

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROLAND AND CONSTANCE UDENZE, on
behalf of and as parents and
natural guardians of NINA MMACHI
UDENZE, a minor,

Petitioners,

vs.

Case No. 15-6184N

FLORIDA BIRTH-RELATED
NEUROLOGICAL INJURY COMPENSATION
ASSOCIATION,

Respondent.

_____ /

SUMMARY FINAL ORDER OF DISMISSAL

This cause came on for consideration upon a Renewed Motion for Summary Final Order filed by Respondent, Florida Birth-Related Neurological Association (NICA), on July 26, 2016.

STATEMENT OF THE CASE

On February 5, 2015, Petitioners, Roland and Constance Udenze, on behalf of and as parents and natural guardians of Nina Mmachi Udenze (Nina), 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 Nina suffered brain damage as a result of a birth-related neurological injury.

The Petition named Daniel C. McDyer, M.D., as the physician providing obstetric services at the birth of Nina at Memorial Hospital, located in Jacksonville, Florida.

DOAH served NICA with a copy of the Petition on November 5, 2015. DOAH served Daniel Charter McDyer, M.D., with a copy of the Petition on November 6, 2015. NICA served Memorial Hospital with a copy of the Petition on November 9, 2015.

As of this date, neither Dr. McDyer nor Memorial Hospital has petitioned to intervene in this proceeding.

On March 14, 2016, 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 that the injury render 'the infant permanently and substantially mentally and physically impaired.'" NICA requested that a hearing be scheduled to resolve whether the claim was compensable.

A final hearing was scheduled for May 10, 2016. On April 11, 2016, NICA filed a Motion for Summary Final Order, asserting that Nina 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 April 11, 2016. No response to the Motion was filed by Petitioners.

On April 26, 2016, an Order to Show Cause was entered which cancelled the May 10, 2016, hearing and allowed Petitioners until May 10, 2016, to inform the undersigned as to why a summary final order should not be entered finding that Petitioners' claim is not compensable. In light of the Petitioners appearing pro se, the Order referenced the applicable rules which set forth the time allowed for responses to motions, and granted Petitioners additional time for response. On May 10, 2016, Petitioners filed a Response to NICA's Motion for Summary Final Order.

On May 18, 2016, an Order was entered denying without prejudice NICA's Motion for Summary Final Order. On July 26, 2016, NICA filed its Renewed Motion for Summary Final Order, which was served via United States Mail and via e-mail. As of the date of this Summary Final Order of Dismissal, no response to NICA's Renewed Motion has been filed.

FINDINGS OF FACT

1. Nina Udenze was born on April 19, 2013, at Memorial Hospital in Jacksonville, Florida.

2. NICA retained Donald C. Willis, M.D. (Dr. Willis), to review Nina's medical records. In medical reports dated February 8 and March 12, 2016, Dr. Willis made the following findings and expressed the following opinion:

I have reviewed the medical records, pages 1-505 for the above individual. The mother, . . . was a 34 year old G3 P2002 with a twin

pregnancy. Nina was the B twins [sic]. The mother had a history of two prior Cesarean deliveries.

* * *

Repeat Cesarean section was done in early labor. Fetus B (Nina Udenze) was in a transverse lie. The baby was converted to breech and delivered. Birth weight was 2,152 grams (4 lbs 11 oz's). Apgar scores were 6/9.

The baby initially had a poor respiratory effort and required bag and mask ventilation for 45 seconds with good response. Apgar score was 9 by five minutes. The baby was taken to the NICU.

The operative note indicated cord blood gases were done for both babies. However, only one cord blood gas result was seen in the available records (page 298). It was not labeled A or B and was apparently a venous sample. The pH was normal at 7.31 with a BE of -5. Hospital discharge was on DOL 4. The baby failed the newborn hearing test.

Placental pathology was normal.

There does not appear to be a birth related hypoxic brain injury based on available, but medical records are limited. No head imaging studies were available. It would be helpful if we could get the cord blood gas for fetus B.

Thank you for allowing me to review this case. I will be available to review any additional records if they become available. Specifically, any head imaging studies and the cord blood gas for fetus B would be helpful.

* * *

Additional medical records were reviewed for the above individual, which included two MRI studies. The first MRI was done at about 8 months of age. A posterior fossa cyst was identified as well as findings suggestive of cerebral volume loss. MRI of the spine on the same day showed scoliosis. A follow-up MRI was done at about 2 ½ years of age, again identified the posterior fossa arachnoid cyst and also described partial absence of the Falx.

It is also my understanding a cord blood gas for this child was not done at birth. The cord blood gas in the medical records was for the twin sibling.

The additional medical records do not change the opinion given in the previous letter dated 02/08/2016. There does not appear to be a birth related hypoxic brain injury or mechanical trauma resulting in brain or spinal cord injury.

3. In an affidavit dated April 1, 2016, Dr. Willis reaffirmed his ultimate opinion that there was no apparent obstetrical event that resulted in loss of oxygen or mechanical trauma to the baby's brain or spinal cord occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period.

