

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRENNA ANDERSON AND GEOFFREY)
ANDERSON, individually and as)
parents and natural guardians)
of JARED ANDERSON, a minor,)
)
Petitioners,)
)
vs.) Case No. 10-0856N
)
FLORIDA BIRTH-RELATED)
NEUROLOGICAL INJURY)
COMPENSATION ASSOCIATION,)
)
Respondent,)
)
and)
)
BAY HOSPITAL, INC., d/b/a GULF)
COAST MEDICAL CENTER, SHAWN)
SIMPSON, DO, AND SMITH, SMITH,)
SIMPSON & PERCY OBGYN)
PHYSICIANS, CHARTERED,)
)
Intervenors.)
_____)

FINAL ORDER

Pursuant to the parties' stipulation, this cause was submitted to Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings upon a stipulated record.

APPEARANCES

For Petitioner Brenna Anderson:

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For Petitioner Geoffrey Anderson:

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For Respondent:

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Medical Center:

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For Intervenor Shawn Simpson, DO, and Smith, Smith, Simpson
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STATEMENT OF THE ISSUE

Whether Jared Anderson, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On February 17, 2010, Brenna Anderson and Geoffrey Anderson, individually and as parents and natural guardians of Jared Anderson (Jared), a minor, filed a petition (claim) with the Division of Administrative Hearings (DOAH), for compensation under the Florida Birth-Related Neurological Injury Compensation Plan (Plan), and if so, to determine whether the notice requirements of the Plan were satisfied.¹

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on February 18, 2010; Bay Medical Center, d/b/a Gulf Coast Medical Center on February 22, 2010; and Shawn Simpson, D.O., on February 22, 2010.

By Order dated April 13, 2010, Bay Medical Center, d/b/a Gulf Coast Medical Center, was granted leave to intervene. On April 28, 2010, Shawn Simpson, D.O., and Smith, Smith, Simpson & Percy, OBGYN Physicians, Chartered, were granted leave to intervene.

On August 10, 2010, after several extensions of time in which to do so, NICA filed its response to the petition, wherein

it gave notice that it was of the view that Jared did not suffer a "birth-related neurological injury," as defined by section 766.302(2), Florida Statutes, and accordingly the claim was not compensable. NICA requested that a hearing be scheduled to resolve whether the claim was compensable.

Thereafter, discovery ensued, and the cause was scheduled for final hearing on January 19, 2011, upon issues of both "compensability" and [lack of] notice.²

On December 2, 2010, Petitioners served an unopposed Motion to Amend Petition, which was granted by an Order entered December 15, 2010,³ and the case has proceeded upon the Amended Petition.

A Prehearing Stipulation was filed on January 11, 2011. At a January 14, 2011, telephonic prehearing conference, the parties orally clarified the status of the case, their various positions, and stated additional stipulations, which stipulations were memorialized in an Order entered January 18, 2011. On January 14, 2011, Petitioners filed a Notice of Withdrawal of Notice Issue. Accordingly, this case has proceeded upon the sole issue of compensability and upon the stipulated record.⁴

The parties were permitted to file proposed final orders on or before February 8, 2011, but no objection or motion to strike having been filed, all proposals have been considered.⁵

FINDINGS OF FACT

1. Brenna Anderson and Geoffrey Anderson are the natural parents and guardians of Jared Anderson, a minor. Jared was born a live infant on March 28, 2007, at Bay Medical Center, d/b/a Gulf Coast Medical Center (hereafter Gulf Coast Medical Center), a licensed hospital located in Panama City, Florida, and his birth weight was in excess of 2,500 grams.

2. The physician providing obstetrical services at the time of Jared's birth was Shawn Simpson, D.O., and at all times material, Shawn Simpson, D.O., and Smith, Smith, Simpson and Percy OBGYN Physicians, Chartered, were participating physicians in the Florida Birth-Related Neurological Injury Compensation Plan.

3. Coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as an "injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post delivery period in a hospital, which renders the infant permanently and substantially mentally and physically impaired. § 766.302(2), Fla. Stat.

