

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LURCRECIA ALAVEZ, individually  
and on behalf of BRYAN ALAVEZ, a  
minor,

Petitioner,

vs.

Case No. 13-3879N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent.

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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 November 3, 2014.

STATEMENT OF THE CASE

On October 3, 2013, Petitioner, Lurcrecia Alavez, individually and on behalf of Bryan Alavez (Bryan), 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 Jerome Yankowitz, M.D., and Kiran Rao, M.D., as the physicians

providing obstetrical services at the birth of Bryan on August 7, 2011, at Tampa General Hospital located in Tampa, Florida.

DOAH served NICA with a copy of the Petition on October 10, 2013. On October 15, 2013, DOAH received a return receipt from the United States Postal Service showing that Tampa General Hospital had been served with a copy of the Petition. On October 15, 2013, DOAH received return receipts from the United States Postal Service showing that Dr. Rao and Dr. Yankowitz had been served with a copy of the Petition.

On November 3, 2014, NICA filed a Motion for Summary Final Order, asserting that Bryan did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. NICA represents in its Motion for Summary Final Order that Petitioner has no objection to the granting of the motion. As of the date of this Summary Final Order of Dismissal, no petitions to intervene have been filed by Dr. Rao, Dr. Yankowitz, or Tampa General Hospital.

FINDINGS OF FACT

1. Bryan Alavez was born on August 7, 2011, at Tampa General Hospital located in Tampa, Florida. Bryan weighed 4,590 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Bryan. In a medical report dated July 14, 2014, Dr. Willis opined as follows:

In summary, the mother had poorly controlled Gestational Diabetes, which most likely resulted in the large for gestational age (macrosomic) newborn and resulting shoulder dystocia. Umbilical cord blood gas was within normal limits, suggesting the baby did not have hypoxia during labor. However, newborn depression occurred, most likely related to shoulder dystocia. The Apgar was 0 at one minute. Chest compressions and bag and mask ventilation were required at birth. The baby improved and was taken to the NICU with respiratory depression requiring nasal canula oxygen. A fractured humerus occurred at time of shoulder dystocia delivery. The baby did not have seizures. Encephalopathy was not suspected. Imaging studies of the brain were not done.

The fetus did not suffer oxygen deprivation or mechanical trauma to the brain during labor. Some oxygen deprivation may have occurred as a result of the shoulder dystocia, as indicated by an Apgar score of 0 at one minute. However, there is no documentation that any significant brain injury resulted from this possible oxygen deprivation.

There was an apparent obstetrical event, shoulder dystocia, but this does not appear to have resulted in any significant loss of oxygen or mechanical trauma to the baby's brain during labor, delivery, or the immediate post delivery period.

3. NICA retained Raymond J. Fernandez, M.D.

(Dr. Fernandez), a pediatric neurologist, to examine Bryan and to review his medical records. Dr. Fernandez examined Bryan on September 15, 2014. In a medical report regarding his independent medical examination of Bryan, Dr. Fernandez opined as follows:

IMPRESSION:

Despite transient neurological depression immediately after birth, there is no evidence for substantial mental and motor impairment due to oxygen deprivation or mechanical injury of brain or spinal cord during labor, delivery, or within the immediate postdelivery period of resuscitation. This opinion is based on record review and clinical history and physical and neurodevelopmental examination. There was no suspicion of perinatal encephalopathy while in the NICU or after discharge. Imaging of the brain and spinal cord has not been necessary.

Bryan sustained a fracture of his left humerus as a complication of shoulder dystocia and there was question of left brachial plexus injury causing left arm weakness. He appears to have subtle residual left upper extremity proximal weakness. This is due to mechanical injury of peripheral nerves (brachial plexus). It is not due to oxygen deprivation or mechanical injury of brain or spinal cord.

4. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinion of Dr. Willis that there was an apparent obstetrical event, shoulder dystocia, but this event does not appear to have resulted in any significant loss of oxygen or mechanical trauma to the baby's brain during labor, delivery, or the immediate post delivery period. Dr. Willis' opinion is credited. There are no contrary expert opinions filed that are contrary to Dr. Fernandez's opinion that although Bryan appears to have subtle residual left upper extremity proximal weakness, this is

due to mechanical injury to peripheral nerves, and is not due to oxygen deprivation or mechanical injury of the brain or spinal cord. Dr. Fernandez's opinion is 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 Bryan did not sustain an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital. Therefore, Bryan 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 Lurcrecia Alavez, on behalf of Bryan Alavez, is dismissed with prejudice.

DONE AND ORDERED this 21st day of November, 2014, in  
Tallahassee, Leon County, Florida.



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BARBARA J. STAROS  
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Filed with the Clerk of the  
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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).