

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ERIKA L. GUERRERO and VINICIO  
CONCEPCION, individually and on  
behalf of XAVIER CONCEPCION, a  
minor,

Petitioners,

vs.

Case No. 15-6715N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION, a/k/a NICA,

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 Association (NICA), on June 20, 2016.

STATEMENT OF THE CASE

On November 18, 2015, Petitioners, Erika L. Guerrero and Vinicio Concepcion, individually and on behalf of Xavier Concepcion (Xavier), a minor, filed a Petition Under Protest Pursuant to Florida Statute Section 766.301 et seq. (Petition), with the Division of Administrative Hearings (DOAH). The Petition requested a determination that Xavier's injuries are not compensable under the NICA Plan.

The Petition named Stefan Novac, M.D., as the physician providing obstetric services at the birth of Xavier at Memorial Hospital West in Pembroke Pines, Florida, on September 16, 2014.

DOAH served NICA with a copy of the Petition on December 1, 2015. On December 7, 2015, DOAH received a return receipt from the United States Post Office showing that Memorial Hospital West had been served with a copy of the Petition. On January 14, 2016, DOAH received a return receipt from the United States Post Office showing that Stefan Novac, M.D., had been served with a copy of the Petition. To date, neither Memorial Hospital West nor Dr. Novac has petitioned to intervene in this proceeding.

On June 9, 2016, NICA filed a Notice of Non-compensability and Request for Evidentiary Hearing on Compensability, 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.

On June 16, 2016, NICA and Petitioners filed a Response to Order indicating that neither NICA nor the Petitioners thought a hearing was necessary. On June 20, 2016, NICA filed a Motion for Summary Final Order, asserting that Xavier did not sustain a birth-related neurological injury as that term is defined in

section 766.302(2), Florida Statutes. The Motion stated that Petitioners agreed that a hearing was not necessary and that the case could be disposed of pursuant to a Summary Final Order.

FINDINGS OF FACT

1. Xavier Concepcion was born on September 16, 2014, at Memorial Hospital West in Pembroke Pines, Florida.

2. NICA retained Donald C. Willis, M.D. (Dr. Willis), to review Xavier's medical records. In a medical report dated January 20, 2016, Dr. Willis made the following findings and expressed the following opinion:

In summary, labor was complicated by maternal infection (chorioamnionitis) and a non-reassuring FHR pattern prior to birth. The baby was depressed at birth with a cord blood pH of <6.9. Seizure activity developed shortly after birth. MRI was consistent with acute brain infarction.

There was an 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. It is possible the brain injury from oxygen deprivation was worsened by infection. I am unable to comment about the severity of the brain injury.

3. Dr. Willis' opinion that there was an 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.

4. Respondent retained Michael Duchowny, M.D.

(Dr. Duchowny), a pediatric neurologist, to evaluate Xavier.

Dr. Duchowny reviewed Xavier's medical records, and performed an independent medical examination on him on May 25, 2016.

Dr. Duchowny made the following findings and summarized his evaluation as follows:

Motor examination reveals symmetric muscle strength, bulk and tone. There are no adventitious movements and no focal weakness or atrophy. Xavier does not evidence dystonic postures or hypertonicity. He has full range of motion at all joints.

Coordination: Xavier walks in a stable fashion and does not fall. He can arise from the floor without difficulty. His balance is good and he has well-developed axial and peripheral balance. He grasps with both hand[s] and moved objects between hands without difficulty. He did not fall and his head control is good.

\* \* \*

In Summary, Xavier's neurological examination discloses no significant findings. He is developmentally appropriate with no focal or lateralizing features to suggest a structural brain abnormality.

Review of the medical records reveals that Xavier was born at Memorial West Hospital at term and transferred to Joe DiMaggio Children's Hospital. Maternal membranes were ruptured 30 hours prior to delivery, and maternal chorioamnionitis and fever were treated with penicillin. Xavier was born vaginally and was pale, cyanotic, flaccid and unresponsive. A tight nuchal cord was removed. He weighed 7 pounds 7 ounces and

his Apgar scores were 1, 5 and 7 at one, five, and ten minutes.