4. Dr. Willis was deposed on May 26, 2016, wherein he testified in pertinent part as follows:

Q. Okay. Do the records show that any mechanical devices such as forceps or vacuum extractions was used in the delivery?

A. No.

Q. You also note that her apgar scores were six and nine. Could you explain what an apgar score is?

A. Yes. The apgar scores are given to the babies for a couple of reasons. The apgar score, the first apgar score is at one minute. And apgar scores can be anywhere from zero to ten. And the apgar score at one minute tells you how much resuscitation the baby requires at time of birth. An apgar score of seven or above would be considered normal. An apgar score below seven would be considered low. The one-minute apgar score is six. So, it was slightly lower than expected. However, by five minutes, the apgar score was nine, which would be a very good score showing that the baby transitioned well after birth.

Babies that have significant oxygen deprivations during time of delivery, usually it takes a longer time for them to transition and recover. The baby seemed to recover fairly quickly.

Q. Had there been oxygen deprivation at the time of delivery, what types of symptoms would you expect to see?

A. Babies that have significant oxygen deprivation during the birthing process will be depressed and require resuscitation. They usually have respiratory distress. So, they'll need some type of oxygen bag, mask ventilation, intubation. And then they will go to the neonatal intensive care nursery at -- which sometimes they will often have abnormalities in many of their different organ systems. For instance, seizure disorders are very common after brain injury at time of birth. You can also have renal failure, elevated liver function studies, blood clotting abnormalities. So, babies that have significant oxygen deprivation at birth will usually have some combination of these problems in the nursery. A baby that

goes to the nursery and has a relatively benign newborn course in the nursery would not be consistent with significant oxygen deprivation during labor or delivery.

Q. And in Nina's case, what did the records indicate regarding her newborn course?

A. The newborn course looked pretty uncomplicated. In fact, the newborn records pretty much just show normal newborn care, no significant problems in the newborn period. And the baby was discharged home on the third day of life. So, no prolonged hospital stay.

* * *

Q. All right. And based on your second letter dated March 2016, which is Exhibit 3, your final opinion was that there does not appear to be a birth-related hypoxic injury or mechanical trauma resulting in brain or spinal cord injury. Is that still your opinion today?

A. That's correct.

Q. During your review of the medical records, did you find that Nina Udenze suffered oxygen deprivation occurring in the course of labor/delivery or resuscitation in the immediate postdelivery period that would have resulted in brain injury?

A. No.

Q. During review of the medical records, did you find that Nina Udenze suffered a mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate postdelivery period that would have resulted in brain injury or injury to her spinal cord?

A. No.

Q. And have your opinions today been rendered within a reasonable degree of medical certainty?

A. Yes.

5. Dr. Willis' opinion that there was no apparent obstetrical event that resulted in loss of oxygen to the baby's brain during labor, delivery and continuing into the immediate post-delivery period, is credited.

6. Respondent retained Michael Duchowny, M.D. (Dr. Duchowny), a pediatric neurologist, to evaluate Nina. Dr. Duchowny reviewed Nina's medical records and performed an independent medical examination on her on February 3, 2016. In an affidavit dated April 4, 2016, Dr. Duchowny made the following findings and summarized his evaluation as follows:

5. It is my opinion that:

In SUMMARY, Nina's neurological examination reveals findings consistent with a substantial mental and motor impairment. Although Nina is walking, her gait is unstable with abnormal motor functioning and hyperreflexia. Her epicanthal folds were acquired prenatally and her unilateral hearing loss is unexplained. She also has microcephaly.

A have had an opportunity to review the medical records which were sent on January 28, 2016. They reveal that Nina's mother went into labor at 36 weeks gestation after experiencing spontaneous rupture of her membranes. Nina and her fraternal twin brother were delivered by urgent cesarean section. The fetal heart rate was stable. Nina was 4 pounds 11 ounces at birth and had

1 and 5 minute Apgar scores of 6 and 9. She required positive pressure ventilation for 45 seconds but then stabilized and did not experience subsequent respiratory complications. There was no evidence of multiorgan system involvement. Nina was discharged from Memorial Hospital Jacksonville on the 5th day of life.

The medical records do not include the results of brain imaging studies. Before making a final determination, I would request to review the salient imaging studies.

* * *

I have now reviewed neuroimaging studies including MR brain imaging. The images do not reveal findings consistent with either an intra-partum hypoxic-ischemic insult or a mechanical injury.

6. It is my opinion that together with the record review and neurological evaluation, the imaging findings confirm that Nina did not suffer from a birth-related neurological injury, and I am therefore not recommending inclusion within the NICA program.

7. Dr. Duchowny's opinion that Nina did not suffer from a birth-related neurological injury is credited.

8. 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 occurring in the immediate post-delivery period. Dr. Willis' opinion is credited.

Dr. Duchowny's opinion that, although Nina has a substantial

mental and motor impairment, she did not suffer from a birth-related neurological injury, is credited.

CONCLUSIONS OF LAW

9. 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).

10. 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.

11. 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.

12. 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.

13. 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.

14. In the instant case, Petitioners filed a claim alleging that Nina 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.").

15. Both Dr. Willis and Dr. Duchowny established that there was no apparent obstetrical event which resulted in loss of oxygen or mechanical trauma to Nina's brain or spinal cord

occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period.

16. The evidence, which is not refuted by competent expert evidence, established that Nina does not meet the definition of a "birth-related neurological injury," as defined in section 766.302(2), Florida Statutes. Thus, Nina 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 Roland and Constance Udenze, on behalf of and as parents and natural guardians of Nina Udenze, a minor child, is dismissed with prejudice, and the final hearing scheduled for September 30, 2016, is cancelled.

DONE AND ORDERED this 10th day of August, 2016, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
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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).