

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MICHELLE RICKETTS AND BRIAN  
RICKETTS, Individually, and as  
Parents and Natural Guardians of  
ELIANA RICKETTS, a minor,

Petitioners,

vs.

Case No. 18-0299N

FLORIDA BIRTH-RELATED  
NEUROLOGICAL INJURY COMPENSATION  
ASSOCIATION,

Respondent.

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SUMMARY FINAL ORDER OF DISMISSAL

This case is before the administrative law judge to consider the Unopposed Motion for Summary Final Order (Motion) filed March 4, 2019, by Respondent, Florida Birth-Related Neurological Injury Compensation Association (NICA). The Motion relies on the affidavits and reports of Donald C. Willis, M.D., and Laufey Y. Sigurdardottir, M.D. The time authorized pursuant to Florida Administrative Code Rule 28-106.204 to respond to the Motion has passed, with no responses being filed, and the case is ripe for consideration.

STATEMENT OF THE ISSUES

The issues to be determined are whether Eliana Ricketts (Eliana) suffered a birth-related neurological injury; and, if

so, whether that injury renders the infant permanently and substantially mentally and physically impaired, as provided by section 766.302(2), Florida Statutes (2016).

PRELIMINARY STATEMENT

On January 8, 2018, Petitioners filed a Petition for Determination of NICA Coverage Filed Under Protest with the Division of Administrative Hearings (Division), for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The Petition named Erika D. Glas, D.O., as the physician who provided obstetrical services at Eliana's birth on September 16, 2017,<sup>1/</sup> at Southern Baptist Hospital of Florida, Inc., d/b/a Baptist Medical Center Jacksonville (Baptist Hospital).

On January 19, 2018, the Division mailed a copy of the Petition to NICA, Dr. Glas, and Baptist Hospital by certified mail. All three were served on January 22, 2018.

After receiving an extension of time for filing a response, on April 26, 2018, NICA filed a Response to Petition for Benefits indicating its position that Eliana's injury was not compensable under the Plan. That same day, an Order was issued instructing the parties to notify the administrative law judge whether a hearing was necessary; and, if so, appropriate dates upon which to conduct the hearing.

Petitioners requested and received an extension of time in which to respond to the Order, because their experts had not had sufficient time to review NICA's expert reports. On May 25, 2018, Baptist Hospital filed a Petition for Leave to Intervene, which was granted by Order dated May 31, 2018. Baptist Hospital also requested and received an extension of time to file a response regarding the need for a hearing. On July 30, 2018, the parties filed a Joint Response to Order Requiring Dates for Hearing, and based upon their response, the matter was scheduled for hearing to commence April 25, 2019.<sup>2/</sup>

On February 1, 2019, Baptist Hospital filed a Notice of Voluntary Withdrawal of Intervention with Prejudice, advising that it had determined not to take any position on the issue of compensability. Finally, on March 4, 2019, NICA filed an Unopposed Motion for Summary Final Order. NICA advised that Petitioners do not intend to challenge NICA's determination on compensability, and requested that a summary final order be issued determining that the claim is not compensable. The Motion relies on the reports and affidavits of Donald C. Willis, M.D., and Laufey Y. Sigurdardottir, M.D.

#### FINDINGS OF FACT

1. Eliana was born on September 16, 2017, at Baptist Hospital, a licensed hospital in Jacksonville, Florida.

2. Eliana was a child born of a single gestation, weighing 3,595 grams.

3. NICA retained Donald C. Willis, M.D., an obstetrician specializing in maternal-fetal medicine, to review the medical records of Eliana and her mother, Michelle Ricketts. NICA asked Dr. Willis to provide an opinion as to whether there was a brain or spinal cord injury to Eliana, due to either oxygen deprivation or mechanical injury that occurred in the course of labor, delivery, or resuscitation in the immediate postdelivery period in the hospital.

4. Dr. Willis authored a report to NICA on February 20, 2018, which is incorporated into his affidavit dated March 7, 2019. In his report, Dr. Willis stated in part:

The mother, Michelle Ricketts [had] . . . no significant prenatal problems. She was admitted to the hospital at term in labor. Her cervix was dilated 4 cms on admission.

