

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BETHZAIDA RODRIGUEZ, on behalf  
of and as parent and natural  
guardian of ARIELLE RODRIGUEZ, a  
minor,

Petitioner,

vs.

Case No. 13-4911N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

ORLANDO HEALTH, INC., d/b/a  
WINNIE PALMER HOSPITAL FOR WOMEN  
& BABIES AND DENNIS C. SZURKUS,  
M.D.,

Intervenors.

\_\_\_\_\_ /

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 September 3, 2014.

STATEMENT OF THE CASE

On December 9, 2013, Petitioner, Bethzaida Rodriguez, on behalf of and as parent and natural guardian of Arielle Rodriguez (Arielle), 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 "Dr. McLaughlin" as the physician providing obstetrical services at the birth of Arielle on September 28, 2010, at Winnie Palmer Hospital for Women and Babies (Winnie Palmer) in Orlando, Florida. On December 18, 2013, Petitioner filed a letter with the Clerk's Office of DOAH referencing Samuel McLead, M.D.; James Lawrence, M.D.; Sekeyta Paul, M.D.; Virginia Pagani, M.D.; as well as Jacqueline McLaughlin, M.D., as physicians present at Arielle's birth.

DOAH served NICA with a copy of the Petition on December 31, 2013. DOAH served a copy of the Petition on Winnie Palmer on December 24, 2013. DOAH served a copy of the Petition on Jacqueline McLaughlin, M.D., on December 23 and again on December 24, 2013. DOAH served a copy on James Lawrence, M.D., on December 23 and again on December 24, 2013. DOAH served a copy of the Petition on Virginia Pagani, M.D.; Samuel McLead, M.D.; and Sekeyta Paul, M.D., on December 24, 2013.

On January 21, 2014, Dennis C. Szurkus, M.D., and Orlando Health, d/b/a Winnie Palmer Hospital for Women and Babies, filed a Petition for Leave to Intervene naming Dr. Szurkus as having been involved with the labor and delivery process of Arielle.

The Petition to Intervene was granted by Order dated February 5, 2014.

On September 3, 2014, NICA filed a Motion for Summary Final Order, asserting that Arielle did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. The motion was served by United States mail on September 3, 2014.

An Order to Show Cause was entered on September 16, 2014, advising Petitioner to show cause in writing why Respondent's Motion for Summary Final Order should not be granted. To date, no response has been filed.

#### FINDINGS OF FACT

1. Arielle Rodriguez was born on September 28, 2010, at Winnie Palmer Hospital for Women and Babies located in Orlando, Florida. Arielle weighed 3,394 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Arielle, to determine whether an injury occurred in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital due to oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period. Dr. Willis described his findings in pertinent part as follows in an affidavit dated August 28, 2014:

5. I have reviewed the medical records for the above individual. The mother, Bethzaida [sic] Calderon was a 19 year old G1 with no significant prenatal problems. She was admitted to the hospital at 37 weeks with spontaneous rupture of the membranes and active labor.

6. The fetus was noted to be in a breech presentation. Cesarean section was done without difficulty. Birth weight was 3,394 grams. Apgar scores were 4/9. The umbilical cord blood gas was normal with pH of 7.24.

7. Newborn evaluation stated the baby was "clinically well." The newborn hospital course was uncomplicated. Hospital discharge note on DOL 3 has a discharge diagnosis of healthy female.

8. The baby was subsequently diagnosed with developmental delay at 5 to 6 months of age. MRI at about one year of age was normal. Laboratory evaluation, including genetic studies (microarray) was negative. A note from 2 years of age states the child had spastic quadraparesis of unknown etiology.

9. In summary, the baby was delivered by Cesarean section due to breech presentation. The baby had a normal cord blood gas (pH 7.24) and a normal and uncomplicated newborn hospital course. There was nothing to suggest a birth-related hypoxic injury. Developmental delay was noted at 5 to 6 months of age. MRI at one year was normal.

