

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

VALERIE GONZALEZ, on behalf of )  
and as parent and natural )  
guardian of JORDAN GONZALEZ, a )  
minor, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 12-3273N  
 )  
FLORIDA BIRTH- RELATED )  
NEUROLOGICAL INJURY )  
COMPENSATION ASSOCIATION, )  
 )  
Respondent, )  
 )  
and )  
 )  
TENET HEALTHSYSTEM NORTH SHORE, )  
INC., d/b/a NORTH SHORE MEDICAL )  
CENTER, )  
 )  
Intervenor. )  
\_\_\_\_\_ )

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 March 4, 2013.

STATEMENT OF THE CASE

On October 4, 2012, Petitioner, Valerie Gonzalez, on behalf of and as parent and natural guardian of Jordan Gonzalez (Jordan), a minor, filed a Petition Under Protest Pursuant to

Florida Statute Section 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 Ramon Hechavarria, M.D., as the physician providing obstetric services at the birth of Jordan at North Shore Medical Center in Miami, Florida.

DOAH served NICA with a copy of the Petition on October 10, 2012. DOAH served copies of the Petition on North Shore Medical Center and Dr. Hechavarria on October 12, 2012.

On November 27, 2012, Tenet Healthsystem North Shore, Inc., d/b/a North Shore Medical Center filed a petition to intervene, which was granted by Order dated December 14, 2013.

On March 4, 2013, NICA filed a Motion for Summary Final Order, asserting that Jordan did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. NICA represented in a Response to Order of February 19, 2013, that the parties agreed that a hearing was not necessary and the Petitioner and Intervenor concurred the injury was not compensable.

#### FINDINGS OF FACT

1. Jordan Gonzalez was born on May 29, 2008, at North Shore Medical Center in Miami, Florida. Jordan weighed 2,530 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Jordan and his mother. In an affidavit dated February 19, 2013, Dr. Willis opined the following within a reasonable degree of medical probability:

It is my opinion that in summary, fetal abnormalities were identified by ultrasound during pregnancy. The baby was delivered by Cesarean section due to the development of fetal ascites. The mother was not in labor. The baby had several congenital abnormalities including hypoplastic lungs, single umbilical artery, ascites, dilated ventricles in the brain, agenesis of the corpus callosum and a small phallus. MRI did not identify findings suggestive of hypoxic brain injury.

As such, it is my opinion that there was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during delivery or during resuscitation in the immediate post delivery period in the hospital. The mother was not in labor. The fetus had known abnormalities identified by ultrasound during pregnancy. It is most likely the baby's brain abnormalities are congenital and not related to oxygen deprivation at birth.

3. Jordan was examined and evaluated by Michael Duchowny, M.D. (Dr. Duchowny), on January 30, 2013. In an affidavit dated February 27, 2013, Dr. Duchowny found the following on his examination of Jordan:

It is my opinion that the findings from the examination are consistent with both a substantial mental and motor impairment. Jordan is functioning at approximately age 2-3 month level and in addition to his global development delay manifests

microcephaly, dynamic hypotonia and dynamic static hypotonia with hyperreflexia and pathological reflexes. However his examination reveals multiple congenital anomalies which together with the neuroimaging findings suggest that Jordan's neurological deficits were most likely acquired prior to birth.

As such, it is my opinion that there is no evidence from his postnatal course or from his present physical findings to indicate that Jordan Gonzalez sustained an hypoxic or ischemic insults in the course of labor, delivery or the immediate neonatal period. I therefore am not recommending Jordan for inclusion into the NICA program.

4. A review of the file does not show any contrary opinions to those of Dr. Willis and Dr. Duchowny. The opinions of Dr. Willis and Dr. Duchowny that Jordan did not suffer a neurological injury due to oxygen deprivation or mechanical trauma during labor, delivery, or resuscitation in the immediate postdelivery period are credited.

#### CONCLUSIONS OF LAW

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

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. The evidence, which is not refuted, established that Jordan 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. Therefore, Jordan 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 Valerie Gonzalez on behalf of and as parent and natural guardian of Jordan Gonzalez, is dismissed with prejudice.

DONE AND ORDERED this 20th day of March, 2013, in Tallahassee, Leon County, Florida.

*Susan Belyeu Kirklund*

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SUSAN BELYEU KIRKLAND  
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Filed with the Clerk of the  
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this 20th day of March, 2013.

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).