4. Here, the parties disagree as to whether Jared suffered any injury to his brain and if so, the timing and cause of any such injury. However, the parties appear to be in agreement that, more likely than not, any injury to Jared's brain did not

result in a permanent and substantial mental and physical impairment as required for coverage under the Plan.⁶ See § 766.302(2), Fla. Stat.

5. Mrs. Brenna Anderson's prenatal course was without significant complications prior to March 28, 2007, the day of Jared's birth. She was admitted to Gulf Coast Medical Center at 37 weeks' gestation, in active labor, on March 28, 2007. This was approximately three weeks early, per the delivery date of April 18, 2007, estimated by ultrasound.

6. Mrs. Anderson's contractions began at 0200 (2:00 a.m.), and she was admitted into the OB Triage for ruptured membranes at 0310 (3:10 a.m.). A vaginal exam was performed at that time, with findings indicating she was 4cm dilated, 50 percent effaced, and at -1 station. She was subsequently admitted for labor at 0340 (3:40 a.m.). Mrs. Anderson had a strong desire to have a vaginal birth due to a previous caesarian section. Dr. Simpson explained the risks to mother and baby, and the Andersons agreed to proceed with a vaginal birth. Dr. Simpson agreed with their decision, as Mrs. Anderson was in spontaneous labor three weeks before her due date. The fetal heart monitor showed the baby with heart tones between 130-140 reactive with occasional contractions.

7. Mrs. Anderson had received pitocin. At 0700 (7:00 a.m.), her labor was augmented with oxytocin in

preparation for a vaginal delivery. An epidural was administered at 1100 (11:00 a.m.). Thereafter, at some point during Mrs. Anderson's labor, there were changes in the fetal heart tones.

8. The records indicate that an emergency caesarian section was called for at 1300 (1:00 p.m.). This timing is an impossibility since the newborn infant record shows that Jared was delivered at 1103 (11:03 a.m.), and it is presumed that the record showing that the caesarian occurred at "1300" was an error due to transposition of numerals. (Joint Exhibit A 000074). During the caesarian section, Dr. Simpson diagnosed uterine rupture. The uterine incision was repaired as well as the point of uterine rupture.

9. Due to multiple late decelerations, Jared Anderson was delivered under general anesthesia for fetal bradycardia by emergency caesarian section at 1103 (11:03 a.m.).

10. At delivery, Jared was pale and flaccid with heart rate at 40 with no respirations. However, he scored 3, 6, and 8 at 1, 5, and 10 minutes respectively, on the Apgar scale.⁷ Resuscitative efforts included tactile stimulation, bulb suctioning, blowby oxygen, deep suctioning, chest compressions for 30 seconds, neopuff ventilation for approximately five minutes, and delee'd 2cc. At some point in time, hard to determine from the records, C-PAP was also used. His condition

was described as stable, and he was transferred to the neonatal intensive care unit (NICU).

11. Jared was admitted to NICU at 1110 (11:10 a.m.) for "perinatal asphyxia and respiratory distress." Upon admission, his respiratory status was described as "mildly decreased air exchange bilaterally, coarse breath sounds bilaterally, grunting, nasal flaring and moderately increased respiratory effort." The NICU Admission Assessment otherwise described him as "normal" neurologically, moving all extremities spontaneously and normal global reflexes for gestation," normal spine; and with a full range of motion in his upper and lower extremities and a "strong" suckle reflex.

12. Per the NICU Discharge Summary, Jared's hospital course was complicated by hypovolemia, sepsis (probably e-coli, per later records), severe metabolic acidosis, hypocalcemia and hyponatremia. Jared was also treated for onset asphyxia on March 28, 2007, which subsequently resolved itself on March 30, 2007.

13. Dr. Donald C. Willis, a board-certified maternal-fetal specialist in obstetrics, reviewed Jared's and his mother's medical records and concluded "[t]hat 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 postdelivery period and that the oxygen deprivation was

sufficient enough to cause brain damage." Dr. Willis did not examine Jared.

14. Jared's pediatrician, Dr. Ingrid Johnson Rachesky, has not identified on Jared's medical chart any areas of concern other than a speech delay, communication concerns, and "still no expressive language."