The fetal heart rate (FHR) monitor tracing during labor was available for review. The baseline heart rate was normal at 140 bpm with normal variability. A decrease in FHR variability developed about 3 hours prior to delivery. Variable FHR decelerations started about 30 minutes prior to delivery. Cervical dilation was complete.

Vacuum extractor was applied to assist vaginal delivery due to FHR decelerations and maternal fatigue. Delivery of the fetal head occurred after three pulls with one pop-off. Delivery was then complicated by a shoulder dystocia, lasting 4 minute 40 seconds. Birth weight was 3,595 grams.

The newborn was depressed with Apgar scores of 3/5. Umbilical cord blood gas was not done. There was no respiratory effort at birth. Intubation was required and the baby transferred to the NICU. Chest X-Ray showed no infiltrates. Hypoxic ischemic encephalopathy (HIE) was suspected and head cooling protocol initiated.

There was a large subgaleal hematoma. The scalp was boggy with swelling behind the ears. The subgaleal hemorrhage resulted in anemia with a Hct of 27% to 28%. Blood transfusion was required. DIC was also present. The platelet count dropped to 84,000 with fibrinogen levels of 166 to 110 and prolonged PT and PTT. Cryoprecipitate and platelet transfusions were given.

Seizures began shortly after birth. Arterial blood gas (ABG) at one hour after birth had a pH of 7.23 and a base excess of -17. ABG 4 hours later had a pH of only 7.14 and a base excess remaining at -17. The initial EEG was abnormal, confirming seizure activity. Follow-up EEG on DOL [day of life] 3 was consistent with diffuse cerebral dysfunction. MRI on DOL 5 showed extensive bilateral infarctions, consistent with "significant anoxic injury" and extensive scalp swelling.

\* \* \*

There was an obstetrical event that resulted in loss of oxygen to the baby's brain during delivery and continuing into the immediate post delivery period. The oxygen deprivation resulted in brain injury. I am not able to comment about the severity of the injury.

5. Eliana's medical records were also reviewed by Laufey Sigurdardottir, M.D., a board-certified pediatric neurologist at Nemours Children's Hospital. Dr. Sigurdardottir examined Eliana

when she was just short of seven months old. Included in the records she reviewed were records of a neurological follow-up at four months with another neurologist, which state in part:

[Four] month old girl with history of HIE and subsequent seizures that have since resolved. Overall, Eliana has tolerated Phenobarbital without side effects. Her most recent EEG (12/5/17) was normal. She has not had any clinical events concerning for seizures. She is currently on track with milestones (tracking, rolling, cooing, etc.) and physical exam is notable for the absence of any focal features and normal tone. She previously tested out of 'Early Steps' as there were no motor concerns from that perspective.

6. As a result of her own examination of the infant, Dr. Sigurdardottir found Eliana upon examination to be alert, interactive, with what appeared to be normal development. She also found that she had a strong grasp with both hands bilaterally, and had normal response on vertical and horizontal suspension. She stated in summary:

Patient is a 6 month old with history of Brachial plexus injury during complicated vaginal delivery as well as hypoxic ischemic event, resulting in a moderate to severe hypoxic ischemic encephalopathy. She had refractory neonatal seizures, evidence of acute ischemic injury on brain MRI and abnormal neurological exam in neonatal period. She has developed acquired microcephaly but has made remarkable neurologic recovery and is close to being age appropriate for her motor milestones at this time.

7. Dr. Sigurdardottir opined that while Eliana did suffer a neurological injury to the brain due to oxygen deprivation during labor and delivery, she did not find permanent and substantial delays in motor and mental abilities, and, at the time of the examination, did not fulfill the criteria of having permanent and substantial mental and physical impairment.

8. The opinions of Drs. Willis and Sigurdardottir, which are unrebutted, are credited. It is found that Eliana suffered from oxygen deprivation during delivery and into the immediate postdelivery period, which caused a brain injury.

9. While Dr. Willis determined that there was a brain injury at birth, he did not comment on the severity of the injury. Dr. Sigurdardottir, however, opined, and it is found, that the injury did not result in a permanent and substantial physical and mental impairment.

#### CONCLUSIONS OF LAW

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

11. The Plan was established by the Legislature "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" related to births occurring on or after January 1, 1989. § 766.303(1), Fla. Stat.

12. An injured infant, his or her personal representative, parents, dependents, and next of kin may seek compensation under the Plan by filing a claim for compensation with the Division.

