

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LUIS ARTURO JIMENEZ and
PRISCILLA FRANCO, individually
and on behalf of DALLAS JIMENEZ,
a minor,

Petitioners,

vs.

Case No. 16-3531N

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

Respondent,

and

SOUTH MIAMI HOSPITAL, INC.,

Intervenor.

_____ /

PARTIAL SUMMARY FINAL ORDER

This cause came on for consideration upon Respondent's Renewed Motion for Summary Final Summary Order filed on June 28, 2017, by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA).

On June 22, 2016, Petitioners, Luis Arturo Jimenez and Priscilla Franco, as parents of Dallas Jimenez (Dallas), a minor, filed an Amended Petition Under Protest 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 Sabriya Ishoof, M.D., as the physician who provided obstetric services at the birth of Dallas on April 8, 2014, at South Miami Hospital, d/b/a Baptist Health South Florida (South Miami), in Miami, Florida.

DOAH served NICA with a copy of the Petition on June 23, 2016. DOAH served South Miami with a copy of the Petition on July 15, 2016. On April 5, 2017, DOAH received notice that Sabryia Ishoof, M.D., was served with a copy of the Petition.^{1/}

On August 3, 2016, South Miami filed a Petition for Leave to Intervene, which was granted by Order dated August 11, 2016. On March 27, 2017, NICA filed a Motion for Summary Final Order. Intervenor South Miami filed a Notice of Joinder in NICA's Motion for Summary Final Order on March 28, 2017. On April 6, 2017, Administrative Law Judge Staros ordered that said motion was premature, and, therefore, was denied without prejudice. On April 6, 2017, the instant matter was reassigned to the undersigned for all further proceedings.

On June 22, 2017, the undersigned conducted a telephonic status conference with the parties. During said conference, Petitioner's counsel represented that Petitioners were not contesting that Petitioners' claim was compensable under the Plan. Thereafter, on June 28, 2017, NICA filed a Renewed Motion

for Summary Final Order. Said motion addresses the issue of compensability. To date, neither Petitioners nor Intervenor has filed a response to NICA's Renewed Motion.

FINDINGS OF FACT

1. Dallas Jimenez was born April 8, 2014, at South Miami. Dallas weighed in excess of 2,500 grams at birth. The Petition identifies Dr. Ishoof as the physician providing obstetric services and who was present at Dallas's birth. It appears undisputed that Dr. Ishoof was a Plan-participating physician at the time of Dallas's birth.

2. Donald Willis, M.D., an obstetrician specializing in maternal-fetal medicine, was retained by NICA to review the medical records for Dallas and his mother. In a medical report dated August 8, 2016, Dr. Willis summarized his findings as follows:

In summary, the mother was a poorly controlled Diabetic. She presented in preterm labor at just less than 34 weeks with an abnormal FHR^[2/1] tracing, primarily reduced FHR variability. Repeat Cesarean section was done with delivery of a depressed newborn. The newborn hospital course was complicated by RDS,^[3/1] hypotension, acidosis and seizures. Head ultrasound and MRI were consistent with HIE.^[4/1]

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. The oxygen deprivation resulted in brain injury.

I am unable to comment about the severity of the brain damage.

3. Dr. Willis reaffirmed his opinions in an affidavit dated March 20, 2017.

4. NICA further retained Michael S. Duchowny, M.D., as its expert in pediatric neurology. Dr. Duchowny reviewed and evaluated the medical records and conducted an examination of Dallas on February 8, 2017. Based upon his review and examination, in an independent medical evaluation report dated February 15, 2017, Dr. Duchowny noted the following findings:

In SUMMARY, Dallas' neurological examination is significant for severe global delay with only minimal responsiveness and reactivity with his environment. He evidences spastic quadriplegia, macrocrania, right posterior plagiocephaly, and multiple pathologic reflexes. There is no evidence of either receptive or expressive language or communication skills. This constellation of findings places Dallas at a developmental level within the neonatal range. He has a longstanding history of shunted communicating hydrocephalus and intractable epilepsy, and a cortical visual impairment.

* * *

Dallas clearly meets criteria for admission to the NICA program based on the physical findings indicative of substantial mental and physical impairment. Timing and cause of his neurological disabilities are less clear. I do not believe that oxygen deprivation occurred in the course of labor and delivery. Dallas was born with immature pulmonary function and his persistent pulmonary hypertension likely contributed to the intraventricular hemorrhage, development of

hydrocephalus and ultimately, white matter injury. I believe that this sequence most likely occurred in the postnatal period rather than in the course of labor or delivery. For this reason, I am not recommending Dallas be admitted to the NICA program.

5. On March 8, 2017, Dr. Duchowny authored additional correspondence to NICA. In this correspondence, Dr. Duchowny provided as follows:

I have given additional consideration to this matter including further review of the medical records and discussion with Dr. Donald Willis. As stated in my previous report of February 15, 2017, I believe that Dallas' neurological injuries were acquired postnatally. However, the medical records also clearly demonstrate that her [sic] injuries were acquired in the immediate post-natal period before she [sic] was medically stabilized. For this reason, together with her [sic] permanent and substantial mental and motor impairments, I am recommending that Dallas be considered for inclusion in the NICA program.

6. Dr. Duchowny reaffirmed his opinions in an affidavit dated March 20, 2017.

7. The undisputed opinions of Dr. Willis and Dr. Duchowny are credited. Based on their opinions, Dallas sustained an injury to his brain during labor, delivery, and continuing into the immediate post-delivery period due to oxygen deprivation, which resulted in brain injury rendering Dallas permanently and substantially mentally and physical impaired.

CONCLUSIONS OF LAW

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

9. 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.

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. 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.

11. In determining the issue of compensability, 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. 766.302(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.

12. 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. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

13. The evidence, which is not refuted, established that Dallas sustained a birth-related neurological injury and is eligible for benefits under the Plan.

CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is


ORDERED:

1. Respondent's Motion for Summary Final Order on the issue of birth-related neurological injury is granted, and Petitioners' claim is found and determined to be compensable.

2. Jurisdiction is reserved to determine the issue of an award pursuant to section 766.31.

3. Jurisdiction is reserved to determine whether the notice requirements of section 766.316 were satisfied.

DONE AND ORDERED this 20th day of July, 2017, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of July, 2017.

ENDNOTES

- 1/ Dr. Ishoof has not petitioned to intervene in this proceeding.
- 2/ Fetal heart rate.
- 3/ Respiratory distress syndrome.
- 4/ Hypoxic ischemic encephalopathy.

COPIES FURNISHED:
(via certified mail)

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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).