

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

TATIANA C. STOWERS AND ROBERT M.  
STOWERS, on behalf of and as  
natural guardians of KAYLA  
MACKENZIE STOWERS, a minor,

Petitioners,

vs.

Case No. 12-3850N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

ERIC J. EDELENBOS, D.O., NORTH  
FLORIDA OBSTETRICAL AND  
GYNECOLOGICAL ASSOCIATES, P.A.,  
AND ORANGE PARK MEDICAL CENTER,  
INC.,

Intervenors.

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FINAL ORDER

Pursuant to an Order dated October 29, 2013, the parties were granted leave to submit a stipulated factual record and written argument in lieu of a contested hearing in this case. The stipulated record was filed on November 27, 2013.

APPEARANCES

For Petitioners: P. Scott Russell, Esquire  
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For Respondent: M. Mark Bajalia, Esquire  
Brennan, Manna and Diamond  
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For Intervenors Eric J. Edelenbos, D.O., and North Florida  
Obstetrical and Gynecological Associates, P.A.:

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For Intervenor Orange Park Medical Center, Inc.:

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STATEMENT OF THE ISSUE

The issue in this case is whether Kayla Mackenzie Stowers sustained a birth-related neurological injury.

PRELIMINARY STATEMENT

On November 26, 2012, Petitioners, Tatiana C. Stowers and Robert M. Stowers, on behalf of and as natural guardians of Kayla Mackenzie Stowers (Kayla), a minor child, filed a Petition for Benefits Pursuant to Florida Statute Section 766.305 et seq. (Petition) with the Division of Administrative Hearings (DOAH). Petitioners allege that Kayla "suffered a birth-related neurological brain and/or spinal cord injury" and that "[s]he was diagnosed with a cerebral palsy, in or about March 2012, and has

now experienced and continues to experience significant developmental delays.”

The Petition alleged that Eric J. Edelenbos, M.D., provided obstetric services at the birth of Kayla, and that Kayla was born at Orange Park Medical Center in Orlando, Florida. DOAH served the Birth-Related Neurological Injury Compensation Association (Association), Dr. Edelenbos, and Orange Park Medical Center with copies of the Petition.

On January 17, 2013, Dr. Edelenbos and North Florida Obstetrical and Gynecological Associates, P.A., filed a Petition to Intervene. The petition for leave to intervene was granted by Order dated February 5, 2013. On February 5, 2013, Orange Park Medical Center, Inc., filed a Petition for Leave to Intervene, which was granted by Order dated February 19, 2013.

On October 25, 2013, the parties filed a Joint Response to Order and stated:

The parties have met and conferred and, at this time, do not request an administrative hearing. Because the parties agree as to the evidence and records to be submitted, the parties respectfully request that Petitioners' claim be resolved pursuant to a stipulated factual record, and that the parties be allowed to submit written arguments or proposed final orders in lieu of a contested hearing.

On October 29, 2013, an Order was entered granting the parties leave to submit a stipulated record in lieu of a live

administrative hearing and to submit memoranda of law or proposed final orders. On November 27, 2013, the parties submitted a stipulated record, consisting of Joint Exhibits A through S. On December 5, 2013, Petitioners filed Petitioners' Memorandum in Support of Petition for Benefits Pursuant to Chapter 766, Florida Statutes. On December 6, 2013, Respondent filed its proposed final order on compensability. The Intervenors did not file any memoranda or proposed final orders.

#### FINDINGS OF FACT

1. Tatiana C. Stowers and Robert M. Stowers are the natural parents of Kayla Mackenzie Stowers, a minor.

2. Kayla was born a live infant on October 12, 2009, at Orange Park Medical Center, a licensed hospital located in Orange Park Florida. Eric J. Edelenbos, M.D., provided obstetric services at the birth of Kayla, and at all times material to this proceeding, was a "participating physician" as defined in section 766.302(7), Florida Statutes.

3. Kayla weighed 3,078 grams at birth.

4. On October 12, 2009, Mrs. Stowers, who was at full term, was admitted to Orange Park Medical Center at 6:28 a.m., for induction of labor. Her prenatal course had been uneventful.

5. The baby's baseline fetal heart rate on admission was 150 bpm, and the fetal heart rate monitor did not show any fetal distress during labor or delivery.

6. At 8:05 a.m., Pitocin was administered to augment Mrs. Stowers' labor. During her labor, the dosage of Pitocin was increased. At 1:48 p.m., Dr. Edelenbos ruptured Mrs. Stowers' membranes, and the medical records indicate that the amniotic fluid was clear and odorless.

7. At 9:40 p.m., Mrs. Stowers delivered Kayla by normal spontaneous vaginal delivery.

8. At birth, Kayla's mouth and nose were suctioned, but no other resuscitative measures were needed or administered in the delivery room. No complications were noted at her birth, and she was in stable condition. Kayla's Apgar scores at one and five minutes were eight and nine respectively.

9. At 10:30 p.m., Kayla was noted to have respiratory distress. Her left nasal passage was tight and her right nare was patent. She was transferred to the hospital's neonatal intensive care unit.

10. On October 13, 2009, at 12:05 a.m., Kayla was placed on a nasal cannula and an IV was started. Antibiotics were given at 12:20 p.m., and Neo-Synephrine was administered for nasal stuffiness. By 3:45 p.m., on October 13, 2009, Kayla had increased retractions and grunting and was placed on neonatal CPAP at 100% oxygen. During the evening of October 13, 2009, Kayla experienced two apneic episodes with jerking movements of her arms and leg.

