

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALESSANDRA KEAL DELVALLE AND
RENE DELVALLE, on behalf of and
as parents and natural guardians
of ISABELLA DELVALLE, a minor,

Petitioners,

vs.

Case No. 14-4742N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent,

and

RICHARD MCCAULEY, M.D., AND
NORTH FLORIDA OB/GYN ASSOCIATES,
INC.,

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 Association (NICA), on February 11, 2016.

STATEMENT OF THE CASE

On September 19, 2014, Petitioners, Alessandra Keal Delvalle and Rene Delvalle, on behalf of and as parents and natural guardians of Isabella Delvalle (Isabella), a minor, filed a Petition for Benefits Pursuant to Florida Statute Section 766.301

et seq. (Petition), with the Division of Administrative Hearings (DOAH). The Petition alleged that Isabella suffered brain damage as a result of a birth-related neurological injury.

The Petition named Richard McCauley, M.D., as the physician providing obstetric services at the birth of Isabella at Orange Park Medical Center in Orange Park, Florida, on January 17, 2012.

DOAH served Richard McCauley, M.D., on October 17, 2014. DOAH served NICA with a copy of the Petition on October 20, 2014. DOAH served Orange Park Medical Center with a copy of the Petition on October 21, 2014.

Richard McCauley, M.D. and North Florida OB/GYN filed a Petition to Intervene on January 15, 2015, which was granted by Order dated January 28, 2015. As of this date, Orange Park Medical Center has not petitioned to intervene in this proceeding.

On June 17, 2015, NICA filed a response to the Petition, giving notice that the injury does not "meet the definition of a 'birth-related neurological injury' as defined in section 766.302(2), Florida Statutes, which specifically requires an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post delivery period." NICA requested that a hearing be scheduled to resolve whether the claim was compensable.

Intervenors filed an unopposed Motion for Extension of Time to advise as to the need for a hearing on the issue of compensability, which was granted by Order dated July 8, 2015.

On November 12, 2015, Respondent and Intervenors filed a Joint Response to Order indicating that they do not need or request a final hearing in this matter. The Joint Response also stated that Petitioners had informed them that they had been referred to an attorney, but no attorney has entered an appearance on behalf of Petitioners since that date. On February 11, 2016, NICA filed a Motion for Summary Final Order. The motion was served by email on February 10, 2016. No response to the Motion was filed by Petitioners.

On February 24, 2016, an Order to Show Cause was entered which allowed Petitioners until March 16, 2016, to inform the undersigned as to why a summary final order should not be entered and a summary final order be entered finding that Petitioners' claim is not compensable. To date, no response has been filed to the Motion for Summary Final Order or to the Order to Show Cause.

FINDINGS OF FACT

1. Isabella Delvalle was born on January 17, 2012, at Orange Park Medical Center in Orange Park, Florida. Isabella weighed in excess of 2,500 grams at birth.

2. NICA retained Donald C. Willis, M.D. (Dr. Willis), to review Isabella's medical records. In a medical report dated

May 30, 2015, Dr. Willis made the following findings and expressed the following opinion:

Additional medical records from Baptist Hospital were reviewed (pages 618-1546). As discussed in the previous report, dated 04/07/2015, the baby was delivered by Cesarean section following failed attempt at vacuum delivery. Apgar scores were reported as 8/9. Cord blood gas had a normal pH of 7.26. This would suggest there was no oxygen deprivation during labor or delivery.

An ARNP was present at delivery to manage the newborn. The baby was felt to be stable enough that the nurse left the delivery room at about two minutes after delivery to assist with another delivery. When she returned after about five minutes, the baby was having some respiratory distress. The baby was transferred to the NICU for observation.

Seizure activity developed within about 24 hours of life. EEG was abnormal and consistent with seizure activity. MRI on DOL 3 was reported as normal. Two additional MRI's over the next few months were also reported as normal. However, MRI at four months of age showed enlargement of the lateral ventricles since the prior exam and was consistent with brain volume loss.

Genetic evaluation was negative. Microarray was negative.

There was no apparent obstetrical event that resulted in oxygen deprivation or mechanical trauma to the baby's brain during labor or delivery. I do not have any opinion about oxygen deprivation during the immediate post delivery period.

