

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARLOS BARRIENTOS-MARTINEZ AND
ASUNCION GUTIERREZ-ARREOLA, on
behalf of and as parents and
natural guardians of CARLA
BARRIENTOS-GUTIERREZ, a minor,

Petitioners,

vs.

Case No. 14-3124N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent.

_____ /

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 December 29, 2014.

STATEMENT OF THE CASE

On July 7, 2014, Petitioners, Carlos Barrientos-Martinez and Asuncion Gutierrez-Arreola, on behalf of and as parents and natural guardians of Carla Barrientos-Gutierrez (Carla), 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 Wilfredo Rivera-Ortiz, M.D., as the physician providing obstetrical services at the birth of Carla on April 12, 2013, at Manatee Memorial Hospital located in Braden River, Florida.

DOAH served NICA with a copy of the Petition on July 10, 2014. On July 22, 2014, DOAH received a return receipt from the United States Postal Service showing that Dr. Rivera-Ortiz had been served with a copy of the Petition. On October 15, 2014, DOAH received a return receipt from the United States Postal Service showing that Manatee Memorial Hospital had been served with a copy of the Petition.

Neither Wilfredo Rivera-Ortiz, M.D., nor Manatee Memorial Hospital has petitioned to intervene in this proceeding.

On December 29, 2014, NICA filed a Motion for Summary Final Order, asserting that Carla did not sustain a "birth-related neurological injury" as that term is defined in section 766.302(2), Florida Statutes. NICA represented in its motion that Petitioners had no objection to the granting of the motion.

FINDINGS OF FACT

1. Carla Barrientos-Gutierrez was born on April 12, 2013, at Manatee Memorial Hospital located in Braden River, Florida. Carla weighed 3,610 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Carla. In an affidavit dated December 17, 2014, Dr. Willis described his findings as follows:

In summary, vacuum assisted delivery resulted in a scalp hemorrhage with significant blood loss and resulting anemia, hypovolemia, hypotension and coagulation defects. Hypovolemia resulted in poor perfusion and multisystem organ failure. E. coli sepsis compounded the complications related to the scalp hemorrhage. The baby suffered brain injury due to these complications. However, the brain injury did not occur during labor delivery or the immediate post-delivery period.

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

3. NICA retained Michael S. Duchowny, M.D. (Dr. Duchowny), a pediatric neurologist, to examine Carla and to review her medical records. Dr. Duchowny examined Carla on October 15, 2014. In an affidavit dated December 17, 2014, Dr. Duchowny opined as follows:

In summary, Carla's neurological examination reveals evidence of a mild to moderate motor disability and language development which is behind age level. There is no focal or lateralizing findings and I was unable to confirm the family's impression of diminished left-sided motor activity.

The medical record review indicates that Carla's neurological impairments are the result of E-coli, sepsis and meningoencephalitis. She likely had diffuse

CNS vasculitis as well. However, there is no indication that Carla's brain damage resulted from either mechanical injury or oxygen deprivation in the course of labor and delivery. The timing of acquisition of her infection is open [sic] a question as she only became symptomatic at 24 hours of age. Should this issue need further examination, input from a pediatric infectious disease consult would be useful. It would be important to review her MRI scans of the brain. However, pending any need for further review, I am not recommending Carla for inclusion in the NICA program.

4. A review of the file in this case reveals that there have been no 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 during labor, delivery, or the immediate post-delivery period, and Petitioners have no objection to the issuance of a summary final order finding that the injury is not compensable under the plan. Dr. Willis' opinion is credited. There are no contrary opinions filed that are contrary to Dr. Duchowny's opinion that there is no indication that Carla's neurological injury resulted from either mechanical injury or oxygen deprivation in the course of labor and delivery. 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 Carla did not sustain an injury to the brain caused by oxygen deprivation or mechanical injury in the course of labor, delivery, or resuscitation in the immediate post-delivery period. Therefore, Carla 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 Carlos Barrientos-Martinez and Asuncion Gutierrez-Arreola, on behalf of and as parents and natural guardians of Carla Barrientos-Gutierrez, is dismissed with prejudice, and the final hearing scheduled for January 27, 2015, is canceled.

DONE AND ORDERED this 12th day of January, 2015, in
Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of January, 2015.

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).