10. There was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery or the immediate post delivery period.

3. NICA retained Michael S. Duchowny, M.D. (Dr. Duchowny), a pediatric neurologist, to examine Arielle and to review her

medical records. Dr. Duchowny examined Arielle on June 25, 2014, and opined in pertinent part as follows in his affidavit dated August 28, 2014.

5. Arielle is 3 years old and has a longstanding history of motor delay. Her parents indicated that she has a combination of both increased and decreased muscle tone and that she is spastic. Arielle cannot walk independently and did not sit until age 18 months. She has never stood on her own and tends to move around by combat crawling. She did not roll over until age 8 months. Both arms and legs are affected equally and there is no laterality to her muscular disability. She is wheelchair-bound.

6. Arielle participates in physical and occupational therapy through her prekindergarten program at Lake Silver Elementary School in Orlando. She participates in 2 sessions per week, each lasting 30 minutes. She wears AFOs and wrist splints and is under surveillance by orthopedic surgery. She has never required surgery and from an orthopedic standpoint, has been stable.

7. In contrast, Arielle's motor disability and cognitive development have proceeded quite well. Her mother indicated that "mentally, she is fine". In fact, she tests out above average and her language skills have always been advanced. Her speech is clear and she is very sociable. There have been no behavioral problems, cognitive or motor regression.

8. Arielle is on no intercurrent medications. She has never had seizures. She has never been examined by an ophthalmologist. Her vision and hearing are both good and her appetite is stable. She sleeps through the night.

9. The physical examination revealed a well-developed, well nourished, wheelchair bound, socially appropriate 3-year old girl. Arielle's height and weight were not measured due to her restriction of being in a wheelchair. Her head circumference measured 50.3 centimeters which is within standard percentiles. There are no neurocutaneous stigmata. She does not have a darkly pigmented nevus on the right lower leg. There are no other neurocutaneous features. The spine is straight without dysraphism. The anterior and posterior fontanelles are closed. There are no cranial or facial anomalies or asymmetries. The neck is supple without masses, thyromegaly or adenopathy. There are no signs of peripheral dysmorphism. The lung fields are clear. The heart sounds are strong without murmurs or rubs. The abdomen is soft and nontender without palpable liver, spleen or kidneys. Peripheral pulses are 2+ and symmetric.

10. The neurologic examination revealed an alert, pleasant and cooperative child who initially was shy but ultimately warmed up during the evaluation. Arielle is quite engaging and she clearly understands everything going on in her surround. She interacts well with her parents and maintains an age appropriate stream of thought and attention. Her speech is fluent and well articulated and she follows simple commands without problems. She was not overly fearful.

11. The motor examination reveals a complex pattern of abnormality. Arielle demonstrates static hypotonia but demonstrates prominent hypertonicity with spasticity. She additionally evidences truncal ataxia and has a dyskinetic syndrome with involuntary movements and intermittent tongue thrusting. Drooling is noted intermittently. She is unable to stand and bear weight and demonstrates a plantigrade attitude. There is prominent scissoring of the lower

extremities. No specific focal weakness or atrophy is noted and there are no fasciculations. Her head control is good. She is unable to maintain a sitting or standing balance. Placing and stepping responses are elicited.

12. In summary, Arielle's neurologic examination reveals a prominent motor disability at a level of development approximating 8 months. In contrast, her mental development is fully on target without evidence of a cognitive deficit. There are no specific focal or lateralizing findings on examination to suggest a lateralized brain lesion.

13. I am familiar with the Florida Birth-Related Neurological Injury Compensation Plan (the "Plan") and the standards imposed by the Plan for compensability of potential claims. Based upon my review of the medical records as described herein and in my report, and further based upon my evaluation of ARIELLE RODRIGUEZ, I have formed an opinion as to whether ARIELLE RODRIGUEZ qualifies for compensation under the plan.

14. I had an opportunity to review medical records which confirm the parent's history and add little in the way of diagnostic information. Arielle's healthcare providers have not established a firm diagnosis of her motor disability although further workup is planned. There is no historical or physical evidence of intrapartum hypoxia or mechanical injury.