15. However, due to his mother's request, at approximately seven months of age, Dr. Rachesky referred Jared for evaluation by a neurologist. Dr. David Suhrbier, D.O., of the Child Neurology Center of Northwest Florida, screened Jared for developmental problems on October 22, 2007, and found Jared's "development to be on target" at the time of his evaluation.

16. Regarding Jared's communication skills, both of the Florida State University First Words Project evaluations of Jared, performed on June 20, 2008, and October 13, 2008, indicate that at 15 months and 19 months of age, Jared was generally communicating as expected for a child his age, and as of the latter evaluation, he was communicating more frequently. The April 22, 2009, Early Steps records indicate that at two years, one month of age, "Mom reports that Jared now has about 15 words total. Jared is learning new words, but he has not started using words to get his needs and wants met."

17. On July 27, 2009, Jared was again referred to Dr. Suhrbier to re-evaluate his developmental language delay,

and Dr. Suhrbier then determined Jared to have a developmental language delay, lack of coordination, and macrocephaly. As of December 30, 2009, after a variety of tests, Dr. Suhrbier amended his diagnosis to be: "disorder developmental language; anomaly, congenital brain nec, lack of coordination, abnormal result function study, eeg."

18. Despite what facially appears to have been a difficult delivery, Jared's physical development has continued to improve as he has grown. He was first assessed for Early Steps by Children's Medical Services on October 27, 2008, (age approximately 19 months). On April 22, 2009, (age approximately two years old), Jared's Early Steps assessment indicated that his gross motor abilities include being able to "walk without support for 10 feet without falling; moves from sitting position to standing position." His fine motor abilities include using a "pincer grasp, throw objects, removes objects from a foam board." In addition, he was able to feed himself bite-sized pieces of food as well as use a spoon and fork. With assistance, he could dress himself and drink from a cup. His Early Steps assessment of October 27, 2009, (age approximately 30 months) indicates that Jared is age appropriate for gross and fine motor skills, in that he can run well, walk backwards and on tip toes, avoids obstacles in his path, jumps in place, and walks up and down stairs alternating his feet. He can also hold

a pencil with his thumb and fingers and scribbles spontaneously. Jared is also able to dress and undress himself with assistance, help wash and dry his hands, brush his teeth, wipe his nose, and bathe himself.

19. Jared qualified for the Bay County District Schools Special Education Services for speech therapy for the 2010-2011 school year where he is receiving speech therapy once a week. This is the only treatment with which he is currently involved. He was previously involved with a similar program at another school.

20. Raymond J. Fernandez, M.D., is a board-certified pediatric neurologist. He reviewed and analyzed Jared's medical records, and also issued a July 24, 2010, report of his physical examination of Jared, which concluded with the opinion that, ". . . [d]espite the evidence for fetal distress and severe metabolic acidosis at birth, I do not find evidence for substantial motor impairment and motor skills are improving. There is speech and language delay, also improving and this trend should continue."

21. Dr. Fernandez does not believe that Jared has a substantial motor impairment, and in essence, he considered that conclusion to be synonymous with there being no substantial physical impairment. Dr. Fernandez testified by a November 12, 2010, deposition as follows, in pertinent part:

Q. [Mr. Schwamm] Okay. In this case you note from your perspective that there may have been some fetal distress that appears based upon the labs to be metabolic acidosis?

A. Correct.

Q. Do you have the opinion that that fetal distress or severe metabolic acidosis caused harm to this child?

A. I did not find evidence for substantial harm to this child.

* * *

Q. With regard to your opinion that he has a speech delay, to what extent does this child suffer from a speech delay in your opinion?

A. Well, it's significant. It's a moderate severity. He has useful speech and language and he is improving.

Q. When you saw Jared how old was he?

A. Three years and I believe four months.

Q. Did you assess to what extent his speech delay was not age appropriate in terms of he is not a three-year and four-month level, what level is he? Do you do that type of analysis?

A. I do.

I don't quantitate it always. I mean, I form an opinion as to whether it's normal or not, and, if not, by that then it's delayed.

The severity of it, sometimes I might come up with a fair estimate that quantitates it. I would say that as of July he was beyond the two-year level, probably

not at the two-and-one-half-year level.
Between two and two-and-one-half years of
age.