11. On October 14, 2009, Kayla was on CPAP for four hours and then intubated due to the apneic episodes the previous evening.

12. A chest X-ray taken of Kayla on October 13, 2009, was within normal limits. On October 14, 2009, Kayla had a normal neonatal head ultrasound.

13. On October 15, 2009, it was noted that Kayla had not experienced any abnormal movements for 24 hours. At 6:00 p.m., on October 17, 2009, Kayla experienced periodic episodes of jerking of hands and legs, in addition to the arching of her back.

14. On October 18, 2009, Kayla had jerky movements of all extremities, including her eyes rolling back. The movements stopped with restraint, but were not typical seizure-like movements.

15. On October 19, 2009, due to suspected seizures, respiratory distress, and suspected sepsis, Kayla was transferred from Orange Park Medical Center to Wolfson Children's Hospital for further workup. An EEG performed on Kayla on October 20, 2009, was within normal limits. A follow-up video EEG on November 4, 2009, was normal.

16. An MRI was done on Kayla on October 21, 2009, and the following findings were reported:

Moderate image degradation secondary to patient's motions. Normal variant cavum septus pellucidum and cavas vergae. Prominent extra-axial fluid at the anterior aspect of both middle fossae, and with 'apparent' suboptimal opoerculation of the Sylvian fissures ? clinical signicance. Followup US may be helpful for further evaluation.

Remainder of the examination appears otherwise unremarkable.

Kayla's attending physician at Wolfson Children's Hospital indicated in her discharge summary dated November 10, 2009, that the MRI was normal.

17. On December 9, 2009, Kayla was taken to the emergency room at Wolfson Children's Hospital. While in the emergency room, Kayla experienced apneic episodes that required intubation. She was admitted to Wolfson Children's Hospital.

18. While admitted to Wolfson Children's Hospital, Kayla had abnormal movements that were nonspecific and not due to seizures. Kayla was discharged on December 22, 2009. In his discharge summary, Clifford David, M.D., summarized the hospital course as it related to the seizure-like activities.

Neurology-wise, the patient was again worked up for this possible seizure-like activity, which was possibly due to reflux. This workup included another EEG and MRI. The CT of the head that was done on admission was reported as positive for a remote area of ischemia involving the basal ganglia but repeat MRI on admission showed no area of acute ischemia. The patient was witnessed to have back arching and head extension with

some clenching of the arms and chest, again unsure whether this was seizure versus reflux versus obstructive airway. Neurology examined the patient and EEG showed no epileptiform discharges although was limited secondary to movement artifact.

19. The repeat MRI referenced in Dr. David's discharge summary was done on December 12, 2009. The findings of this MRI indicated that there was no acute ischemic event.

20. Respondent retained Donald C. Willis, M.D., to review the medical records for Kayla. Dr. Willis reviewed the fetal heart rates of Kayla as recorded by the fetal heart rate monitor during labor. It is Dr. Willis' opinion that the fetal heart rate monitor did not show any fetal distress during labor. On the issue of whether there was an obstetrical event which resulted in loss of oxygen or mechanical trauma to Kayla during labor or delivery, Dr. Willis opined:

In summary, there was no fetal distress during labor. The baby was not in distress at birth. Apgar scores were 8/9. Immediately after delivery, the baby was placed on the mother's abdomen for bonding. The newborn course was complicated by a complex history of apnea episodes, respiratory distress and possible seizures. EEG's and MRI studies were normal.

There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain during labor or delivery.



21. Raymond J. Fernandez, M.D., a pediatric neurologist, reviewed Kayla's medical records and examined Kayla on April 30, 2013. He opined as follows:

There is ample evidence for substantial mental and motor impairment, but this is of unknown etiology. There is no evidence in the medical record for oxygen deprivation or mechanical injury of brain or spinal cord during labor, delivery, or the immediate post delivery period that explains Kayla's substantial and global impairment.

22. Petitioners have presented no expert opinions that refute the opinions of Dr. Willis and Dr. Fernandez. The opinions of Dr. Willis and Dr. Fernandez that Kayla's mental and motor impairments are not due to oxygen deprivation or mechanical injury of the brain or spinal cord during labor, delivery, or the immediate post delivery period are credited.

#### CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2012).

24. The NICA 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.

25. 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. 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.

26. In the instant case, Petitioners filed a claim alleging that Kayla did sustain a birth-related neurological injury that is compensable under the NICA Plan, and NICA has determined that the injury is not compensable under the Plan. As the proponent of the issue of compensability, the burden of proof as to compensability is upon Petitioners. See Balino v. Dep't of Health & Rehab. Servs. 348 So. 2d 349, 350 (Fla. 1st DCA 1997). Therefore, 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.

27. 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.

28. 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.

29. Based on the stipulated record presented, Kayla did not sustain a birth-related neurological injury because her mental and motor impairments are not the result of oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post delivery period. Thus, Kayla does not qualify for benefits under the Plan.

#### CONCLUSION

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

The claim for compensation filed by Tatiana C. Stowers and Robert M. Stowers on behalf of and as natural guardians of Kayla Mackenzie Stowers, a minor, is dismissed with prejudice.

DONE AND ORDERED this 9th day of January, 2014, 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 9th day of January, 2014.

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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).