

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

EMERSON CARDICHON and ROSE  
LOUDES CARDICHON, on behalf of  
and as parents and natural  
guardians of JEDEDIAH JACQUES-  
RODSON CARDICHON, a minor,

Petitioners,

vs.

Case No. 16-0215N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent,

and

NORTH BROWARD HOSPITAL, d/b/a  
BROWARD HEALTH, d/b/a BROWARD  
HEALTH CORAL SPRINGS; CARLOS  
BARRIONUEVO, M.D.; AND  
COMPREHENSIVE OBGYN, LLC,

Intervenors.

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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 May 4, 2016.

STATEMENT OF THE CASE

On December 31, 2015, Petitioners, Emerson Cardichon and Rose Loudes Cardichon, on behalf of and as parents and natural

guardians of Jedediah Jacques-Rodson Cardichon (Jedediah), 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 Carlos Barrionuevo, M.D., as the physician providing obstetrical services at the birth of Jedediah on December 7, 2014, at Broward Health Coral Springs located in Coral Springs, Florida.

DOAH served Carlos Barrionuevo, M.D., with a copy of the Petition on January 19, 2016. DOAH served NICA and Broward Health Coral Springs with a copy of the Petition on January 20, 2016.

On February 3, 2016, North Broward Hospital, d/b/a Broward Health Coral Springs, filed a Petition for Leave to Intervene which was granted by Order dated February 4, 2016. On February 17, 2016, Carlos Barrionuevo, M.D., and Comprehensive OBGYN, LLC, filed a Motion to Intervene which was granted by Order dated March 1, 2016.

On May 4, 2016, NICA filed a Motion for Summary Final Order, asserting that Jedediah 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 to Petitioners and by e-mail to NICA and Intervenors

on May 4, 2016. An Order to Show Cause was entered on May 17, 2016, which allowed Petitioners until May 31, 2016, to inform the undersigned in writing why Respondent's Motion for Summary Final Order should not be granted. As of the date of this Summary Final Order of Dismissal, no response has been filed to the Motion for Summary Final Order or to the Order to Show Cause.

#### FINDINGS OF FACT

1. Jedediah Cardichon was born on December 7, 2014, at Broward Health Coral Springs located in Coral Springs, Florida. Jedediah weighed 4,720 grams at birth.

2. Donald Willis, M.D. (Dr. Willis), was requested by NICA to review the medical records for Jedediah, to determine whether an injury occurred 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. In a medical report dated April 12, 2016, Dr. Willis described his findings in part as follows:

Vaginal delivery was assisted by vacuum extraction. Although the baby suffered a brachial plexus injury, the delivery note by the Obstetrician stated the delivery occurred with no complications. Birth weight was 4,720 grams, which would be large for gestational age.

Apgar scores were 5/9. No umbilical cord blood gas was done. Respiratory depression at birth required bag and mask ventilation for 2 to 3 minutes with "good response." The baby was transported to the NICU for

respiratory depression. Chest X-Ray was consistent with Transient Tachypnea of the Newborn (TTN). Intubation was not required. Respiratory depression worsened soon after birth and was managed with high frequency nasal canula oxygen.

Intravenous glucose was given for hypoglycemia. Cardiac ECHO findings were consistent Hypertrophic Cardiomyopathy, which is generally related to maternal Diabetes. This was managed with a short course of Propranolol. Antibiotics were started for R/O sepsis. Cultures were negative.

Physical exam of the newborn identified decreased movement of the left arm. Brachial plexus palsy was diagnosed. There was no report of seizure activity. Imaging of the brain, CT or MRI was apparently not done.

In summary, pregnancy was complicated by insulin dependent Gestational Diabetes with resulting fetal macrosomia. The baby suffered a brachial plexus injury, Erb's palsy, most likely related to macrosomia. The newborn had respiratory distress, but never required intubation. Chest X-Ray was consistent with TTN.

There was an obstetrical event that resulted in a brachial plexus injury, but medical records do not support related hypoxic injury or trauma to the brain or spinal cord.

3. Dr. Willis reaffirmed his opinion in an affidavit dated April 21, 2016.

4. NICA retained Michael S. Duchowny, M.D. (Dr. Duchowny), a pediatric neurologist, to examine Jedediah and to review his medical records. Dr. Duchowny examined Jedediah on April 6,

2016. In an affidavit dated April 28, 2016, Dr. Duchowny opined in pertinent part as follows:

5. In summary, Jedediah's neurological examination reveals findings consistent with left upper extremity Erb's palsy. These findings are restricted to movement of the proximal left upper extremity musculature and do not involve the central nervous system (brain and spinal cord). Furthermore, Jedediah's examination does not reveal either a substantial mental or motor impairment and the findings point to compromise only in the peripheral nervous system.

6. Jedediah's medical records confirm his mother's information and detail both the gestational diabetes mellitus and fetal macrosomia. Jedediah was delivered vaginally with vacuum assist and weight 4720 grams (10 pounds 6 ounces) at birth. Apgar scores were 5 and 9 at one and five minutes. No cord gases were obtained. He required ventilator support for several minutes after delivery but his neonatal course subsequently stabilized.

Based upon my evaluation and record review, I am not recommending Jedediah for inclusion within the NICA program.

5. 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 an apparent obstetrical event that resulted in brachial injury, but medical records do not support a birth related hypoxic injury or trauma to the brain or spinal cord. Dr. Willis' opinion is credited. There are no expert opinions filed that are contrary to Dr. Duchowny's opinion that Jedediah's Erb's palsy does not involve the central nervous

system (brain or spinal cord) and that his examination does not reveal either a substantial mental or motor impairment.

Dr. Duchowny's opinion is credited.

#### CONCLUSIONS OF LAW

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

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. The evidence, which is not refuted by any contrary expert opinions, established that Jedediah did not sustain an injury to the brain or spinal cord caused by oxygen deprivation or mechanical injury in the course of labor and delivery. Moreover, his Erb's palsy does not constitute a substantial mental or motor impairment. Therefore, Jedediah is not eligible for benefits under the Plan. §§ 766.302(2) and 766.309(1), Fla. Stat.

#### CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition filed by Emerson Cardichon and Rose Loudes Cardichon, on behalf of and as parents and



natural guardians of Jedediah Jacques-Rodson Cardichon, is dismissed with prejudice.

DONE AND ORDERED this 3rd day of June, 2016, in Tallahassee, Leon County, Florida.



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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).