Q. He's about a year delayed?

A. More or less.

Q. You said he's improving. What do you
mean?

A. Well, based on history, his vocabulary
was improving in terms of content and I
believe also in terms of clarity of speech.

Q. And you indicate in your report that you
expect the improvement trend to continue?

A. Correct.

Q. Why?

A. Because if it's improving at the age of
three, it usually continues to improve.

Q. I'm assuming in your experience you
follow kids who have a delay at this level
and in this quantified amount, and then as
you follow the children they do continue to
improve with or without therapy?

A. Most of them do, yes.

Q. What is it about this speech delay in
this child where you think he will, in fact,
continue the improvement trend?

A. Well, number one, he is improving.

And when improving at about the age of
three years, those children usually continue
to make good progress. And I think many of
them can end up with perfectly normal speech
and language function.

There's nothing about him in his history or physical examination or MRI or EEG that indicates anything other than that.

Q. Does his speech delay have a receptive and/or an expressive component?

A. Mainly expressive.

I think this boy has the ability to understand language and carry out verbal requests. I think there's probably some delay there as well, but I'm not sure about that. That would relate--I think that puts us in the cognitive areas, and I think he does fairly well cognitively.

Q. In your opinion he does not have a cognitive impairment?

A. Not substantial, no.

Q. Do you have an opinion that he has any cognitive impairment?

A. There might be some mild impairment, that's difficult to state at his age, but I'm certain it's not substantial.

Q. Could he have a speech delay without cognitive impairment?

A. Yes.

* * *

Q. If he has mild cognitive impairment, do you have an opinion as to why or the cause?

A. No. I think, as before, I think sometimes the cause is for unknown reasons, but the cause could be the perinatal anoxia that he experienced.

* * *

Q. Since you don't use that term, would you be able to offer an opinion as to whether or not this child suffers a physical impairment?

A. Well, if we equate it to motor impairment, I would say no. If we don't equate it to anything but just try to define it more generally, if it's any finding on the physical examination that might be abnormal, then I suppose the answer might be that he has hypermobile joints. That's a physical finding or a physical abnormality so to speak, but it's--I don't know if it would be defined as truly a physical impairment.

I don't think it interferes with his function, so, therefore, I don't think it's impairment.

* * *

Q [Mr. Bajalia]. . . . Doctor, just for clarification [sic] sake I just want to ask you this. Do you have an opinion as to whether or not Jared Anderson, based upon your examination and your review of the medical records that have been provided to you, qualifies for coverage under the Birth-Related Neurological Injury Compensation plan with respect to his impairments, if any?

* * *

A. Dr. Fernandez: As I understand the NICA law, he does not.

I don't think I'm the one to pass final judgment on that. I'm the one to state whether or not he has substantial mental and motor impairment, and I do not think that he does.

And I should add due to the lack of oxygen or mechanical trauma to the brain

during labor and delivery or the immediate post delivery period, I don't think he fills those criteria. (Exhibit N).

22. According to Jared's father, Geoffrey Anderson, deposed November 10, 2010, Jared suffered from acid reflux as an infant and his developmental milestones were slightly behind those of his older brother. However, as Jared has aged, his gross and fine motor skills have progressed without issue. Mr. Anderson has no concerns about Jared's gross motor skills, fine motor skills or problem solving ability. Mr. Anderson is concerned that Jared's speech and language defects make it hard to determine or prove that Jared is learning.

23. Jared has continued to have issues concerning his speech since he first began to talk, but Mr. Anderson acknowledged that Jared has shown improvement.

Q. [Mr. Bajalia] . . . All right. But once he learned to walk, I mean, there was no issue with him from a development standpoint from going from walking to running, as you saw it?

A [Mr. Anderson]. Right, no. I mean, he-- seemed to progress fine through means of mobility.

Q. Okay. And let's talk a little bit about, from a motor perspective, you talked about walking and running. As he was developing, did he have any problems that you were able to detect with respect to grasping things or using his hands or manipulating small objects, you know, as he was developing and--

A. No. I haven't seen any of those issues.

* * *

Q. Okay. All right. Now you talked a little bit about--we talked a little bit about when he first began to talk, Jared. And you said that he began to talk at one and a half, saying some basic words like Ma Ma and Da Da. How did his speech progress from that point forward?

