode similar to the one he had in May 2013. His mother and grandmother report that he continues to have episodes in which he stares off and becomes

confused. However, he returns to baselines after the staring episodes.

19. Oliver is an active child; he can run, walk, and play. He is able to throw a ball and can drive a power-wheel car by pushing the pedal to drive it. He plays with other children. Oliver likes to play with his Hot Wheels cars. He can pull off his hats, socks, and clothes. He is able to turn pages in a book, and he can stack blocks. Oliver scribbles on paper with pens, pencils, and crayons. He can feed himself with utensils and drinks from a sippy cup. He can also drink from a straw. He can put his arms inside his sleeves when he is being dressed.

20. When asked to point to his body parts, including his eyes, ears, hair, feet, hands, and belly button, he is able to do so. As of October 15, 2013, Oliver could speak approximately eight single words meaningfully and had not spoken any two-word phrases. His speech development at that time was not age appropriate. However, Oliver is able to use nonverbal communications effectively. When he is hungry, he smacks his lips and holds out his hands, indicating that he wants something to eat. He is able to understand and carry out verbal requests. He makes good eye contact. He can identify objects in pictures such as a ball, airplane, and ice cream cone by pointing to the objects. He is not receiving any type of therapy, such as physical, occupational, or speech therapy.

21. Respondent retained Raymond Fernandez, M.D., to evaluate Oliver. Dr. Fernandez is board-certified in pediatrics and neurology together with child neurology and has been practicing pediatric neurology for 37 years. Dr. Fernandez reviewed Oliver's medical records and performed independent medical examinations on Oliver on September 25, 2012, and October 15, 2013. After Dr. Fernandez's examination on September 25, 2012, he felt that it would be appropriate to reexamine Oliver in six to nine months in order to track his developmental progress before coming to a final conclusion. After his second evaluation, Dr. Fernandez summarized his evaluation as follows:

There is no evidence at this time, of substantial mental and motor impairment due to oxygen deprivation sustained during labor and delivery.

Oliver has made good progress with his fine and gross motor skills and at this time, there is no convincing evidence for spasticity or cerebral palsy that was noted earlier. There is no reason to anticipate any reversal or regression in his motor skills, strength, or coordination.

Expressive speech development has been delayed, but he is improving at a steady pace and this trend should continue. Receptive language skills are also improving steadily. Delay in speech and language skills, even when improving, is sometimes an early indicator of later learning difficulty in the classroom setting. Whether or not this will prove to be a problem for Oliver remains to be determined. It is a potential problem

that should not be insurmountable with appropriate input from his teachers.

22. At the time of Dr. Fernandez's examination on October 15, 2013, Oliver was able to run without falling and had no abnormality in his gait.

23. Intervenor, Orange Park Medical Center, retained Trevor Resnick, M.D., to evaluate Oliver. He is board-certified in pediatrics and neurology with a special competence in child neurology. Dr. Resnick reviewed Oliver's medical records and examined Oliver. He opined Oliver's staring spells and resulting confusion were partial complex seizures. These seizures have not been confirmed with a video EEG and have been witnessed only by his family. However, given the long history of these episodes, more likely than not, the episodes are partial complex seizures.

24. When Oliver experiences a staring episode and resulting confusion, he will return to his baseline condition and is able to carry on with the activities previously described. The episodes are transient in nature; thus, any physical or mental impairment that occurs during the episode is not permanent.

25. Dr. Fernandez's opinion that Oliver does not have a substantial, permanent physical and mental impairment is credited.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2011).

27. The Plan was established by the Legislature "to provide compensation on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation." § 766.301, Fla. Stat. The Plan applies only to a birth-related neurological injury, which 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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality. (emphasis added).

28. 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. 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 submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury."

§ 766.305(4), Fla. Stat.

29. 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.

30. In discharging this responsibility, the Administrative Law Judge must make the following determinations based upon all 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 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.

31. The parties have stipulated that a participating physician provided obstetric services at Oliver's birth in a hospital licensed in Florida. Oliver was born a live infant and weighed more than 2,500 grams. NICA agrees that Oliver sustained an injury to the brain caused by oxygen deprivation during labor, delivery, and resuscitation in the immediate post-delivery resuscitation period. The issue to be determined is whether the injury resulted in a permanent and substantial mental impairment and a permanent and substantial physical impairment, inasmuch as both are required to establish compensability. Fla. Birth-Related Neurological Injury Comp. Ass'n v. Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997) (the "Birnie" decision).

32. Petitioner has the burden to establish that the injury Oliver sustained resulted in him being rendered permanently and substantially mentally and physically impaired.



§ 766.309(1)(a), Fla. Stat. See also Balino v. Dep't of Health & Rehab. 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.").

33. The Legislature did not define "permanently and substantially mentally and physically impaired." However, those terms should be read in the context of the legislation creating the Plan. The Legislature intended that only a limited class of catastrophic injuries be compensable under the Plan.

34. In Matteini v. Florida Birth-Related Neurological Injury Compensation Association, 946 So. 2d 1092, 1095 (Fla. 5th DCA 2006), the court discussed the criteria for a physical impairment.

Under the Plan, a "physical impairment" relates to the infant's impairment of his "motor abnormalities" or "physical functions," which along with the brain injury significantly affects the infant's mental capabilities so that the infant will not be able to translate his cognitive capabilities into adequate learning or social development in a normal manner.

35. In Adventist Health System/Sunbelt, Inc. v. Florida Birth-Related Neurological Injury Compensation Association, 865 So. 2d 561, 567 (Fla. 5th DCA 2004), the court in explaining the Birnie decision stated: "[U]nder NICA, the identification of a substantial mental impairment may include not only significant cognitive deficiencies but can include, in a proper case,

additional circumstances such as significant barriers to learning and social development."

36. The child in the Birnie decision was found to have both permanent and substantial mental and physical impairments, although tests indicated that he was average or above average in his cognitive skills and preacademic skills. The child in Birnie is described as follows:

At the time of the hearing in this case, Eric was 4 1/2 years old. He was unable to stand up, walk, or crawl. His only method of independent mobility was to roll over. The use of his hands and arms was very limited. He also had great difficulty talking and/or communicating and he must take long pauses to formulate a response to any inquiry. Eric's brain dysfunction is permanent. Because Eric's speech is greatly impacted by his condition, it is virtually certain that he will always be severely limited in his verbal expression and other communication skills. While continued therapy may help him to communicate better and to become somewhat more mobile, he will almost certainly never be able to walk, feed, groom or toilet himself.

\* \* \*

As a direct result of his injury, Eric will not be able to communicate, attend school or otherwise learn and develop intellectually without substantial accommodation. His social and vocational development have unquestionably been significantly impaired.

688 So. 2d at 1352.

37. There is a sharp contrast between Oliver and the child in the Birnie decision. Oliver is able to walk, run, feed

himself, use his hands, and talk. Oliver should be able to attend school and should be able to learn and to communicate.

38. Petitioner has failed to establish that Oliver has a permanent and substantial mental and physical impairment. Thus, Oliver is not entitled to benefits under the Plan.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the petition filed by Tyler Dyal, individually, and as parent of Oliver Bender, is dismissed with prejudice.

DONE AND ORDERED this 6th day of March, 2014, in Tallahassee, Leon County, Florida.

*Susan Belyeu Kirklund*

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Filed with the Clerk of the  
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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).