

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GILBERT KOUAME AND SELINA KOUAME
DUKU, on behalf of and as
parents and natural guardians of
TRINITY KOUAME, a minor,

Petitioners,

vs.

Case No. 13-3822N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

FLORIDA HEALTH SCIENCES CENTER,
INC., d/b/a TAMPA GENERAL
HOSPITAL,

Intervenor.

_____ /

SUMMARY FINAL ORDER

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 December 6, 2013.

STATEMENT OF THE CASE

On September 25, 2013, Petitioners, Gilbert Kouame and Selina Kouame Duku, on behalf of and as parents and natural guardians of Trinity Kouame (Trinity), a minor, filed a Petition

for Determination of Compensability Pursuant to Section 766.309, Florida Statutes, and for Bifurcation of any Determination of Compensation (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 the following physicians as providing obstetric services at the birth of Trinity at Tampa General Hospital at Tampa, Florida: Catherine Lynch, M.D., Margaux Manuel, M.D., Jerome Yankowitz, M.D., and Angela Gonzalez, M.D.

DOAH served NICA with a copy of the Petition on October 2, 2013. DOAH served Dr. Manuel with a copy of the Petition on October 4, 2013. On October 7, 2013, DOAH served Dr. Lynch with a copy of the Petition. On October 7, 2013, DOAH received a receipt from the United States Postal Service (USPS) showing that Tampa General Hospital had been served with a copy of the Petition. On October 9, 2013, DOAH received a receipt from USPS showing that Dr. Gonzalez had been served with a copy of the Petition. On October 11, 2013, DOAH received a receipt from USPS that Dr. Yankowitz had been served with a copy of the Petition.

On October 29, 2013, Florida Health Services Center, Inc., d/b/a Tampa General Hospital filed an Amended Motion to Intervene, which was granted by Order dated November 8, 2013. As of the date of this Summary Final Order, Dr. Lynch, Dr. Manuel,

Dr. Yankowitz, and Dr. Gonzalez have not petitioned to intervene in this proceeding.

On December 6, 2013, NICA filed a Motion for Summary Final Order, asserting that Trinity did sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. On January 9, 2014, Petitioners filed Petitioners' Response to Motion for Summary Final Order, stating that they had no objection to a summary final order finding that Trinity "suffered a compensable birth-related neurological injury."

On January 15, 2014, Intervenor filed Intervenor's Response to Motion for Summary Final Order, stating it had no position as to the relief requested by Respondent.

FINDINGS OF FACT

1. Trinity Kouame was born on January 31, 2012, at Tampa General Hospital in Tampa, Florida. She weighed 2,955 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records of Trinity. In a report dated November 18, 2013, Dr. Willis set forth his findings as follows:

The fetal heart rate (FHR) monitor tracing on admission to the hospital showed a fetal tachycardia of 180 bpm and decreased FHR variability. Regular uterine contractions were present every 2 to 3 minutes, consistent with labor. A FHR deceleration occurred about one hour after hospital admission with

FHR dropping to 95 bpm. A persistent irregular FHR pattern continued with the FHR remaining below 120 bpm until the monitor was removed, which was about 40 minutes after the FHR deceleration.

Emergency Cesarean section was done for an abnormal FHR pattern. Birth weight was 2,995 grams.

The newborn was depressed at birth. Apgar scores were 0/3/5. Umbilical cord blood gas was abnormal and consistent with acidosis with a pH of 6.86 and a base excess of -14. The baby was limp at birth with spontaneous respiratory effort. Bag and mask ventilation was started.

No heart rate could be identified at 30 seconds after birth. Chest compressions began at 60 seconds after birth. At 90 seconds the baby was intubated. A heart rate of >100 bpm was noted at 3 minutes of life. Respiratory distress worsened. At 7 minutes after birth the oxygen saturation was only 65%. The baby was transported to NICU.