A. It's gotten better. But then again, I'm with him a lot. There are people that have never--you know, have never seen Jared, that when he talks, they can't understand what he says.

* * *

Q. So Jared has always had some speech issues, as I understand it; is that a fair statement?

A. That's fair, yes.

Q. And while he's always had some speech issues, I think you said that it's gotten better, it's continued to improve; is that correct?

A. Yes.

* * *

Q. Okay. And is Jared currently undergoing any treatment for these speech problems?

A. Yes, he is.

Q. And where does he receive treatment for the speech problems?

A. He goes to Deer Point Elementary School here in Bay County.

* * *

Q. Okay. And let me--before I move on, let me just ask you generally, other than the speech issues, from your perspective, what other issues does Jared currently have or is dealing with from a mental or motor perspective?

A. For the most part, it's just speech and language.

Q. Just speech and language?

A. Yes.

* * *

Q. Well, let me ask you this, and I'm asking you--I'm not asking for a medical opinion, I'm asking you as a parent who probably observes his behavior and what he can and cannot do better than anybody else. Do you believe he has any issues learning?

A. Not that I--not that I've seen, no. I mean, he learns. (Exhibit L).

24. Jared's mother, Brenna Anderson, also testified at her deposition on November 10, 2010, that Jared has a speech and language delay but does not suffer from any physical or motor impairments. While Jared becomes frustrated by his speech/language delays, he is, in her opinion, "perfectly normal" as to mental and motor skills. Mrs. Anderson also indicated that Jared was most recently checked by a neurologist (Dr. Suhrbier) in 2009. (See Finding of Fact 17). Excerpts from Mrs. Anderson's deposition, Exhibit M, include:

Q. [Mr. Bajalia] What issues does Jared currently have, to your knowledge, from a mental or physical perspective?

A. He has speech and language delay.

Q. Okay. Any other conditions or issues that he's been diagnosed with or is being treated for?

A. No.

Q. Okay. From a physical or motor perspective, at this particular point in time, Jared does not have any issues, to your knowledge?

A. No, sir.

* * *

Q: Okay. He is not unlike any other kid from a physical perspective--

A: That's correct.

* * *

Q. . . . What is your understanding of the speech issue that Jared currently has? What are the--what is your understanding of the issue or the problem?

A. Well, he has problems relaying [sic] He understands well, he comprehends, but as far as trying to get out what he's trying to say to make someone understand what he's saying, that's where the speech and language is a problem. Did I answer--

* * *

Q. Do you have any reason to believe that as long as Jared continues to receive

therapy, that his speech will continue to improve or won't continue to improve?

A. I hope that it does. It does seem to be doing him good, yes.

Q. Okay. When was the last time, to your knowledge, that Jared has been to a neurologist?

A. Last year, 2009, I believe.

25. Clearly, Jared had a difficult delivery and suffered oxygen deprivation during the statutory period, but given the record, it appears that he has consistently progressed and does not qualify as having a "birth-related neurological injury" as defined at section 766.302(2).

CONCLUSIONS OF LAW

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

27. The Florida Birth-Related Neurological Injury Compensation 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.

28. 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 the Division of Administrative hearings. §§ 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 to submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." § 766.305(4), Fla. Stat.

29. 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.

30. 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.

31. Pertinent to this case, "birth-related neurological injury" is defined by section 766.302(2), to mean:

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, deliver, 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.

32. As the proponent of the issue, the burden rested on Petitioners to demonstrate that Jared suffered a "birth-related neurological injury." § 766.309(1)(a) Fla. Stat. See also Balino v. Dep't of Health and Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1997) ("[T]he burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.").⁸

33. More specifically, it has been held in Florida Birth-Related Neurological Injury Compensation Ass'n v. Division of Administrative Hearings, 686 So. 2d 1349, 1356 (Fla. 1997) that, the plan "is written in the conjunctive and can only be interpreted to require permanent and substantial impairment that has both physical and mental elements." See also Masterton v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case 08-6032N (Fla. DOAH Jan. 29, 2010) (Corrected Final Order).

