

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAFNE QUIROGA and ALVARO)
IRIARTE, individually and as)
parents and natural guardians)
of ALVARO TADEO IRIARTE)
QUIROGA, a minor,)
)
Petitioners,)
)
vs.) Case No. 12-1851N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
GENE BURKETT, M.D., AND PUBLIC)
HEALTH TRUST OF MIAMI-DADE)
COUNTY, d/b/a JACKSON HEALTH)
SYSTEM,)
)
Intervenors.)
_____)

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon the Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA), on March 4, 2013.

STATEMENT OF THE CASE

On April 26, 2012, Petitioners, Dafne Quiroga and Alvaro Iriarte, individually and as parents and natural

guardians of Alvaro Tadeo Iriarte Quiroga (Alvaro), a minor, filed a Petition Pursuant to Fla. Stat. §766.301 et seq.

(Petition) with the Division of Administrative Hearings (DOAH) for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

The Petition named Gene Burkett, M.D.; Lesley de la Torre, M.D.; Sarah Jeffers, M.D.; Dr. Lewis, Dr. Del Valle; Dr. Gilles; Dr. Toyama; Dr. Frohoch, and Dr. Missair, as the physicians providing obstetric services at the onset of labor through the birth of Alvaro at Jackson Memorial Hospital in Miami, Florida. The Petition alleges that the named physicians were employed by the University of Miami, d/b/a University of Miami School of Medicine or The Public Health Trust of Miami-Dade County.

DOAH served NICA with a copy of the Petition on May 23, 2012. DOAH served copies of the Petition on Jackson Memorial Hospital and Drs. Frochock, Gilles, Toyama, Lewis, Jeffers, Missair, De La Torre, Burkett, and Del Valle on May 24, 2012. Dr. Jeffers was also served a copy of the Petition by DOAH on June 29, 2012.

On June 6, 2012, Dr. Burkett filed a Petition for Leave to Intervene, which was granted by Order dated June 19, 2012. On June 20, 2012, The Public Health Trust of Miami-Dade County, d/b/a Jackson Health System filed a Petition for Leave to Intervene, which was granted by Order dated July 3, 2012. As of

the date of this Summary Final Order of Dismissal, none of the other physicians have petitioned to intervene in this proceeding.

On March 4, 2013, NICA filed a Motion for Summary Final Order, asserting that Alvaro did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. Petitioners have not filed a response to the motion and had previously taken the position that the injury to Alvaro is not compensable.

By Order dated March 8, 2013, Dr. Burkett was given an extension of time in which to file a response to the Motion for Summary Final Order. On March 29, 2013, Dr. Burkett, filed a response to the Motion for Summary Final Order stating that he had no objection to the granting of the Motion for Summary Final Order. On April 1, 2013, Public Health Trust of Miami-Dade County filed a response joining Dr. Burkett's response and stating that it had no objection to the granting of the Motion for Summary Final Order.

FINDINGS OF FACT

1. Alvaro Tadeo Iriarte Quiroga was born on May 31, 2007, at Jackson Memorial Hospital in Miami, Florida. Alvaro weighed 2,865 grams at birth.

2. NICA retained Michael S. Duchowny, M.D., as its medical expert in pediatric neurology. Dr. Duchowny examined Alvaro and reviewed his medical records. Dr. Duchowny opined as follows:

In summary, Alvaro's neurological examination reveals evidence of abnormal cranial configuration, speech dysarthria, short attention span, high activity level, inconsistent social visual regard, and limited social interaction. He manifests an expressive language delay. He also demonstrates fine motor incoordination. These findings are consistent with a diagnosis of pervasive developmental disorder (PDD) which does not constitute either a substantial mental or motor impairment.

A review of Alvaro's medical records indicates that he was born at 37 weeks gestation at Jackson Memorial Hospital with a birth weight of 2,865 gm. Cord Blood gases revealed [sic] significant acidosis and he did not get oxygen for a prolonged period of time (23 minutes). He went on to evidence renal failure and liver dysfunction and had polcythemia and thrombocytopenia. A brain CT scan revealed partial craniosynostosis of the anterior sagittal suture. Of note, Alvaro's MRI scan of the brain performed on June 7, 2007 showed no significant abnormalities.

Despite his adverse perinatal circumstances, I do not believe that Alvaro's present neurological problems resulted from either mechanical injury or oxygen deprivation in the course of labor or delivery. Furthermore, he has neither a substantial mental nor motor impairment. For these reasons, I am not recommending Alvaro for compensation within the NICA program.

3. A review of the file does not show any opinion contrary to Dr. Duchowny's opinions Alvaro did not suffer a neurological injury due to oxygen deprivation or mechanical injury during labor or delivery and that Alvaro does not have a substantial and permanent mental and physical impairment due to lack of oxygen or mechanical trauma are credited.

CONCLUSIONS OF LAW

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

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. The evidence, which is not refuted, established that Alvaro did not sustain an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor or delivery which resulted in substantial and permanent mental and physical impairments. Therefore, Alvaro 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 filed by Dafne Quiroga and Alvaro Iriarte, individually and as parents and natural guardians of Alvaro Tadeo Iriarte Quiroga, is dismissed with prejudice.

DONE AND ORDERED this 4th day of April, 2013, in Tallahassee, Leon County, Florida.

Susan Belyeu Kirklund

SUSAN BELYEU KIRKLAND
Administrative Law Judge
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Filed with the Clerk of the
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this 4th day of April, 2013.

COPIES FURNISHED:
(Via Certified Mail)

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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).