Hypoxic ischemic encephalopathy was clinically suspected. The baby was managed with controlled hypothermia. Seizure activity was present a <12 hours of life. EEG on DOL 2 confirmed seizure activity. The baby was not extubated until DOL 7.

MRI on DOL 11 showed cerebral infarcts, consistent with global hypoxia.

3. In an affidavit dated December 5, 2013, Dr. Willis opined as follows:

It is my opinion that in summary, labor was complicated by an abnormal FHR pattern. Emergency Cesarean section delivery was done with a depressed newborn. Umbilical cord pH was only 6.86. Resuscitation was required, including intubation and chest compressions.

Seizure activity was present by 12 hours of life. MRI on DOL 11 was consistent with global hypoxia.

As such, it is my opinion that there was an apparent obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery and continued into the immediate post delivery period. The oxygen resulted in brain injury.

4. NICA retained Michael S. Duchowny, a pediatric neurologist, to review Trinity's medical records and to examine her. He performed a neurological evaluation on Trinity on November 20, 2013. On December 5, 2013, Dr. Duchowny executed an affidavit which stated:

It is my opinion that TRINITY's neurological examination reveals evidence of substantial mental and motor impairment consistent with global developmental delay. Trinity's examination demonstrates spastic quadriparesis, microcephaly, cortical visual impairment, and absence of communication or socialization skills. She additionally has a long standing history of medical resistant seizures.

A review of medical records sent on November 7, 2013 confirms her mother's recall of a with cerclage problem prenatally. The cerclage was removed on January 26, but a stitch was left in place and the pregnancy was complicated by significant hemorrhage. Apgar scores were 0, 3, & 5 at 1, 5, and 10 minutes and a cord arterial pH was measured at 6.86. Trinity was delivered at Tampa General Hospital and immediately placed in a hypothermia protocol for 72 hours. Seizures were noted after the day of birth. An ultrasound of the brain performed on February 3rd was normal but an MRI scan on February 12th revealed multiple areas of

infarction involving the corpus callosum, basal ganglia, internal capsule and periventricular white matter with widespread diffusion abnormalities in the cerebral hemispheres. These findings are consistent with hypoxic ischemic damage.

As such, it is my opinion that based on the neurological examination and record review, I believe that TRINITY should be considered for compensation with the NICA program as she has a substantial mental and motor impairment resulting from a brain injury due to oxygen deprivation in the course of labor and delivery. Her findings are in all likelihood permanent and her prognosis is extremely guarded. Should she be accepted into the NICA program, I believe that her lifespan prognosis includes another 20 years.

5. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinions of either Dr. Willis or Dr. Duchowny. The opinions of Dr. Willis and Dr. Duchowny that Trinity did suffer a neurological injury due to oxygen deprivation during labor and delivery are credited. Additionally, Dr. Duchowny's opinion that Trinity has both a substantial mental and motor impairment is also credited.

CONCLUSIONS OF LAW

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

7. 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.

8. 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.

9. 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. 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 Trinity did sustain an injury to the brain caused by oxygen deprivation occurring in the course of labor and delivery in a hospital, which renders her substantially and permanently

physically and mentally impaired. Therefore, Trinity is eligible for benefits under the Plan.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED:

1. Respondent's Motion for Summary Final Order is granted, and Trinity Kouame sustained a birth-related neurological injury which is compensable under the Plan.

2. Jurisdiction is reserved to determine the issue of award pursuant to section 766.31.

3. It is further ORDERED that the parties are accorded 30 days from the date of this Order to resolve, subject to approval of the administrative law judge, the amount and manner of payment of an award to Petitioners; the reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees and costs; and the amount owing for expenses previously incurred. If not resolved within such period, the parties shall so advise the administrative law judge, and a hearing will be scheduled to resolve such issues. Once resolved, an award will be made consistent with section 766.31.

DONE AND ORDERED this 22nd day of January, 2014, 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 22nd day of January, 2014.

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).