§§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat.

Section 766.305(4) provides that NICA, which administers the Plan, has 45 days from the date that a complete claim is served 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.

13. If NICA determines that the alleged injury is a birth-related neurological injury that is compensable under the Plan, it may award compensation to the claimant, provided that the award is approved by the assigned administrative law judge. § 766.305(7), Fla. Stat. However, if NICA disputes the claim as it does in this case, the dispute must be resolved by the administrative law judge in accordance with chapter 120, Florida Statutes. §§ 766.304, 766.30, and 766.31, Fla. Stat.

14. The first inquiry is whether the infant has sustained a birth-related neurological injury as defined by section 766.302(2), which provides:

(2) "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.

15. If the administrative law judge determines that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury, and that as a result the infant was rendered permanently and substantially mentally and physically impaired, then section 766.309(1) provides that there is a rebuttable presumption that the injury is a birth-related neurological injury. The presumption requires evidence of both the injury and the impairments as a result of that injury.

16. In this case, the evidence does not support such a presumption. The undisputed evidence presented indicates that there was an injury to Eliana's brain or spinal cord that was caused by oxygen deprivation occurring in the course of labor, delivery, and into the immediate postdelivery period.

17. However, the evidence presented indicates that the injury suffered at birth did not render Eliana to be permanently and substantially mentally and physically impaired.

18. Based upon the affidavits and opinions of Drs. Willis and Sigurdardottir, Eliana did not sustain a birth-related

neurological injury as defined in section 766.302(2) and is not eligible for benefits under the Plan.

CONCLUSION

Based on the foregoing, Findings of Fact and Conclusions of Law, it is ORDERED that Respondent's Motion for Summary Final Order on the issue of a birth-related neurological injury is granted, and Petitioners' claim is found and determined not to be compensable. The Petition is dismissed with prejudice.

DONE AND ORDERED this 15th day of March, 2019, in Tallahassee, Leon County, Florida.



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LISA SHEARER NELSON  
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 15th day of March, 2019.

ENDNOTES

<sup>1/</sup> The Petition actually states that the infant was born in 2007 as opposed to 2017, but refers to the obstetrical records as being from 2017. All of the records submitted indicate that Eliana was born in 2017, not 2007.

<sup>2/</sup> The hearing was scheduled several months in advance because of Eliana's age at the time of her evaluation by Dr. Sigurdardottir. The delay would give the parties an opportunity for a re-evaluation to see if there was any change in age-related benchmarks. Given the parties' decision not to contest NICA's determination that the claim was not compensable, no re-evaluation became necessary.

COPIES FURNISHED:  
(via certified mail)

Grant A. Kuvin, Esquire  
Morgan & Morgan  
76 South Laura Street, Suite 1100  
Jacksonville, Florida 32202  
(eServed)  
(Certified Mail 7015 0640 0001 2706 9013)

Kenney Shipley, Executive Director  
Florida Birth Related Neurological  
Injury Compensation Association  
2360 Christopher Place, Suite 1  
Tallahassee, Florida 32308  
(eServed)  
(Certified Mail 7015 0640 0001 2706 9020)

M. Mark Bajalia, Esquire  
Bajalia Law  
11512 Lake Mead Avenue, Suite 301  
Jacksonville, Florida 32256  
(eServed)  
(Certified Mail 7015 0640 0001 2706 9037)

Earl E. Googe, Jr., Esquire  
Smith, Hulsey and Busey  
1800 Wachovia Bank Tower  
225 Water Street  
Jacksonville, Florida 32202  
(eServed)  
(Certified Mail 7015 0640 0001 2706 9044)

Erika Dawn Glas, D.O.  
836 Prudential Drive, Suite 1103  
Jacksonville, Florida 32207  
(Certified Mail 7015 0640 0001 2706 9051)

Amie Rice, Investigation Manager  
Consumer Services Unit  
Department of Health  
4052 Bald Cypress Way, Bin C-75  
Tallahassee, Florida 32399-3275  
(Certified Mail 7015 0640 0001 2706 9068)

Mary C. Mayhew, Secretary  
Health Quality Assurance  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 1  
Tallahassee, Florida 32308  
(eServed)  
(Certified Mail 7015 0640 0001 2706 9075)

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).