3. Dr. Willis' opinion that there was no apparent obstetrical event that resulted in oxygen deprivation or

mechanical trauma to the baby's brain during labor or delivery is credited.

4. Respondent retained Raymond Fernandez, M.D. (Dr. Fernandez), a pediatric neurologist, to evaluate Isabella. Dr. Fernandez reviewed Isabella's medical records and performed an independent medical examination on her on February 2, 2015. Dr. Fernandez made the following findings and summarized his evaluation as follows in a medical report dated February 10, 2015:

IMPRESSION: There is ample evidence for substantial mental and motor impairment that is likely to be permanent, but etiology is unknown. Based on record review, history and physical examination, etiology cannot be determined at this time. There is no evidence in the medical record made available to me for brain or spinal cord injury due to oxygen deprivation or mechanical injury during labor, delivery, or the immediate post delivery period of resuscitation. However, note that I have not yet reviewed the Wolfson's Children's Hospital NICU admission, nor have I reviewed brain imaging studies presumably performed while at Wolfson's. Records and imaging studies have been requested and an addendum to this report will be sent to NICA upon further review.

5. On April 12, 2015, Dr. Fernandez wrote an addendum to the above medical report after reviewing additional records:

I recently received records from Wolfson Children's Hospital where Isabella was admitted on January 18, 2012 and discharged on May 24, 2012 and two additional admissions to the hospital were reviewed. Also reviewed

were brain imaging studies, including two brain CTs and four brain MRIs.

* * *

In conclusion, as previously states [sic] there is ample evidence for substantial mental and physical impairment that likely will be premanent. However, etiology is unknown. There is no evidence in the record for oxygen deprivation or mechanical injury during labor, delivery, or the immediate post delivery period of resuscitation to be the explanation for Isabella's substantial mental and motor impairment. There was a small amount of subdural blood within the posterior fossa, but this was not of clinical significance. This bleeding probably occurred during labor and delivery and was possibly due to the attempted vacuum extraction that was unsuccessful. Again, this is not felt to be clinically significant. There is no evidence for parenchymal brain hemorrhage, brain swelling, or brain injury due to oxygen deprivation or mechanical injury.

6. Dr. Fernandez's opinion that there is no evidence of oxygen deprivation or mechanical injury during labor, delivery or the immediate post-delivery period of resuscitation to be the explanation of Isabella's substantial mental and motor impairment is credited.

7. A review of the file in this case reveals that there have been no expert opinions filed that are contrary to the opinions of Dr. Willis and Dr. Fernandez that there was no obstetrical event that resulted in oxygen deprivation or

mechanical injury to the baby's brain during labor, delivery or the immediate post-delivery period.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2014).

9. The Plan was established by the Legislature "to provide compensation on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation." § 766.301, Fla. Stat. The Plan applies only to a birth-related neurological injury, which 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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

10. 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. The Florida

Birth-Related Neurological Injury Compensation Association, 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 submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury."

§ 766.305(4), Fla. Stat.

11. 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.

12. In discharging this responsibility, the Administrative Law Judge must make the following determinations based upon all 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. 766.302(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.

13. In the instant case, Petitioners filed a claim alleging that Isabella did sustain a birth-related neurological injury that is compensable under the NICA plan. As the proponent of the issue of compensability, the burden of proof is upon Petitioners.

§ 766.309(1)(a), Fla. Stat. See also Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977) ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.").

14. Dr. Willis established that there was no apparent obstetrical event which resulted in loss of oxygen or mechanical injury to Isabella's brain during labor or delivery. This opinion is consistent with Dr. Fernandez's opinion that Isabella's

substantial mental and motor impairments were not caused by oxygen deprivation or mechanical injury during labor, delivery or continuing into the immediate resuscitation period.

15. The evidence, which is not refuted, established that Isabella's substantial mental and physical impairments were not caused by oxygen deprivation or mechanical injury to her brain during labor, delivery or the immediate post-delivery period. Thus, Isabella is not entitled to benefits under the Plan.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Alessandra Keal Delvalle and Rene Delvalle, on behalf of and as parents and natural guardians of Isabella Delvalle, is dismissed with prejudice.

DONE AND ORDERED this 22nd day of March, 2016, 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 22nd day of March, 2016.

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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).