15. I therefore do not believe that Arielle should be considered for compensation within the NICA Program. Her mental development is normal and there is no indication of an intrapartum event causing her neurological disability.

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 no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord during labor, delivery or the immediate post-delivery period. Dr. Willis' opinion is credited. There are no expert opinions filed that are contrary to Dr. Duchowny's opinion that Arielle does not show a significant mental impairment and that there is no indication of an intrapartum event causing her neurological injury. Dr. Duchowny'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 Arielle did not sustain an injury to the brain caused by oxygen deprivation occurring during labor, delivery, or the immediate post-delivery period, nor that she has a permanent and substantial mental impairment. Therefore, Arielle 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 Bethzaida Rodriguez, on behalf of and as parent and natural guardian of Arielle Rodriguez, is dismissed with prejudice.

DONE AND ORDERED this 24th day of October, 2014, in Tallahassee, Leon County, Florida.



---

BARBARA J. STAROS  
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 24th day of October, 2014.

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. 7014 1200 0002 3336 4341)

Bethzaida Rodriguez  
6737 Stardust Lane  
Orlando, Florida 32818  
(Certified Mail No. 7014 1200 0002 3336 4358)

Andrea L. Diederich, Esquire  
Marshall, Dennehey, Warner,  
Coleman, and Goggin  
315 East Robinson Street, Suite 550  
Orlando, Florida 32801  
(Certified Mail No. 7014 1200 0002 3336 4365)

Martin P. McDonnell, Esquire  
Rutledge, Ecenia, and Purnell, P.A.  
119 South Monroe Street, Suite 202  
Tallahassee, Florida 32301  
(Certified Mail No. 7014 1200 0002 3336 4372)

Amie Rice, Investigation Manager  
Consumer Services Unit  
Department of Health  
4052 Bald Cypress Way, Bin C-75  
Tallahassee, Florida 32399-3275  
(Certified Mail No. 7014 1200 0002 3336 4389)

Elizabeth Dudek, Secretary  
Health Quality Assurance  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308  
(Certified Mail No. 7014 1200 0002 3336 4396)

Jacqueline Sheree McLaughlin, M.D.  
9827 North Sheldon Road  
Tampa, Florida 33635  
(Certified Mail No. 7014 1200 0002 3336 4402)

James S. Lawrence, Jr., M.D.  
2699 Lee Road, Suite 510  
Winter Park, Florida 32789  
(Certified Mail No. 7014 1200 0002 3336 4419)

James Lawrence, M.D.  
Winnie Palmer Hospital for Women and Babies  
83 West Miller Street, 3rd Floor  
Orlando, Florida 32806  
(Certified Mail No. 7014 1200 0002 3336 4426)

Samuel McLead, M.D.  
Winnie Palmer Hospital for Women and Babies  
83 West Miller Street, 3rd Floor  
Orlando, Florida 32806  
(Certified Mail No. 7014 1200 0002 3336 4433)

Jacqueline McLaughlin, M.D.  
Winnie Palmer Hospital for Women and Babies  
83 West Miller Street, 3rd Floor  
Orlando, Florida 32806  
(Certified Mail No. 7014 1200 0002 3336 4440)

Virginia Pagani, M.D.  
Winnie Palmer Hospital for Women and Babies  
83 West Miller Street, 3rd Floor  
Orlando, Florida 32806  
(Certified Mail No. 7014 1200 0002 3336 4471)

Virginia Pagani, M.D.  
High Risk OB/GYN Resident Practice  
89 West Copeland Drive, Suite 3  
Orlando, Florida 32806  
(Certified Mail No. 7014 1200 0002 3336 4457)

Sekeyta Paul, M.D.  
Winnie Palmer Hospital for Women and Babies  
83 West Miller Street, 3rd Floor  
Orlando, Florida 32806  
(Certified Mail No. 7014 1200 0002 3336 4464)

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).