The records indicated that an initial arterial pH was 6.95 but the base excess was unknown. Xavier was intubated at 3 minutes of age, established spontaneous respiration at 25 minutes of age and was subsequently extubated. His CBC revealed a bandemia of 22 on September 22nd. Seizures were noted on the first day of life and there was evidence of a mild coagulopathy. The placenta was positive for E.coli.

An MRI scan of the brain revealed multiple acute infarcts in the left temporal, occipital and superior parietal regions and right thalamus and putamen, and a small subdural hematoma.

Despite Xavier's difficulties at birth, he has developed well and does not evidence neurodevelopmental delay. I am therefore not recommending Xavier for compensation within the NICA program.

5. In order for a birth-related injury to be compensable under the Plan, the injury must meet the definition of a birth-related neurological injury and the injury must have caused both permanent and substantial mental and physical impairment.

6. Dr. Duchowny's opinion that Xavier has developed well and does not evidence neurodevelopmental delay 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 opinion of Dr. Duchowny that Xavier has developed well and does not evidence neurodevelopmental delay. There is nothing in Dr. Duchowny's report that indicates that Xavier has either a

substantial mental or physical impairment. Thus, Xavier does not meet the requirement of having a substantial physical or mental impairment.

#### 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. (emphasis added).

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 for a determination of whether Xavier 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. While Dr. Willis established that there was an apparent obstetrical event which resulted in loss of oxygen to the baby's brain during labor, delivery, and continuing into the immediate



post delivery period, the remaining issue to be determined is whether the injury resulted in a permanent and substantial mental impairment and a permanent and substantial physical impairment, inasmuch as both are required to establish compensability. Fla. Birth-Related Neurological Injury Comp. Ass'n v. Div. of Admin. Hearings, 686 So. 2d 1349 (Fla. 1997).

15. The evidence, which is not refuted, established that Xavier does not have a permanent and substantial mental or physical impairment. Thus, Xavier 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 Erika L. Guerrero and Vinicio Concepcion, individually and on behalf of Xavier Concepcion, is dismissed with prejudice.

DONE AND ORDERED this 23rd day of June, 2016, 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 23rd day of June, 2016.

COPIES FURNISHED:  
(via certified mail)

Kenney Shipley, Executive Director  
Florida Birth Related Neurological  
Injury Compensation Association  
2360 Christopher Place, Suite 1  
Tallahassee, Florida 32308  
(eServed)  
(Certified Mail No. 7015 0640 0003 7652 5100)

Maria D. Tejedor, Esquire  
Diez-Arguelles & Tejedor, P.A.  
505 North Mills Avenue  
Orlando, Florida 32803  
(eServed)  
(Certified Mail No. 7015 0640 0003 7652 5117)

David W. Black, Esquire  
Frank, Weinberg & Black, P.L.  
7805 Southwest 6th Court  
Plantation, Florida 33324  
(eServed)  
(Certified Mail No. 7015 0640 0003 7652 5124)

Amie Rice, Investigation Manager  
Consumer Services Unit  
Department of Health  
4052 Bald Cypress Way, Bin C-75  
Tallahassee, Florida 32399-3275  
(Certified Mail No. 7015 0640 0003 7652 5131)

Elizabeth Dudek, Secretary  
Health Quality Assurance  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 1  
Tallahassee, Florida 32308  
(eServed)  
(Certified Mail No. 7015 0640 0003 7652 5148)

Stefan Novac, M.D.  
8245 Northwest 36th Street, Unit 3  
Doral, Florida 33166  
(Certified Mail No. 7015 0640 0003 7652 5155)

Memorial Hospital West  
Attention: Risk Management  
703 North Flamingo Road  
Pembroke Pines, Florida 33028  
(Certified Mail No. 7015 0640 0003 7652 5162)

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).