34. Here, the proof failed to support a conclusion that, more likely than not, Jared has any permanent and substantial mental or physical impairments, irrespective of the timing or cause of any such impairment. Consequently, given the provisions of section 766.302(2), Jared does not qualify for coverage under the Plan. See also §§ 766.309(1) and 766.31(1), Fla. Stat. Humana of Fla., Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 5th DCA 1995) ("[B]ecause the Plan . . . is a statutory substitute for common law rights and liabilities, it should be

strictly construed to include only those subjects clearly embraced within its terms."), approved, Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).

35. Where, as here, the Administrative Law Judge determines that ". . . the injury alleged is not a birth-related neurological injury . . . she or he [is required to] enter an order [to such effect] and . . . cause a copy of such order to be sent immediately to the parties by registered or certified mail." § 766.309(2), Fla. Stat. Such an order constitutes final agency action subject to appellate court review. § 766.311(1), Fla. Stat.

CONCLUSION

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

ORDERED that the claim for compensation filed by Brenna Anderson and Geoffrey Anderson, individually and as parents and natural guardians of Jared Anderson, a minor, is dismissed with prejudice.

DONE AND ORDERED this 4th day of March, 2011, in
Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of March, 2011.

ENDNOTES

1/ The claim also included language that could be read as asserting a "willful and wanton" claim.

2/ On September 21, 2010, the undersigned wrote the parties as follows, in pertinent part:

It is my understand [sic] that prior case law has held that "willful and wanton" allegations pursuant to Section 766.303, Florida Statutes, are to be determined by a Circuit Court. However, if any of you feel differently, please immediately schedule a telephonic case management hearing to address jurisdiction of the "willful and wanton" allegations. Thereafter, if appropriate, I will amend the notice of hearing and the scope of the January 19, 2011, hearing.

No party responded.

3/ The announced purpose of this Motion was to clarify that while Petitioners continued to assert that "while Jared Anderson

sustained neurological injury during birth he did not sustain permanent and substantial mental and physical impairment as statutorily required to make the claim compensable."

4/ The stipulated record encompasses Volumes 1-4 (Joint Exhibits A-S) as set out in the Notice of Filing Stipulated Record filed January 12, 2011: Joint Exhibit A: Medical Records, including Fetal Heart Monitor Strips, from Bay Medical Center, d/b/a Gulf Coast Medical Center for Brenna Anderson dated March 28, 2007, through April 2, 2007. (Bates Numbers 1-307); Joint Exhibit B: Medical Records for Brenna Anderson from Shawn Simpson, D.O., dated May 30, 2006 through May 18, 2007. (Bates Numbers 308-382); Joint Exhibit C: Medical Records from Bay Medical Center, d/b/a Gulf Coast Medical Center for Jared Anderson Dated March 28, 2007 through April 8, 2007, and updated medical records dated July 12, 2008 and November 8, 2008. (Bates Numbers 383-560); Joint Exhibit D: Medical Records from Early Steps for Jared Anderson dated July 18, 2008 through October 27, 2009, and updated records dated March 20, 2009 through May 26, 2009. (Bates Numbers 561-659); Joint Exhibit E: Medical Records from First Words for Jared Anderson dated September 20, 2008 through October 31, 2008, and updated records dated June 20, 2008 through June 4, 2009. (Bates Number 588-659); Joint Exhibit F: Medical Records from Audiology Consultants for Jared Anderson dated December 8, 2008 through August 4, 2009. (Bates Numbers 660-676); Joint Exhibit G: Medical Records from Ingrid Johnson Rachesky, M.D. for Jared Anderson dated April 11, 2007 through August 25, 2008, and updated records through September 8, 2008. (Bates Numbers 766-798); Joint Exhibit H: Medical Records from Child Neurology Center of Northwest Florida, P.A., David Suhrbier, M.D. for Jared Anderson dated July 13, 2007 through October 22, 2007, and updated records from May 26, 2009 through December 30, 2009. (Bates Numbers 799-868); Joint Exhibit I: Records from Bay District Schools for Jared Anderson dated March 5, 2010 through August 30, 2010. (Bates Numbers 869-949); Joint Exhibit J: Donald Willis, M.D.'s report dates November 9, 2009. (Bates Numbers 950-951); Joint Exhibit K: Raymond Fernandez, M.D.'s report dated July 24, 2010. (Bates Numbers 952-955); Joint Exhibit L: Transcript of the Deposition of Geoffrey Anderson taken on November 10, 2010. (Bates Numbers 956-1012); Joint Exhibit M: Transcript of the Deposition of Brenna Anderson taken on November 10, 2010. (Bates Numbers 1013-1032); Joint Exhibit N: Transcript of the Deposition of Raymond Fernandez, M.D. taken on November 12, 2010 and Exhibits 1 through 6. (Bates Numbers 1033-2226); Joint Exhibit O: Petitioners' Answers to Respondent's First Set of Interrogatories dated

