

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

VANESSA ALVAREZ AND NELSON  
SANTIAGO, on behalf of and as  
parents and natural guardians of  
BRANDON SANTIAGO, a minor,

Petitioners,

vs.

Case No. 13-0182N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent.

\_\_\_\_\_ /

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 July 10, 2013.

STATEMENT OF THE CASE

On January 11, 2013, Petitioners, Vanessa Alvarez and Nelson Santiago, on behalf of and as parents and natural guardians of Brandon Santiago (Brandon), 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 a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan).

The Petition named Shereen Oloufa, M.D., and Carlos Dieguez, M.D., as the physicians providing obstetric services at the birth of Brandon at Health Central, located in Ocoee, Florida.

DOAH served NICA with a copy of the Petition on January 18, 2013. DOAH served a copy of the Petition on Health Central on January 22, 2013. Dr. Dieguez and Dr. Oloufa were served copies of the Petition on January 22, 2013. As of the date of this Summary Final Order of Dismissal, Dr. Dieguez, Dr. Oloufa, and Health Central have not petitioned to intervene in this proceeding.

On July 10, 2013, NICA filed a Motion for Summary Final Order, asserting that Brandon did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. A response to the motion was due to be filed on July 22, 2013. No response was filed. On August 1, 2013, an Order was entered requiring Petitioners to show cause on or before August 19, 2013, why the motion should not be granted. As of the date of this Summary Final Order of Dismissal, Petitioners have filed no response to the motion for summary final order.

#### FINDINGS OF FACT

1. Brandon Santiago was born on January 28, 2008, at Health Central in Ocoee, Florida. Brandon weighed 2,750 grams at birth.

2. NICA retained Donald C. Willis, M.D., as its expert in maternal fetal medicine. After having reviewed the medical records of Brandon and his mother, Dr. Willis opined in an affidavit dated June 26, 2013, as follows:

The fetal heart rate (FHR) monitor tracing during labor was not available for review. However, the operative report stated "repetitive variable decelerations to the 60's" were present. Cesarean section delivery was done for the abnormal FHR pattern and failure to progress in labor.

Amniotic fluid was clear at delivery. Birth weight was 2,750 grams. The newborn was not depressed. Apgar scores were 7/9/9. Cord blood gas did not suggest acidosis. The pH was 7.26 with abase [sic] excess of only -3. Decreased fetal tone was present after birth and attributed to maternal MgS04 administration during labor.

The baby had an uneventful hospital course and was discharged home two days after birth. Subsequently, the baby was noted to have poor muscle tone and developmental delay. Genetic evaluation was done but no obvious genetic condition was identified.

In summary, Cesarean section was done for abnormal FHR pattern. The baby was not depressed at birth. Decreased muscle tone was noted, but otherwise the newborn hospital course was uneventful. The baby was discharged home with the mother two days after birth. These findings do not suggest oxygen deprivation during the birthing process. There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to Brandon Santiago's brain during labor, delivery, or the immediate post delivery period.

3. NICA retained Michael S. Duchowny, M.D., as its medical expert in pediatric neurology. Dr. Duchowny examined Brandon and reviewed his medical records. In an affidavit dated July 9, 2013, Dr. Duchowny opined as follows:

Brandon's neurological examination reveals evidence of severe motor delay with virtually no progress past the newborn level. This disorder affects all limbs in a symmetric fashion and has likely compromised his bulbar musculature, as well. Cognitive testing is difficult to assess due to the profound motor impairment.

A review of the medical records confirms his mother's impression of only transient difficulties at birth and in fact, Brandon was born only with a brief period of absent respirations which responded immediately in the delivery room. His Apgar scores were 7, 9, 9 at 1, 5, and 10 minutes and Brandon's hospital course stabilized rapidly allowing him to be discharged on the second day of life. These facts do not support the acquisition of a neurological injury to the brain or spinal cord due to oxygen deprivation or mechanical injury during labor or delivery. While Brandon does evidence a substantial motor impairment, he is likely suffering from an unknown neuromuscular disorder. The history of seizures obviously suggests that the underlying diagnosis also involves the central nervous system and is therefore more complex, but his caretakers have so far been unable to ascertain a definitive diagnosis.

\* \* \*

It is my opinion that BRANDON SANTIAGO does have a substantial motor impairment. However, I do not regard Brandon's neurological presentation as consistent with a neurological injury to the brain or spinal

cord acquired due to oxygen deprivation or mechanical injury occurring during the course of labor, delivery, or the immediate post-delivery period in the hospital during the birth of BRANDON SANTIAGO. I, therefore, do not believe that BRANDON SANTIAGO is compensable within the NICA program.

4. A review of the file does not show any opinions contrary to the opinions of Dr. Duchowny and Dr. Willis that Brandon did not suffer a neurological injury due to oxygen deprivation or mechanical injury during labor, delivery, or resuscitation in the immediate post-delivery 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 Brandon 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 during resuscitation in the immediate post-delivery period, which resulted in substantial and permanent mental and physical impairments. Therefore, Brandon 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 Vanessa Alvarez and Nelson Santiago, on behalf of and as parents and natural guardians of Brandon Santiago, is dismissed with prejudice.

DONE AND ORDERED this 23rd day of August, 2013, in Tallahassee, Leon County, Florida.

*Susan Belyeu Kirklund*

---

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 23rd day of August, 2013.

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. 7013 1090 0002 4071 3718)

Vanessa Alvarez  
c/o Nelson Santiago  
1314 Fetter Way  
Winter Garden, Florida 34787  
(Certified Mail No. 7013 1090 0002 4071 3725)



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. 7013 1090 0002 4071 3749)

Amie Rice, Investigation Manager  
Consumer Services Unit  
Department of Health  
4052 Bald Cypress Way, Bin C-75  
Tallahassee, Florida 32399-3275  
(Certified Mail No. 7013 1090 0600 0002 2576 5637)

Elizabeth Dudek, Secretary  
Health Quality Assurance  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308  
(Certified Mail No. 7013 0600 0002 2576 5644)

Shereen Oloufa, M.D.  
Suite 387  
10000 West Colonial Drive  
Ocoee, Florida 34761-3435  
(Certified Mail No. 7013 0600 0002 2576 5651)

Health Central Hospital  
10000 West Colonial Drive  
Ocoee, Florida 34761  
(Certified Mail No. 7013 0600 0002 2576 0670)

Carlos Dieguez, M.D.  
Suite 387  
10000 West Colonial Drive  
Ocoee, Florida 34761-3435  
(Certified Mail No. 7013 0600 0002 2576 0687)

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).