

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MICHELLE AND THOMAS ALVAREZ,  
individually and as natural  
persons and guardians of AMY  
NICOLE ALVAREZ, a minor,

Petitioners,

vs.

Case No. 14-2621N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

UNIVERSITY OF MIAMI, d/b/a  
MILLER SCHOOL OF MEDICINE AND  
THE PUBLIC HEALTH TRUST OF  
MIAMI-DADE COUNTY,

Intervenors.

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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 September 26, 2014, and the Motion for Summary Final Order filed by Petitioners, Michelle and Thomas Alvarez, individually and as natural persons and guardians of Amy Nicole Alvarez, a minor, filed on October 1, 2014.

STATEMENT OF THE CASE

On May 27, 2014, Petitioners, Michelle and Thomas Alvarez, individually and as natural persons and guardians of Amy Nicole Alvarez (Amy), a minor, filed a Petition for NICA to Find that Florida Statute Section 766.301 et seq. Does Not Apply to Alvarez v. The Public Health Trust of Miami-Dade County d/b/a Jackson Health System d/b/a Jackson South Community Hospital; University of Miami d/b/a Miller School of Medicine; and Jose Alvarez-Fuentes, M.D. (Petition), with the Division of Administrative Hearings (DOAH) for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). By letter dated June 4, 2014, Petitioners identified Ronald Sancetta, M.D., as the physician providing obstetric services at the birth of Amy at Jackson South Community Hospital in Miami, Florida.<sup>1/</sup> DOAH served NICA with a copy of the Petition on June 6, 2014. DOAH served a copy of the Petition on Dr. Sancetta on June 7, 2014. DOAH received a return receipt from the United States Postal Service on June 23, 2014, showing that the Public Health Trust of Miami-Dade County had been served with a copy of the Petition. On June 19, 2014, and June 20, 2014, respectively, the University of Miami, d/b/a Miller School of Medicine and the Public Health Trust of Miami-Dade County, filed Petitions for Leave to Intervene, which were granted by Order dated June 27, 2014. As of the date of this Summary Final

Order of Dismissal, Dr. Sancetta has not petitioned to intervene in this proceeding.

On September 26, 2014, NICA filed a Motion for Summary Final Order, asserting that Amy did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. On October 1, 2014, Petitioners also filed a Motion for Summary Final Order, stating that they are in agreement with Respondent's position that the facts of this case do not fit within the definitions of what is compensable under the pertinent NICA statutes.

On October 3, 2014, Intervenor University of Miami filed its Motion to Defer Ruling on Motions for Summary Final Order, to which Respondent and Petitioners filed responses. Intervenor's Motion to Defer Ruling on Motions for Summary Final Order was granted by Order dated October 3, 2014, extending the time to respond until November 24, 2014.

On November 21, 2014, Intervenor University of Miami filed Intervenor's Response in Opposition to Petitioners' and NICA's Motions. Petitioners' and Respondent's Motions for Summary Final Order were heard by telephonic conference call on November 24, 2014. On November 25, 2014, Intervenor the Public Health Trust filed its Response in Opposition to Petitioners' and Respondent's Motions for Summary Final Order.

FINDINGS OF FACT

1. Amy Nicole Alvarez was born on June 16, 2010, at Jackson South Community Hospital in Miami, Florida.

2. Michael S. Duchowny, M.D. (Dr. Duchowny), was requested by NICA to do an independent medical examination of Amy and to review her medical records. Dr. Duchowny examined Amy on July 2, 2014. In an affidavit dated September 22, 2014, Dr. Duchowny reported his findings and gave the following opinion:

In summary, Amy's neurological examination today reveals mild right spastic hemiparesis, speech dysarthria and a complex visual agnosia. She additionally evidences microcephaly. Although I am concerned about Amy's overall cognitive development due to her microcephaly, she appears to be progressing satisfactory and is making progress with respect to verbal communication both in the receptive and expressive domains. Her visual impairment is likely to be centrally-based.

I had an opportunity to review Amy's medical records. It contained information that is consistent with Amy's overall history but I have not reviewed Amy's brain MRI scans. However, in view of Amy's relatively good mental development and only mild degree of motor impairment, I would not recommend inclusion within the NICA program.

As such, it is my opinion that AMY NICOLE ALVAREZ is not permanently and substantially mentally impaired nor is she permanently and substantially physically impaired 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 AMY NICOLE ALVAREZ. (Emphasis in original.)

3. A review of the file does not show any contrary opinion, nor was any potential contrary expert disclosed during the telephone hearing on the Motions for Summary Final Order. The opinion of Dr. Duchowny that Amy does not have a permanent and substantial mental or physical impairment is credited.

CONCLUSIONS OF LAW

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

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. The evidence, which is not refuted, established that Amy does not have a permanent and substantial mental or physical impairment; thus, Amy has not sustained a birth-related neurological injury because she is not permanently and substantially physically impaired. Therefore, Amy is not eligible for benefits under the Plan.

#### CONCLUSION

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

1. The Petition filed by Michelle and Thomas Alvarez, individually and as natural persons and guardians of Amy Nicole Alvarez, is dismissed with prejudice.

2. The final hearing scheduled for January 8, 2015, is cancelled.

DONE AND ORDERED this 3rd day of December, 2014, in Tallahassee, Leon County, Florida.



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BARBARA J. STAROS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 3rd day of December, 2014.

ENDNOTE

<sup>1/</sup> The letter supplied the name and address of the physician providing obstetrical services who was present at the birth and the name and address of the hospital at which the birth occurred as required by section 766.305(1)(c), Florida Statutes.

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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).