October 18, 2010. (Bates Numbers 2227-2235); Joint Exhibit P: Petitioners Answers to Intervenor Gulf of Coast Medical Center's First Set of Interrogatories dated November 15, 2010. (Bates Numbers 2236-2242); Joint Exhibit Q: Defendants, Shawn Simpson, D.O. and Smith, Smith, Simpson & Percy OB/GYN Physicians, Chartered, Responses and Objections to Petitioners' Request for Admissions dated November 22, 2010, and Petitioners' Request for Admissions to Intervenor Shawn Simpson, D.O. and Smith, Smith, Simpson & Percy, OBGYN Physicians, Chartered. (Bates Numbers 2243-2250; Joint Exhibit R: Intervenor, Gulf Coast Medical Center's Responses and Objections to Petitioners' Request for Admissions dated November 23, 2010, and Petitioners' Request for Admissions to Intervenor Gulf Coast Medical Center. (Bates Numbers 2251-2258); and Joint Exhibit S: Florida Birth-Related Neurological Injury Compensation Association's Response to Petitioners' Request for Admissions dated December 10, 2010, and Petitioners' Request for Admissions to Respondent Florida Birth-Related Neurological Injury Compensation Association. (Bates Numbers 2259-2264).

The Pre-Hearing Stipulation has been marked as ALJ-Exhibit A, and is admitted.

5/ "Petitioners' Submission of Proposed Findings," filed February 1, 2011; Respondent's "Final Order on Compensability," filed February 8, 2011; and Intervenor Bay Medical Center's "Notice of Adoption of NICA's Proposed Final Order and Objection to Petitioners' Proposed Final Order," filed February 15, 2011, have been considered as proposed final orders. Intervenor Shawn Simpson, D.O. et al., did not file a proposal.

6/ Per their Pre-Hearing Stipulation, the parties have asserted a variety of positions: Petitioners contend that "Jared Anderson sustained hypoxic injury during labor and delivery. While he continues to suffer from neurological injury and language delay, there is no evidence that he has a substantial physical injury or that his injuries are permanent. Based on the evidence of record the Petition should be denied." Respondent asserts that Jared's "claim is not compensable under the Plan because irrespective of the timing and cause of any brain injury, if any, [sic], he does not suffer from permanent or substantial mental and motor impairments." Intervenor Gulf Coast Medical Center argues that ". . . Jared Anderson did not suffer a permanent injury during labor and delivery, and that, to the extent he suffered any injury at all, the injury was insubstantial." Intervenor Simpson D.O., et al., stated, "The evidence presented establishes that Jared Anderson did not

suffer a permanent injury during labor and delivery, and that, to the extent he suffered any injury at all, the injury was insubstantial." However, the statutory definition, and elements of that statutory definition, that must be met for comprehensibility are set out at sections 766.302(2) and 766.309(1)(a) and (b). See Conclusions of Law 30-31.

7/ An Apgar score is a numerical expression of the condition of a newborn infant, usually determined at 60 seconds after birth, being the sum of points gained on assessment of the heart rate, respiratory effort, muscle tone, reflex irritability, and color. Dorland's Illustrated Medical Dictionary, page 1497 (28th ed. 1994).

8/ In so ruling, the undersigned has not ignored the language of section 766.309(1)(a), establishing a rebuttable presumption in Petitioners' favor or cases related thereto, but under the posture of this case, no such presumption ever arose.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Sections 120.68 and 766.311, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 766.311, Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992). The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.